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A TREATISE

ON THE

LAW OF TRIALS

IN ACTIONS

CIVIL AND CRIMINAL

By SEYMOUR D. THOMPSON, LL. D.

IN TWO VOLUMES

VOL. I

CHICAGO
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To Herr GUSTAF EDW. FAHLCRANTZ,

v. HÄRADSHÖFDING, ADVOCATE, &c.,

OF STOCKHOLM, SWEDEN.

Sir, — I ask leave to dedicate this work to you, in recognition of the efforts which you have made, through various published writings, to reform and improve the system of trials in your own country, and especially to inculcate the obligation of speaking the truth in forensic controversies. That a distinguished Swedish advocate, after investigating the English system of trial by jury, should recommend its adoption to his countrymen, cannot but be regarded as a compliment to the English-speaking race. And yet, while naturally partial to the institutions of my own great and prosperous country, I feel that it would not be becoming in me to offer the suggestion that the jury system of your country would be improved by adopting ours. A system of jury trial which has been found suitable to our institutions and habits of thought, might be so out of keeping with the ways of thinking of your countrymen, that it would not work well if transplanted into your country. But, allowing that this is so, you have certainly shown that your jury system, if such it may be called, is not without serious defects; and, for having drawn the attention of your countrymen to those defects, you are entitled to their sincere thanks, whether or not you have suggested the most expedient remedy. Your struggle in behalf of the principle that mere formalism and technicality ought to be expelled from the courts of justice and the truth established there instead, is deserving of universal sympathy; and if you shall not succeed in im-

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pressing those views upon your countrymen in your own lifetime, your fate will be no worse than that of Bentham, who, having spent his lifetime in a like struggle, died without seeing the fruition of his hopes, but whose writings have, since his death, confessedly shed an influence upon the jurisprudence of his country, surpassing that of any other man. If you are thus "equalled with him in fate," so may you be "equalled with him in renown!"

One who has traveled in your country and who has everywhere observed the pride of honesty which animates the Swedish people, can scarcely understand how it is that you need courts of justice at all. Several hundred thousand of your countrymen have made homes in America. They are among our most honest, industrious, peaceful and law-abiding citizens. Would that we had more of them! It is not to be supposed that a feeling of discontent with the institutions of their native land has caused them to seek homes in our country. Their presence among us is rather to be ascribed to that natural overflow which the New World has received from the overcrowded populations of the Old.

Your writings have impressed me with certain strong points of resemblance between your jury system and ours. Your *nacmd*, when the panel is full, is composed of twelve men; and, I believe the jury of all the northern nations of Europe is composed either of twelve men, or of a multiple, or an aliquot part of that number. Your *nacmd*, if I correctly understand you, has the power, considered as mere power, of judging of the law as well as of the facts, and of overruling the judge, by an unanimous vote, upon the whole case, or upon any question which arises therein, whether it be a question of law or a question of fact. The extravagant conceptions of liberty and of popular right, with which our American republic commenced its career, invested juries, in several

States of the Union, with the same power; and under the constitutions of some of the American States, as you will see by looking through the following pages,[1] juries in criminal cases are invested with the power of judging of the law, of deciding the law in opposition to the decision of the judge, and even of declaring acts of the legislature to be null and void, because, in their opinion, contrary to the constitution, which is the fundamental or organic law. The jurisprudence of those States has thus unwisely invested twelve ignorant men, hastily gathered together, with the power of setting aside the law of the land and of declaring acts of the legislature null and void. When I tell you that such a state of things exists in several of the most progressive States of the American Union, you will of course believe me; but you will none the less be surprised that a people who have the reputation of possessing the practical sense of the American people could have descended to such folly. You must further understand that the jury which is clothed with this extraordinary power is not composed of men of the highest probity, chosen by the electors for a term of years, as is the case with your Swedish jury, but that it is composed of men who are selected for the purpose of a single trial, — frequently of *talesmen*, gathered together from the court idlers who happen to be standing around,[2] — and that those who happen to have intelligence enough to have read the newspapers and to have formed or expressed an opinion about the case which is to be tried,[3] are for that reason ineligible and are rejected upon challenge; so that the jury which really tries the case is often composed of the most ignorant men who can be found in the community. When you consider that this body of twelve dolts, selected because they are ignorant of the facts of the case about to be tried, no matter how notorious those

[1] *Post*, § 2140, *et seq.*

[2] *Tales de circumstantibus: post*, § 23.

[3] *Post*, § 76, *et seq.*

facts may have been, are entrusted with the power of judging of the law against the opinion of the presiding judge, and even in opposition to the Supreme Court, you will at least conclude, — however much you may be impressed in favor of the English system of trial by jury, — that there is one feature of our American system which you cannot recommend to your countrymen. Your Swedish jury, much to their credit, when the judge brings in his decision, founded upon a record which they have not had the opportunity of reading, exercise the mere office of nodding their heads. But not so with our American jury. They not unfrequently, in violation of the plain obligation of the oaths which they have taken, decide the case in opposition to the law as expounded to them by the judge in his instructions, and bring in verdicts which have the result of turning the worst criminals loose upon the community to repeat their crimes.

It is true that, in a majority of American jurisdictions, juries are not invested with the power of judging of the law, except in so far as they have the power, in criminal trials, of bringing in a verdict of not guilty contrary to the law as expounded by the judge, which verdict cannot be set aside,[1] — the maxim of the English law, embodied in all our American constitutions, being that no one shall be twice put in jeopardy of life or limb for the same offense. But in all American jurisdictions they are nevertheless invested with this power to the extent that the verdict of a jury which is even procured by bribery or corruption, if it be a verdict of acquittal, cannot be set aside, but is forever conclusive. With this exception, in a majority of American jurisdictions, juries are not, even in criminal trials, judges of the law, but are bound to accept the law as expounded to them by the judge in his instructions.

[1] *Post*, § 2133, *et seq.*

But, although they may not be judges of the law, they are, in many American jurisdictions, judges of the facts, in a manner so conclusive that the judge is not permitted to advise them as to the weight of the evidence, or as to the credibility of the witness, or even to intimate to them his opinion upon any question of fact.[1] It is true that this is not the rule in the Federal, and in some of the State courts; but it is the rule in many of the State jurisdictions that the slightest intimation from the bench, of an opinion as to how the jury should find an issue of fact, or as to the weight or probative force of any evidence which has been delivered to them, is sufficient to authorize a court of appeal to reverse the judgment.[2] The twelve common men, thus selected haphazard from the community to sit as jurors in the particular trial, who have perhaps never sat in a trial before, who find themselves discharging an office new and strange to them, surrounded by strange scenes, like children attending for the first time at school, — are by that law conclusively presumed to be able to discriminate properly upon all questions of fact, to detect the true from the false in the testimony delivered by the witnesses, to weigh the evidence impartially, — and all this without any aid or assistance from the bench, beyond instructing them in certain general rules which they are told they may or must apply in determining the weight to be attached to the various elements of the evidence.

But unfortunately many of these rules which the judge is authorized, and even required on request of one of the parties, to give to the jury to aid them in weighing the evidence, are not rules of common sense, but are rules which have been filtered down to us from the impure fountains of the scholastic jurisprudence of the middle ages. They come to us in the form of what

[1] *Post*, §§ 1037, 2287, *et seq.*

[2] *Post*, §§ 2420, 2421.

are called *presumptions:* and so it is that in many cases the jury are instructed by the court that *the law presumes*, or draws a certain conclusion of fact from a certain other fact, although, in the case before the jury, viewed in conjunction with its surroundings, an ordinary man, proceeding in accordance with his experience and conscience, would not draw such conclusion, but the reverse. Among these so-called presumptions is the presumption that a man intends the natural and ordinary consequences of his own acts.[1] This is sometimes in accordance with experience and and sometimes contrary to experience. A man does many things unguardedly and accidentally, without intending or expecting the natural and ordinary consequences of what he does. Another of these so-called presumptions arises generally in trials for murder, and it is that malice is presumed from the unjustifiable use of a deadly weapon.[2] The use of the word unjustifiable, and the language in which the courts expound this presumption to juries,[3] deprive it of much of its objectionable meaning; but even as thus expounded, it is sometimes in accordance with experience and sometimes contrary to it. A man very often uses a deadly weapon in lethal combat when he is not justified in using it, and yet when the principles of the common law do not impute malice to him. He often uses it in that heat of passion which the common law to some extent indulges, out of respect to the infirmities of human nature. This our law concedes; and it would therefore seem that all the circumstances surrounding an act imputed as a crime ought to be submitted to the jury for their free and conscientious verdict as to what the accused intended, without throwing an artificial presumption into the scale against him. Another of these so-called presumptions is that which ascribes guilt of the crime of larceny to the recent,

[1] *Post*, § 252s. [2] *Post*, § 2531. [3] *Post*, § 2532.

unexplained possession of stolen goods.[1] Suppose that a thief were to secrete an article of stolen goods in your house, that it should be found there soon after the fact of the larceny, and that you should not deign to offer, or should not have the power of offering, an explanation as to how it came there, — the fact of its being found there without your offering an adequate explanation, would, under the operation of this infamous principle, require a jury to convict you of larceny, to brand you with infamy, and to send you to the penitentiary to undergo a term of penal servitude.[2] Such a consequence might not result in the case of a man of standing in the community, who could throw his good character into the scale as evidence in his behalf;[3] but without doubt, under its operation, many obscure persons of indifferent character have been convicted and sent to the penitentiary, in my country, for larcenies which they never committed.

These artificial presumptions have no other effect than to disturb and obscure the judgment of juries in dealing with the evidence. Instead of dealing with the evidence in the natural way, according to their conscience and experience, they are impressed by this lesson, which they receive for the first time from the bench, that they are to decide, not according to common sense, but according to legal sense, — according to some artificial standard of sense which they but dimly understand, — and they are thus driven in many cases to decide wrongly. The view which, in the following pages, I have endeavored to inculcate is, that the jury must be freely allowed to determine the truth; that they must not be fettered by artificial rules and presumptions: that the whole brood of so-called presumptions of law, except those conclusive presumptions which rest upon grounds of pub-

[1] *Post*, § 2534, *et seq.* [2] *Post*, § 2541. [3] *Post*, § 2538.

lic policy, and leaving to their due office those which the law raises in order to fix the burden of proof,— is an heretical brood which should be extirpated from the law; and that the grounds on which the law raises those presumptions should be regarded as mere evidentiary circumstances, to be considered by the jury for what they are worth.

If I understand you aright, you are struggling against similar artificial rules of evidence, inherited from the German scholastic jurisprudence. In this struggle in behalf of truth and against blind and unreasoning technicality in the administration of justice, it is my happy fortune to be able to join hands with you.

You thus perceive that our American system of jury trial is not a homogeneous system: that while we attempt to invest juries, on the one hand, with the extravagant power of judging of the law, and with the conclusive power of judging of the facts, we, on the other hand, hamper their intelligence and conscience with artificial rules which interfere with their free judgment as to the facts. But we have done more than this. Our American judges have shown themselves capable of attenuated refinements, which would move laughter in the law courts of London. It is a canon of Anglo-American criminal law that every person is presumed to be innocent until he is proved to be guilty beyond a reasonable doubt. The phrase "reasonable doubt" is one of the simplest and most easily understood phrases in our language. And yet our American judges, in their charges to juries, have endeavored to improve it by a variety of definitions: paraphrasing it, lengthening it, shortening it, and twisting it around from side to side, and some of them landing in the conclusion that common sense is not a guide on this question![1] I have found a

[1] *Post*, 2482.

great number of decisions upon the meaning of these two simple words, and have been obliged to devote many pages to a discussion of the hair-drawn conceptions which those decisions present.[1]

But the manner in which we treat our juries in other respects is not at all in keeping with the extravagant powers with which we have clothed them. In capital cases, and in many jurisdictions in other cases of felony, we lock them up in charge of a sworn officer, from the time when the evidence is submitted to them for their decision until they return into court with their verdict.[2] These twelve men who, in one juridical conception, occupy almost the position of demigods, are now made prisoners, though worshiped, like the Abuna of Abyssinia. Moreover, while we invest them with the exclusive power of judging of the facts without the aid of the judge, we withhold from them in many instances those sources of natural evidence which every right-minded and conscientious man would seek in endeavoring to solve the disputed questions of fact which are committed to him. If a crime has taken place, and they inadvertently and without the consent of the court, visit the scene where it took place, their verdict is avoided and a new trial must be had.[3] Nay, even a law book,[4] a county map,[5] or a deposition [6] which has been read in the case, if accidentally found in the jury room, will, in some of the narrow conceptions of American jurisprudence, have the dreadful effect of vitiating their verdict; and extravagances or improprieties in argument, which would be thought trivial if the argument were addressed to the judge, will require the granting of a new trial if addressed to the jury.[7]

[1] *Post*, § 2461, *et seq.*
[2] *Post*, § 2548, *et seq.*
[3] *Post*, §§ 904, 2605.
[4] *Post*, § 2586.
[5] *Post*, § 2588.
[6] *Post*, § 2578.
[7] *Post*, § 963, *et seq.*

In the discussions of the following pages, wherever I have encountered these conceptions, I have written of them with that freedom which the subject seemed to deserve. If I have not always written wisely concerning them, I have at least written faithfully. If what I have thus written could deserve of my countrymen some small share of the approbation which similar efforts on your part have deserved at the hands of your King and Country, I should be more than satisfied.

I am, with the highest respect, your obliged friend and servant,

SEYMOUR D. THOMPSON.

PREFACE.

This is an attempt to sketch the leading outlines of a trial before a jury, or before a judge sitting as a jury, from the impaneling of the jury to the signing and filing of the bill of exceptions. The effort of the author has been to aid the judge and practitioner in the work of getting a jury, of examining the witnesses, of presenting the documentary evidence, of arguing the case to the jury, of instructing the jury, and of attending to the custody and conduct of the jury, to the delivery and reception of the verdict, to the motion for new trial, and to the bill of exceptions. By far the most important subjects which have undergone discussion, and those which have received the greatest attention and the greatest space, relate to the examination of witnesses and to the instruction of juries.

At the threshold of the latter subject lies the constantly recurring question of the relative province of the court and jury. This subject has been discussed in thirty-three chapters, in connection with a great variety of questions. In these chapters the author has not only considered what questions are questions of law for the decision of the judge and what are questions of fact for the jury, but he has also discussed the manner in which questions for the decision of the jury should be submitted to them: giving a great variety of precedents of instructions on questions likely to arise in trials civil and criminal, all of which have met with distinct approval in appellate courts on appeal or

error. These are followed by six chapters, treating of the general rules which obtain with reference to the manner of instructing juries. So much space was thus consumed in what the author judged to be a sufficient treatment of the subject of the relative province of court and jury and of the manner of instructing juries, that it became necessary, in order to avoid expanding the work into three volumes, to limit the treatment of the final title, bills of exceptions, to a mere outline sketch.

Some years ago the author published a small work on the theory of instructing juries[1] which met with considerable favor at the hands of the bench and bar. That work being now out of print, so much of it as was deemed appropriate to this discussion has been preserved in the present work. In order to a complete discussion of the leading incidents of a trial, it also became necessary to traverse some ground which was gone over in a previous work written in part by the present writer.[2] Under an arrangement with the publisher of that work and with Mr. Merriam, my learned co-author, some matter was drawn from it for use in these pages. The matter drawn from these two works has been, as far as practicable, condensed, restated, re-arranged, and brought down to the present time by the citation of more recent decisions.

In several States there exists a system under which the judge submits special interrogatories to juries, requiring of them special findings of fact on particular matters raised by the evidence. It was thought best to have a chapter detailing the practice under such statutes written by a practitioner living in a state where such a system is in vogue. The chapter on the special findings of juries was accordingly contributed by W. W. Thornton, Esq.,

[1] "Charging the Jury." St. Louis: Published by the Central Law Journal Company.

[2] Thompson and Merriam on Juries. The same publisher.

of Crawfordsville, Indiana. The three chapters on motions for new trial were contributed by Eugene McQuillin, Esq., of the St. Louis bar. Both of these writers are favorably known to the profession as contributors to the law magazines. In their contributions to the present work they have examined and cited a great many statutes and judicial decisions; and it is confidently believed that their contributions will prove useful and satisfactory to the profession.

It is customary for law writers to apologize to the profession for the character of their work. If an author is conscientious and capable, no one can know and feel the deficiencies of his work as much as he knows and feels them himself. There can be no such thing as perfection in a legal treatise, and this is especially true of American law books. Our law is the result of the enactments of nearly fifty independent legislatures and of the judgments of more than fifty independent judicial tribunals. Our reported case-made law is being turned out at the rate of more than thirteen thousand cases a year. On nearly every subject which can engage the pen of a legal writer he is oppressed with a multitude of decisions; and it is within the bounds of literal truth to say that there is scarcely any subject in the American law on which contradictory decisions cannot be found. An author who attempts to struggle with this superabundant mass of material will finally conclude that all effort must stop somewhere. Even while he is writing, new decisions on the subjects which engage his attention are multiplying in such numbers that he cannot hope to retrace his steps and gather them all up and fit them into their proper places. At last he finds that the edifice which his ambition has attempted to build, though to the inexperienced eye it may seem symmetrical in its general outline, and even stately in its appearance, must forever remain unfinished.

The subject of this work is a very wide one. Nearly every title in the law can be touched upon or hinted at in a work on trials. If one who is expert in the art of war were to write a technical history, in fullness of detail, of a battle by land, of a naval battle, and of a siege, it would be found that he had written a history of the art of war. The gathered skill and preparation of years, in the engineer, the ordnance, the quartermaster, the commissary departments, and in the more general work of discipline and drill,—are often expended in a single battle, nay, even in a single charge. It is so in the practice of the law. The gathered learning and experience of a professional life time may be called into requisition in a single forensic struggle. The history of a trial, if written by a competent hand and in fullness of detail, must therefore be in a large measure a history or description of the law itself.

If the author of the present work has not treated of everything which might be supposed to be germane to so great a subject, his apology is that he could not treat of everything in two volumes. An examination of the index, containing 1214 titles, will convey a hint to the reader of the number and variety of subjects which have been drawn into the discussion. It has been found necessary to examine nearly sixteen thousand adjudged cases,[1] and to state, condense and arrange the doctrine of these adjudications in a text embracing 2146 pages, divided into 82 chapters and 2139 sections.[2] So that, what was originally intended for treatment in a single volume has, notwithstanding efforts at condensation in some of its parts, been expanded into two volumes of much more than the usual size. And yet some subjects, which might properly be included in a work on trials, have

[1] The exact number is 15,631.

[2] In numbering the sections intervals have been purposely left at the end of each chapter and article, thus reducing the real, from the apparent number , (2828), to that above stated.

scarcely been touched upon at all. Very little attempt has been made to deal with minor or collateral matters. But such as this work is, it is given to the profession in the confident belief that it will in some measure lighten their labors.

THE AUTHOR.

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THE LAW OF TRIALS.

TITLE I.

IMPANELING THE JURY.

CHAPTER I. — OF JURIES AND THE QUALIFICATION OF JURORS.
CHAPTER II. — OF SELECTING, DRAWING AND SUMMONING THE PANEL; AND HEREIN OF SPECIAL VENIRES AND TALESMEN.
CHAPTER III. — OF CHALLENGES.
CHAPTER IV. — OF THE DETAILS OF PRACTICE IN CHALLENGING AND IMPANELING.

CHAPTER I.

OF JURIES AND THE QUALIFICATIONS OF JURORS.

SECTION

1. Preliminary.
2. Waiving a Jury.
3. Regularly the Jury must consist of Twelve Men.
4. What if it consists of more than Twelve.
5. What if the Record is Contradictory as to the Number of Jurors.
6. Waiver of Right to Jury of Twelve Men.
7. Special or Struck Juries.
8. Juries de Mediatate Linguæ.
9. Juries of Mixed Races.
10. Qualifications for Jury Duty.
11. Exemptions from Jury Duty.

§ 1. **Preliminary.**— Counsel at the outset are confronted with the task of getting an impartial jury. It will, therefore, be use-

ful to give a sketch of the various steps that usually take place in the organization of a trial jury,— dwelling especially upon the subjects of challenges and objections and the time and manner of making the same.

§ 2. **Waiving a Jury.**— It may be premised that the right of trial by jury may be waived in civil cases,[1] but, according to the better opinion, not in criminal cases,[2] though there is some opinion to the contrary.[3] A statute authorizing such a waiver in criminal cases has been held not unconstitutional.[4] This may be done, under various constitutions, statutes and judicial holdings, by not demanding a jury;[5] by making no objection[6] or consenting[7] to an order of reference; by failing to advance the jury fee prescribed by statute;[8] by consent entered of rec-

[1] Harris *v.* Shaffer, 92 N. C. 30; Railroad Co. *v.* Foreman, 24 West Va. 662; Chapline *v.* Robertson, 44 Ark. 202; Heacock *v.* Hosmer, 109 Ill. 245; Vitrified Wheel & Emery Co. *v.* Edwards, 135 Mass. 591; Pasour *v.* Lineberger, 90 N. C. 159; Franklin *v.* McCorkle, 11 Lea (Tenn.), 190; Leahy *v.* Dunlap, 6 Colo. 552; Heacock *v.* Lubukee, 108 Ill. 641; Wanser *v.* Atkinson, 43 N. J. L. 571; Crump *v.* Thomas, 85 N. C. 272; Tharp *v.* Witham, 65 Ia. 566; Gregory *v.* Lincoln, 13 Neb. 352; Bamberger *v.* Terry, 103 U. S. 40; Grant *v.* Reese, 82 N. C. 72; Coulter *v.* Weed Sewing Machine Co., 3 Lea (Tenn.), 115; Davison *v.* Jersey Company Associates, 71 N. Y. 333; Baird *v.* Mayor, 74 N. Y. 382; King *v.* Burdett, 12 West Va. 688; Cushman *v.* Flanagan, 50 Tex. 389; Sutton *v.* McConnell, 46 Wis. 269; Merrill *v.* St. Louis, 83 Mo. 244; *s. c.*, aff'd, 12 Mo. App. 466; Trail *v.* Somerville, 22 Mo. App. 1; Bruner *v.* Marcum, 50 Mo. 405; Tower *v.* Moore, 52 Mo. 118; Brown *v.* Home Savings Bank, 5 Mo. App. 1.

[2] State *v.* Carman, 63 Ia. 130; *s. c.*, 50 Am. Rep. 741 (Seevers, J., dissenting); State *v.* Stewart, 89 N. C. 563; State *v.* Holt, 90 N. C. 749; *s. c.*, 47 Am. Rep. 544.

[3] State *v.* White, 33 La. Ann. 1218; State *v.* Askins, *Id.* 1253.

[4] Re Staff, 63 Wis. 285; *s. c.*, 53 Am. Rep. 285.

[5] Heacock *v.* Hosmer, 109 Ill. 245; Mich. Const., art. 6, § 27. See Odell *v.* Reynolds, 40 Mich. 21; Cushman *v.* Flanagan, 50 Tex. 389; Wanser *v.* Atkinson, 43 N. J. L. 571. When the demand is *in time:* Gallagher *v.* Baton Rouge Hebrew Congregation, 34 La. Ann. 526; Hall *v.* Chicago &c. R. Co., 65 Ia. 258; Vitrified Wheel & Emery Co. *v.* Edwards, 135 Mass. 591; Bonham *v.* Mills, 39 Oh. St. 534. When failing to demand, under a rule of court, not a waiver: Biggs *v.* Lloyd (Cal.), 11 Pac. Rep. 831.

[6] Baird *v.* Mayor, 74 N. Y. 382.

[7] Grant *v.* Reese, 82 N. C. 72; Harris *v.* Shaffer, 92 N. C. 30.

[8] Venine *v.* Archibald, 3 Colo. 163. But payment of the jury fee at the time the demand for a jury is made is not necessary to make the demand valid. Odell *v.* Reynolds, 40 Mich. 21.

ord;[1] by a stipulation in writing signed by the parties and filed with the clerk that the case shall be tried by the court;[2] by failing to appear at the trial;[3] by not filing a notice under a statute of a desire for a jury trial;[4] by waiving a jury orally in open court;[5] by demanding a jury without specifying the issues to be tried by the jury, where there are issues triable by the court;[6] by failing to take an appeal from the decision of a board of supervisors to the circuit court.[7] The prevailing opinion seems to be that a waiver of a jury at one term, will not estop the party from claiming it at a *subsequent term*,[8] or after a *new trial* has been granted;[9] though there are holdings, influenced by statute, to the effect that a waiver once made is a waiver for all subsequent trials.[10] It has been held that, although in a case regularly triable by jury the parties waive a jury, the *court* is *not bound* by the waiver, but may refuse to perform the office of a jury, without assigning any reason therefor.[11]

Although the statute requires that the fee be deposited on the first day of the term (Rev. Stat. Tex., art. 3066), a deposit on the second day will be sufficient, no prejudice appearing, the statute being directory as to time. Gallagher *v.* Goldfrank, 63 Tex. 473.

[1] West. Va. Act of 1872, chap. 47, § 35; Md. Const., art. 4, § 4; Desche *v.* Gies, 56 Md. 135 (holding that the record must show the consent.) A recital in the record that "neither party requires a jury, and the court is substituted in lieu of a jury to try the case,"—satisfies such a statute. King *v.* Burdett, 12 W. Va. 688; Tower *v.* Moore, 52 Mo. 118; Bruner *v.* Mareum, 50 Mo. 405. "Claim" of jury of twelve men under New York Laws of 1869, chap. 410: Poyer *v.* New York Central, etc., R. Co., 7 Abb. New Case, (N. Y.) 371. A record entry, "Neither party requiring a jury,"—imports a waiver of the right. Chapline *v.* Robertson, 44 Ark. 202.

[2] Bamberger *v.* Terry, 103 U. S. 40. Compare Supervisors of Wayne Co. *v.* Kennicott, *Id.* 554.

[3] 2 Ind. Rev. Stat. 1876, § 340; Love *v.* Hall, 76 Ind. 326; Leahy *v.* Dunlap, 6 Colo. 552.

[4] Bailey *v.* Joy, 132 Mass. 356.

[5] Gregory *v.* Lincoln, 13 Neb. 352.

[6] Greenleaf *v.* Egan, 30 Minn. 316.

[7] Tharp *v.* Witham, 65 Ia. 566.

[8] Cross *v.* State, 78 Ala. 430; Dean *v.* Sweeney, 51 Tex. 242; Brown *v.* Chenoworth, *Id.* 469.

[9] State *v.* Touchet, 33 La. Ann. 1154; Carthage *v.* Buckner, 8 Bradw. (Ill.) 152.

[10] Coulter *v.* Weed Sewing Machine Co., 3 Lea (Tenn.), 115; Nashville &c. R. Co. *v.* Foster, 10 Lea (Tenn.), 351; Heacock *v.* Lubukee, 108 Ill. 641 (Scott, J., dissenting).

[11] McCarthy *v.* Missouri R. Co., 15 Mo. App. 385. As to the right to trial by jury, and its waiver, see Biggs *v.* Lloyd (Cal.), 11 Pac. Rep. 831, and note; Lewis *v.* Klotz (La.), 1 South. Rep. 539; Railroad Co. *v.* Morris

§ 3. Regularly the Jury must Consist of Twelve Men. — According to the common law, a legal petit jury consists of neither more nor less than twelve men,[1] and the ancient law was so precise that if the trial were by a jury consisting of more or less than twelve men it was a mistrial.[2] In criminal trials this is undoubtedly the law in this country at the present time. The constitution of the United States, and it is believed the constitutions of all the States, contain, with some variation of words, the declaration that the right of trial by jury shall remain inviolate. The constitutional jury thus guaranteed is a common-law jury of twelve men.[3] In the face of this constitutional guaranty an act of the legislature providing for the trial of common-law cases before a jury of less than twelve men is void.[4] Moreover

(Tex.), 3 S. W. Rep. 457; Railroad Co. *v.* Martin (Tenn.), 2 S. W. Rep. 381; Caldwell Co. *v.* Crocket (Tex.), 4 S. W. Rep. 607.

[1] Hale, P. C. 161; Bac. Abr. Juries A.; 1 Chit. Cr. L. 505.

[2] Trials per Pais (anno 1725) 79.

[3] Cancemi *v.* People, 18 N. Y. 128, 135; May *v.* Milwaukee, etc., R. Co., 3 Wis. 219; State *v.* Cox, 8 Ark. 436; Work *v.* State, 2 Oh. St. 296; Brazier *v.* State, 44 Ala. 387, 392; Turns *v.* Com., 6 Metc. (Mass.) 224, 235; Lamb *v.* Lane, 4 Oh. St. 167; People *v.* Kennedy, 2 Park Cr. R. (N. Y.) 312; Byrd *v.* State, 1 How. (Miss.) 163, 177; Carpenter *v.* State, 4 How. (Miss.) 163, 166; Redus *v.* Wofford, 4 Smed. & M. (Miss.), 579, 592; State *v.* McClear, 11 Nev. 39; Smith *v.* Atlantic, etc., R. Co., 25 Oh. St. 91, 102; Gibson *v.* State, 16 Fla. 291, 300; Wynehamer *v.* People, 13 N. Y. 378, 427; Cruger *v.* Hudson, etc., R. Co., 12 N. Y. 190, 198; People *v.* Lane, 6 Abb. Pr. (N. S.) 105, 115.

[4] Vaughn *v.* Seade, 30 Mo. 600; Work *v.* State, 2 Oh. St. 296; Byrd *v.* State, 1 How. (Miss.) 177; Dowling *v.* State, 5 Sm. & M. (Miss.) 664; Norval *v.* Rice, 2 Wis. 23; May *v.* Milwaukee, etc., R. Co., 3 Wis. 219; Foster *v.* Kirby, 31 Mo. 496; Allen *v.* State, 51 Ga. 264; Henning *v.* Hannibal, etc., R. Co., 35 Mo. 408. But as *justices of the peace* do not form any part of the ordinary judicial machinery of the common law, it is held that such constitutional provisions do not inhibit the legislature from authorizing a jury of less than twelve in justices' courts, especially since the right to a jury of twelve men is secured in the unlimited right of appeal to a superior court of record. Emerick *v.* Harris, 1 Binn. (Pa.) 416; Work *v.* State, 2 Oh. St. 296; Bryan *v.* State, 4 Iowa, 349; State *v.* Beneke, 9 Iowa, 203; Norton *v.* McLeary, 8 Oh. St. 205; Dawson *v.* Horan, 51 Barb (N. Y.) 549; Knight *v.* Campbell, 62 Barb. (N. Y.) 16 (overruling Baxter *v.* Putney, 37 How. Pr. (N. Y.) 140); People *v.* Lane, 6 Abb. Pr. (N. S.) 105; Ward *v.* People, 30 Mich. 116; State *v.* Gutierrez, 15 La. Ann. 190. The statutes generally provide that a justice's jury shall consist of six men, unless the parties agree upon a less number. So, also, in cases in courts which exercise their

the rule in civil as well as in criminal cases is that the *record must show* that the case was tried by a jury of twelve men (except by consent of the parties), or the verdict will be a nullity, and the judgment entered thereon will be reversed and a new trial granted.[1]

§ 4. **What if it Consists of More than Twelve.** — The same consequences will follow where the record shows that the verdict was rendered by a jury of thirteen except by consent of parties.[2] This rule has not been accepted in America in civil cases without some qualification. In one case, an action of *assumpsit*, it was held that the verdict by a jury of thirteen was good.[3] The Court of Appeals of Kentucky have adopted what seems to be a just and reasonable qualification of the rule, by holding that the objection that the verdict was rendered by a jury of thirteen will be *waived* unless made in the trial court on a motion for a new trial, and that it cannot be raised for the first time on *ap-*

functions without the aid of a jury by the ancient common law, a trial, even in a criminal case by a jury of less than twelve, will be legal. Duffy *v.* People, 6 Hill (N. Y.), 75; People *v.* Justices, 74 N. Y. 406; People *v.* Clark, 23 Hun (N. Y.), 374. The constitutions of many of the States moreover, provide that in criminal cases trial before courts not of record or before inferior courts, the number of the jury may be less than twelve as prescribed by law. Colo. Const., 1875; art. 2, § 23; Ga. Const., 1868; art. 5, § 4, sub sec. 5; Iowa Const., 1857, art. 1, § 9; Amend. to Fla. Const., 1868, art. 6, § 12, ratified 1875; Mich. Const., 1850, art. 6, § 28; Mo. Const., 1875, art. 2, § 28; Neb. Const., 1866–67, art. 1, § 5 (Const. 1875, art. 1, § 6); S. C. Const., 1865, art. 9, § 7. The La. Act of 1880, Nos. 35 and 35, providing for trial of certain criminal cases by a jury of *five* is valid. State *v.* Everage, 33 La. Ann. 120; State *v.* Demouchet (La.), 3 S. W. Rep. 565.

[1] Cancemi *v.* People, 18 N. Y. 128; *s. c.*, 7 Abb. Pr. (N. Y.) 271; Brown *v* State, 6 Blackf. (Ind.) 561; Jackson *v.* State, 6 Blackf. (Ind.) 461; Maduska *v.* Thomas, 6 Kan. 153; Brown *v.* State, 16 Ind. 496; Allen *v.* State, 54 Ind. 461; Hill *v.* People, 16 Mich. 351; Com. *v.* Shaw, 7 Am. Law. Reg. 289; Dixon *v.* Richard, 3 How. (Miss.) 771; Ayres *v.* Barr, 5 J. J. Marsh. (Ky.) 286; Oldham *v.* Hill, 5 J. J. Marsh. (Ky.), 300; Bone *v.* McGinley, 7 How. (Miss.) 671; Briant *v.* Russell, 2 N. J. L. 107; Denman *v.* Baldwin, 3 N. J. L. 945; State *v.* Van Matre, 49 Mo. 268; State *v.* Myers, 68 Mo. 266.

[2] Wolfe *v.* Martin, 1 How. (Miss.) 30; McCormick *v.* Brookfield, 4 N. J. L. 69; Whitehurst *v.* Davis, 2 Hayw. (N. C.) 113; Parke, B., in Muirhead *v.* Evans, 6 Exch. 447, 449.

[3] Tillman *v.* Ailles, 5 Smedes & M. (Miss.) 373.

peal.[1] Moreover, it is a rule, applicable alike in civil and criminal cases, that, if a jury of more than twelve men has been impaneled and the last juror sworn can be pointed out during the trial, he may be dismissed from the panel and the trial may proceed.[2]

§ 5. **What if the Record is contradictory as to Number of Jurors.** — Where the entries of the record are contradictory as to the number of jurors who sat at the trial, so much of the record as states that the jury consisted of twelve men will be regarded as stating the truth, and the contrary statement will be rejected as a clerical error, — the legal presumption being that the portion of the record is true which answers the requirements of the law, unless the contrary be made to appear by the bill of exceptions.[3]

§ 6. **Waiver of right to Jury of Twelve Men.** — While in cases of felony the constitutional right to be tried by a jury of twelve men cannot be waived by the accused,[4] in cases of misdemeanor[5] the rule is different, especially where the punishment is a pecuniary fine merely.

§ 7. **Special or Struck Juries.** — This jury differs from the common jury in respect of the fact that it is not impaneled in the ordinary manner. It is ordinarily formed by each party striking a designated number from a list of names, the remaining composing the jury which is to try the cause. No general direc-

[1] Ross *v.* Neal, 7 B. Mon. (Ky.) 408; Berry *v.* Kenney, 5 B. Mon. (Ky.) 122. In a criminal case a legal verdict cannot be rendered by a jury of more than twelve men (Bullard *v.* State, 38 Tex. 504), and as hereafter seen this defect in cases of felony cannot be waived. *Post*, § 6.

[2] Muirhead *v.* Evans, 6 Exch. 447; Bullard *v.* State, 38 Tex. 504; Davis *v.* State, 9 Tex. App. 634.

[3] Larillian *v.* Lane, 8 Ark. 372; Foote *v.* Lawrence, 1 Stew. (Ala.) 483.

[4] Cancemi *v.* People, 18 N. Y. 128; State *v.* Mansfield, 41 Mo. 470; Williams *v.* State, 12 Ohio St. 622; Allen *v.* State, 54 Ind. 461; Hill *v.* People, 16 Mich. 351. But see State *v.* Kaufman, 51 Iowa, 578; *s. c.* 9 Cent. L. J. 313.

[5] Com. *v.* Dailey, 12 Cush. (Mass.) 80; State *v.* Borowsky, 11 Nev. 119; State *v.* Cox, 8 Ark. 436, 447; Sarah *v.* State, 28 Ga. 576; State *v.* Van Matre, 49 Mo. 268; Tyra *v.* Com., 2 Metc. (Ky.) 1.

tion concerning the impaneling of a special jury can be given in a brief compass.[1] In America the subject is generally one of statutory regulation, the policy of the statutes being, like that of the rule of the common law, to allow either party the privilege of such a jury in cases of exceptional difficulty or importance.[2] Under some systems, special juries are composed of persons, otherwise qualified for jury duty, who are possessed of certain special qualifications demanded by the peculiarities of the case on trial.[3] Under some systems, challenges for cause are allowed before the striking begins.[4]

§ 8. **Juries de Mediatate Linguæ.** — This kind of jury was allowed to an alien. Its distinctive feature was that half of its members were composed of citizens or denizens, and the other half of foreigners. It was used in England under various statutes until recently abolished.[5] The right to this kind of jury was recognized in a few early cases in this country,[6] denied in others,[7] and is generally abolished by statute,[8] though in one State it may still be directed by the court.[9]

[1] See Thomp. & Mer. Jur., §§ 12, 13, 14.

[2] Patchin *v.* Sands, 10 Wend. (N. Y.) 570; People *v.* McGuire, 43 How. Pr. (N. Y.) 67. As to what are such causes and how the fact is to be brought to the attention of the court, see Poucher *v.* Livingstone, 2 Wend. (N. Y.) 296; Anon., 1 Johns. (N. Y.) 314; Wright *v.* Columbian Ins. Co., 2 Johns. (N. Y.) 211; Murphy *v.* Kipp, 1 Duer (N. Y.), 659; Livingston *v.* Smith, 1 Johns. (N. Y.) 141; Walsh *v.* Sun Mutual Ins. Co., 2 Rob. (N. Y.) 646; *s. c.* 17 Abb. Pr. (N. Y.) 356; Nesmith *v.* Atlantic Ins. Co., 8 Abb. Pr. (N. Y.) 423; Stryker *v.* Turnbull, 3 Caines (N. Y.), 103; Hartshorn *v.* Gelston, 3 Caines (N. Y.), 84; People *v.* McGuire, 43 How. Pr. (N. Y.) 67.

[3] Golding *v.* Petit, 27 La. Ann. 86.

[4] R. S. Mo. 1879, § 2802; R. S. Del. 1874, chap. 109, § 18; 2 Ind. Rev. Stat. 1876, p. 159, § 1, note.

[5] By the Stat. 33 Vict., chap. 14, § 5. See Thomp. & Mer. Jur., § 16, and authorities cited.

[6] Respublica *v.* Mesca, 1 Dall. (U. S.) 73; People *v.* McLean, 2 Johns. (N. Y.) 381; United States *v.* Carnot, 2 Cranch C. C. (U. S.) 469; Richards *v.* Com., 11 Leigh (Va.), 690; Brown *v.* Com., 11 Leigh (Va.), 711.

[7] State *v.* Antonio, 4 Hawks (N. C.), 200; United States *v.* McMahon, 4 Cranch C. C. (U. S.) 573; State *v.* Fuentes, 5 La. Ann. 427.

[8] N. Y. Code. Rem. Jus., § 1190; Code Ala. 1876, § 4886; R. C. Md. 1878, art. 62, § 17; R. S. Ill. 1880, ch. 38, § 429; Gen. Laws Colo. 1877, § 818; R. S. Mo. 1879, § 1892; Comp. L. Mich. 1871, § 6012; 1 Bright. Purd. Dig., p. 837, § 71; *Ib.*, p. 385, § 45.

[9] G. S. Ky. 1879, p. 571, § 6.

§ 9. **Juries of Mixed Races.** — While persons of the negro race can not demand as a right,[1] even under the fourteenth amendment of the constitution of the United States and the Civil Rights Law,[2] that juries to try causes to which they are parties shall be composed in part of persons of their own race; yet a State law [3] which confines eligibility to jury duty to *white* male persons, etc., is obnoxious to the fourteenth amendment to the Federal constitution, as denying to colored persons the equal protection of the laws, and hence void.[4]

§ 10. **Qualifications for Jury Duty.** — Counsel cannot proceed with the work of impaneling a jury without having in mind the qualifications of jurors prescribed by the common law, by constitutional provisions, or by statute. The common-law qualifications may generally be disregarded,[5] and constitutional provisions prescribe the qualifications of jurors in three States only, so far as the writer has observed.[6] It is generally the subject of legislation, and the power to prescribe qualifications other than those of the common law, by abolishing the freehold qualification,[7] or the property qualification,[8] is fully established.[9] But

[1] Nashville *v.* Shepherd, 3 Baxt. (Tenn.) 373. See, also, Williams *v.* State, 44 Tex. 34.

[2] Virginia *v.* Rives, 100 U. S. 313; *s. c. sub nom. Re* Com. Virginia, 12 Cent. L. J. 229; Bush *v.* Kentucky, 107 U. S. 110.

[3] Laws West Va. 1872–3, p. 102. Several State statutes confine the selection of jurors to white persons and are to that extent invalid. R. S. W. Va. 1879, ch. 109, § 1; G. S. Ky. 1879, p. 571, § 2; G. S. Neb. 1873, p. 642, § 657; Gen. Laws Ore. 1872, § 918. See, also, Rev. Code Md. 1878, p. 558, §§ 1 and 2. Others provide against disqualification on account of color. Stat. Tenn. 1871, § 4002*a*; R. S. La. 1876, § 2125.

[4] Strauder *v.* State, 100 U. S. 303, 307; *s. c.* 10 Cent. L. J. 225. See, also, Cases of the County Judges, 3 Hughes (U. S.), 576. Where a State constitution limited the right of suffrage to the white race, and a statute confined the selection of jurors to *electors*, the adoption of the *Fifteenth Amendment* operated to enlarge the list of electors and to qualify colored citizens for jury service. Neal *v.* Delaware, 103 U. S. 370.

[5] These ordinarily touch the question of citizenship or freehold. Thomp. & Mer. Jur., §§ 16, 21.

[6] Const. Fla. 1868, art. VII, § 12; Const. Ga. 1868, art. V, § 13, subsec. 2; Const. N. H. 1792, part I, art. 21.

[7] Kirwin *v.* People, 96 Ill. 206.

[8] Com. *v.* Dorsey, 103 Mass. 412; State *v.* Wilson, 48 N. H. 398.

[9] See also Byrd *v.* State, 1 How. (Miss.) 163, 176. So, the legislature

where the constitution prescribes the qualification, it is not competent for the legislature to *restrict* it, — as if the constitution makes all qualified voters qualified jurors, and the legislature attempts to restrict the qualification to householders or freeholders.[1] By some State constitutions religious or political tests are forbidden.[2] Others provide more generally that "the civil rights, privileges, or *capacities* of any citizen, shall in no way be diminished or enlarged on account of his religious principles,"[3] and by others particular disqualifications are provided for.[4] The statutes generally disqualify those convicted of scandalous crime or guilty of gross immorality.[5] *Alienage* is a ground of disqualification at common law, except in the case of *mixed juries*,[6] already considered;[7] and many statutes provide that jurors shall be citizens of the United States,[8] "residents" of the district,[9] qualified voters,[10] of fair character, approved integrity, sound judg-

may define the mode of ascertaining such qualifications. Whitehead *v.* Wells, 29 Ark. 99.

[1] Maloy *v.* State, 33 Tex. 599; Wilson *v.* State, 35 Tex. 365; Brennan *v.* State, 33 Tex. 266. But, *contra*, see Lester *v.* State, 2 Tex. App. 432.

[2] Const. Tenn. 1870, art. 1, § 6; Const. W. Va. 1872, art. III, § 11.

[3] Const. Ala. 1819, art. I, § 4; Const. Ala. 1865, art. I, § 4; Const. Ala. 1875, art. I, § 4; Const. Ark. 1864, art. II, § 4; Cal. Const. 1879, art. IV, § 9; Const. Ia. 1857, art. I, § 4; Const. Ia. 1846, art. I, § 4; Const. Ky. 1799, § 4; Const. Ky. 1850, art. XIII, § 6; Const. Kans. 1857, art. XV, Bill of Rights, § 4; Const. Tenn. 1870, art. I, § 6.

[4] Const. Ala. 1819, art. VI, § 5; Const. Tex. 1876, art. XVI, § 2; Cal. Const. 1879, art. XX, § 11.

[5] Code Va. 1873, p. 1059, § 4; R. S. W. Va. 1879, ch. 109, § 8; R. S. So. Car. 1873, p. 520, § 9. See, also, R. S. Wis. 1878, § 2525; Gen. Laws Ore. 1872, Civil Code, § 918; Cal. Code. Civ. Proc., § 199; Code Ala. 1876, § 4733; Comp. Laws Utah, 1876, § 1073; R. S. Tex. 1879, § 3010; Comp. L. Nev. 1873, § 1051; G. S. Neb. 1873, p. 642, § 657; Comp. L. Ariz., ch. 47, § 10; Gen. Laws Colo. 1877, § 1460; R. C. Miss. 1880, § 1661; R. S. Me. 1871, ch. 106, § 2.

[6] *Post*, § 54.

[7] *Ante*, § 8; Co. Litt. 156*b*; Judson *v.* Eslava, Minor (Ala.), 3; State *v.* Primrose, 3 Ala. 546; Boyington *v.* State, 2 Port. (Ala.) 100.

[8] Cal. Code, Civ. Proc., § 198; R. S. Wis. 1878, § 2524; Comp. L. Arizona, ch. 47, § 10; Gen. Laws Colo. 1877, § 1460; Gen. Laws New Mexico, 1880, p. 366; N. Y. Code Rem. Jus., § 1027; Gen. Laws Ore. 1872, Civil Code, § 918; G. S. R. I., p. 36, § 1; Comp. L. Utah, 1876, § 1073.

[9] Rev. St. U. S., § 872; construed in United States *v.* Nardello, 4 Mackey (D. C.), 503.

[10] R. S. Tex. 1879, art. 310; Miller's R. C. Iowa, 1880, ch. 10, § 227; Comp. L. Nev. 1873, § 1051; Code Va.

ment, well informed and the like ;[1] and neither mentally nor bodily disabled,[2] and not more than sixty,[3] or seventy,[4] years of age. Freehold,[5] household[6] and property[7] qualifications are retained in some States. *Educational* qualifications are rarely prescribed,[8] though in one State inability to *read or write* is made a ground of challenge,[9] and in others inability to understand the language in which the proceedings are conducted disqualifies.[10] It should

1873, p. 1058, § 1; Comp. L. Kan. 1879, § 2964; Bush Dig. Fla., ch. 104, § 1; R. S. Del. 1874, ch. 109, § 1; Ark. Dig., 1874, § 3654; Comp. L. Arizona, ch. 47, § 10; R. S. Wis. 1878, § 2524; Comp. L. Mich. 1871, § 5978; R. S. La. 1876, § 2125; G. S. Mass. 1860, ch. 132, § 1; R. S. Me. 1871, ch. 106, § 2; Cal. Code Civ. Proc., § 198; G. S. R. I. 1872, p. 430, § 1; R. S. So. Car. 1873, p. 519, §§ 3, 6; 2 Rev. Ind. 1876, p. 31.

[1] N. Y. Code Rem. Jus., § 1027; Cal. Code Civ. Proc., § 198; R. S. Ill. 1880, ch. 78, § 2; Supp. to Ga. Code, 1873, § 654; Bush Dig. Fla., ch. 104, § 3; G. S. Ky. 1879, p. 573, § 4; Comp. L. Mich. 1871, § 5978; Code Ala. 1876, § 4733; R. S. Wis. 1878, § 2530; Ark. Dig. 1874, § 3669; Comp. L. Kan. 1879, § 2964; G. S. Neb. 1873, p. 642, § 657; G. S. R. I. 1872, p. 432, § 14; R. C. Miss. 1880, § 1681; G. S. Ky. 1879: p. 571, § 2; R. S. So. Car. 1873, p. 519, §§ 3, 6; Stat. Tenn. 1871, § 3990. It was held not erroneous to allow a juror to sit in a case, although "he did not read the newspapers and could not tell what age he was," where the statute required simply that jurors should be "sober, intelligent and judicious persons." Com. *v.* Winnemore, 1 Brewst. 356; *s. c.* 2 Brewst. 378.

[2] N. Y. Code Rem. Jus., § 1027; R. S. Ill. 1880, ch. 78, § 2; Comp. L. Mich. 1871, § 5978; Comp. L. Arizona, ch. 47, § 10; Code Ga. 1873, §§ 3930, 3906; Comp. L. Kan. 1879, § 2964; G. S Neb. 1873, p. 642, § 657; Comp L. Utah, 1876, § 1073; Gen. Laws Ore. 1872, Civil Code, § 918; R. S. Tex 1879, art. 3010.

[3] N. Y. Code Rem. Jus., § 1027; Code Va. 1873, p. 1058, § 1; R. S. W. Va. 1879, ch. 109, § 1; Code Ga., §§ 3930, 3906; Comp. L. Arizona, ch. 47, § 10; R. C. Miss. 1880, § 1661; R. S. Ill. 1880, ch. 78, § 2.

[4] R. S. Me. 1871, ch. 106, § 2. In New Jersey, sixty-five years is the limit. Rev. N. J. 1877, p. 532, § 6.

[5] N. Y. Code Rem. Jus., § 1027; R. S. Tex. 1879, § 3010; Stat. Tenn. 1871, § 4002; Gen. Laws New Mexico, 1880, p. 366; 2 Rev. Ind. 1876, p. 31; Code Ala. 1876, § 4732. A tenant by the curtesy initiate is a freeholder. State *v.* Mills, 91 N. C. 581.

[6] R. S. Tex. 1879, § 3010; Gen. Laws New Mexico, 1880, p. 366; Stat. Tenn. 1871, § 4002; G. S. Ky. 1879, p. 571, § 2; 2 Rev. Ind. 1876, p. 31; Code Ala. 1876, § 4732.

[7] N. Y. Code Rem. Jus., § 1027; Comp. Laws Utah, 1876, § 1073, Comp. L. Kan. 1879, § 2964; Cal. Code Civ. Proc., § 198; G. S. R. I. 1872, p. 36, § 1; R. S. Del. 1874, ch. 109, § 2; Code Ga. 1873, § 3907; Battle's Rev. N. C., p. 194, § 229*a*.

[8] Comp. Laws Utah, 1876, p. 55.

[9] Texas Code Crim. Proc., art. 636, subsec. 14. See Nolen *v.* State, 9 Tex. App. 419. See *post*, § 56.

[10] Cal. Code. Civ. Proc., § 198; R.

be borne in mind that inability to read and write was no disqualification at common law, since in ancient times very few persons possessed this qualification.[1]

§ 11. Exemption from Jury Duty. — The right of exemption from jury duty need not be much considered;[2] because, unless the statute creating the exemption is couched in such terms as to create a disqualification, it will be a personal privilege merely which may be *waived*, provided the person is not otherwise subject to challenge.[3] Many of the statutes enact in terms that the exemption by them created shall not be considered as a ground of challenge;[4] and others are framed in such terms as to carry the same implication.[5]

S. Ill. 1880, ch. 78, § 2; Comp. L. Mich. 1871, § 5978. See *post*, § 55.

[1] See Com. *v.* Winnemore, 1 Brewst. (Pa.) 356, 380, *s. c.* 2 Brewst. (Pa.) 378; White *v.* State, 52 Miss. 216, 224; American Ins. Co. *v.* Mahone, 56 Miss. 180; Citizens Bank *v.* Strauss, 26 La. Ann. 736; State *v.* Lewis, 28 La. Ann. 84; Campbell *v.* State, 48 Ga. 353.

[2] The subject is discussed in Thomp. & Mer. Jur., §§ 34-40, inclusive.

[3] Mulcahy *v.* Reg., Irish Rep. 1 C. L. 12; *s. c.* affirmed in L. R. 3 H. L. 306; State *v.* Forshner, 43 N. H. 89; State *v.* Wright, 53 Me. 328; Moore *v.* Cass, 19 Kan. 288; Davis *v.* People, 19 Ill. 74; Murphy *v.* People, 37 Ill. 447; Chase *v.* People, 40 Ill. 352; Davidson *v.* People, 90 Ill. 221; Edwards *v.* Farrar, 2 La. Ann. 307; Breeding *v.* State, 11 Tex. 257; Greer *v.* Norvill, 3 Hill (S. C.), 262; Booth *v.* Com., 16 Gratt. (Va.) 519; United States *v.* Lee, 4 Mackey (D. C.), 489; *s. c.* 54 Am. Rep. 293.

[4] Cal. Penal Code, § 1073; Comp. L. Ariz., ch. 11, § 321; Stat. at L. Minn. 1873, p. 1056, § 238; Bullitt's Ky. Code (Cr.), p. 42, § 211; R. S. La. 1876, § 2131; Ark. Dig. Stat. 1874, § 1914; Miller R. C. Iowa, 1880, § 2777; R. S. Ill. 1880, ch. 78, § 14; Comp. L. Nev. 1873, § 1965; Gen. Laws Ore. 1872 (Civil Code), § 186; Laws Utah, 1878 (Code Cr. Proc.), § 243.

[5] Bush Dig. Fla., ch. 104, § 2; R. S. Del. 1874,, ch. 109 § 1; Supp. to Ga. Code of 1873, §§ 415, 416, 417. That it is not a ground of challenge, see Green *v.* State, 59 Md. 123; *s. c.* 43 Am. Rep. 542.

CHAPTER II.

OF SELECTING, DRAWING AND SUMMONING THE PANEL; AND HEREIN OF SPECIAL VENIRES AND TALESMEN.

SECTION.

13. Selecting the Jury List.
14. [Continued.] In the Federal and Territorial Courts.
15. Drawing the Panel.
16. Publication of the Panel.
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18. [Continued.] Nature and Extent of this Right.
19. Summoning the Jurors.
20. Special Venire in Default of Jurors.
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22. Venire, by whom Executed and Returned.
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25. [Continued.] Conflicting Rulings on this Subject.
26. [Continued.] Further of this Subject.
27. [Continued.] By Whom and How Summoned.

§ 13. Selecting the Jury List. — At common law no such thing was known as the preparation of a list of persons who were liable to be summoned to serve as jurors at a succeeding term of court; but the uncontrolled discretion was vested in the *sheriff*, in the *coroner*, or in officials called *elisors*, of summoning such "good and lawful men" as they might choose under the command of the writ of *venire facias*.[1] This led to enormous abuses, chiefly in the packing of juries and the blackmailing of citizens;[2] to remedy which, American statutes have generally provided, with more or less particularity, for the preparation, a given time before the commencement of any term of court, or at other stated periods, of a list of persons, within the county or other jurisdiction, from whom jurors are to be summoned. The preparation of this list is generally, though not always,[3] confided

[1] See Thomp. & Mer. Jur., § 44.
[2] Rex *v.* Whittaker, Cowp. 752.
[3] Code Ala. 1876, §§ 4732, 4733; R. S. La. 1876, § 2127; Rev. N. J. 1877, p. 532, § 7.

to officials other than the sheriff, such as the judges of general elections, or the county canvassers of the votes polled at general elections; [1] the trustees of the township or the councilmen of wards; [2] other town officers; [3] special boards,[4] county courts,[5] or jury commissioners.[6] *Penalties* are frequently imposed upon the designated officers for the non-performance of this duty,[7] though in respect of the *manner* of performing it the statutes are sometimes, though not always,[8] regarded as *directory*.[9]

§ 14. [**Continued.**] **In the Federal and Territorial Courts.**— In the Federal courts the practice is now chiefly regulated by a recent statute,[10] which commits this duty to the clerk of the court, and to a jury commissioner appointed by the judge, who shall be a well known member of the principal political party within the district opposed to that to which the clerk belongs. Practitioners in those courts should direct their attention to this statute, at the same time bearing in mind that, under section 800, of the Revised Statutes of the United States, those courts

[1] R. C. Iowa 1880, § 234, *et seq.*

[2] R. S. Ohio 1880, § 5164.

[3] G. S. Mass. 1860, chap. 132, § 6, *et seq.*; N. Y. Code Rem. Just., § 1035, *et seq.*; Comp. L. Kan. 1879, § 2693; R. S. Wis. 1878, § 2526; R. S. Mich. 1871, § 5977; G. S. Vt. App. 1870, p. 117, § 89; R. S. Me. 1871, ch. 106, § 1; G. S. N. H., ch. 194, §§ 1 and 2; G. S. Conn. 1875, ch. X, § 1; G. S. R. I. 1872, p. 432, § 14.

[4] Gen. Laws Colo. 1877, § 1462; Cal. Code Civ. Proc., § 204; Bush Dig. Fla., ch. 104, § 3; Battle's Rev. N. C., p. 194, § 229*a*; R. S. Ill. 1889, ch. 78, § 1; R. S. Wis. 1880, § 1681; Stat. Minn. at L. 1873, p. 221, § 23, *et seq.*; R. C. Miss. 1880, § 1681; G. S. Neb. 1863, p. 642, § 658; Code Ala. 1876, § 4733; Comp. L. Ariz., ch. 47, § 13; Comp. L. Nev. 1873, § 1052; 2 Ind. Rev. 1876, p. 29, § 1; Code Ga. 1873, § 3907; R. S. So. Car. 1873, p. 518, § 1; Comp. L. Utah, 1876, p. 55; R. S. La. 1876, § 2127; Gen. Laws New Mexico, 1880, ch. 68, § 1; 1 Bright. Purd. Dig., 829, § 2.

[5] R. C. Del., ch. 109, § 2; Code Va. 1873, p. 1059, § 3; R. S. Mo. 1879, § 2784; Stat. Tenn. 1871, § 3981; R. S. W. Va. 1879, ch. 109, § 7; Gen. Laws Ore. 1872, Civil Code, § 921; R. C. Md. 1878, art. 62, § 2.

[6] G. S. Ky. 1879, p. 573, § 4; R. S. Tex. 1879, art. 3030.

[7] Comp. L. Kan. 1879, § 2693.

[8] Gladden *v.* State, 13 Fla. 623; Buhol *v.* Boudousquie, 8 Mart. (N. S.) (La.) 425.

[9] Forsythe *v.* State, 6 Oh. 19; Burlingame *v.* Burlingame, 18 Wis. 285; Colt *v.* Eves, 12 Conn. 243; Thomas *v.* People, 39 Mich. 309.

[10] Act Cong. June 30, 1879; Laws U. S. 1879 (Sess. I.), chap. 52; 21 U. S. Stat. at Large, 143.

may, by rule or order, conform the designation and impaneling of juries, in substance, to the laws and usages relating to jurors in the State courts.[1] In the territories, the selection and summoning of jurors is governed by territorial statutes,[2] or, in the absence of statutory regulation, by the usages and holdings of the common law, — in accordance with which an open *venire facias* is directed to the marshal, who summons such good and lawful men as he will.[3]

§ **15. Drawing the Panel.** — From the general list thus selected of persons eligible or liable to serve as jurors at the succeeding term of court, the list of names actually to be summoned, called either the *array* or the *panel*, is drawn by lot from a box or wheel, at a time and at a place, either in open court or otherwise, upon public notice, by the designated official or officials, and sometimes in the presence of other designated officials, in a designated manner, — all the conditions and details of the proceeding being generally prescribed by statute.[4] Although, as in the case of the general list,[5] *penalties* are frequently prescribed

[1] See Alston *v.* Manning, Chase's Dec. 460. For the mode of selection before the passage of the act of 1879, see United States *v.* Collins, 1 Woods (U. S.), 499, 503; United States *v.* Tallman, 10 Blatchf. C. C. 21; United States *v.* Gardner, 1 Woods (U. S.), 514, 519; United States *v.* Wilson, 6 McLean (U. S.), 604; Rich *v.* Campbell, 1 Woods (U. S.), 509; United States *v.* Dow, Taney Dec. 34; United States *v.* Insurgents, 2 Dall. (U. S.) 335, 341; United States *v.* Fries, 3 Dall. (U. S.) 515. The Federal courts have the power, and it is their duty, to enforce other well founded objections than those available in the State courts. United States *v.* Benson, 31 Fed. Rep. 896.

[2] *Per* Mr. Chief Justice Waite in Reynolds *v.* United States, 98 U. S. 145, 154, citing American Ins. Co. *v.* Canter, 1 Pet. 511; Benner *v.* Porter, 9 How. 235; Clinton *v.* Englebrecht, 13 Wall. 434.

[3] Beery *v.* United States, 2 Colo. 186. The acts of Congress which regulate the procuring of juries for Federal courts are not applicable to the territories. Clinton *v.* Englebrecht, 13 Wall. (U. S.) 434. See also Reynolds *v.* United States, 98 U. S. 145, 154; American Ins. Co. *v.* Canter, 1 Pet. (U. S.) 511; Benner *v.* Porter, 9 How. (U. S.) 235.

[4] See N. Y. Code Rem. Jus., § 1042 *et seq.*; Rev. N. J. 1877, p. 533, § 13; G. S. Mass. 1860, p. 680, § 10 *et seq.*; Gen. Stat. N. H., chap. 194, § 10; G. S. Conn. 1875, tit. 19, chap. 10, § 6; G. S. Vt. 1862, chap. 37, § 5; R. S. Me. 1871, chap. 106, § 9; Gen. Stat. R. I. 1872, p. 432, § 15.

[5] *Ante*, § 13.

for failing to make a drawing,[1] yet a literal compliance with the terms of the statute is not necessary to the validity of the panel.[2] On the contrary, the statutes are generally regarded as directory,[3] the object being to secure a proper apportionment of jury duty among those liable to perform such duty, as well as to secure impartial juries;[4] and the usual presumption of right action on the part of the officials charged with this duty is generally sufficient to cure irregularities in its performance,[5] though obviously a general disregard of the essential provisions of the statute may have the effect of vitiating the array.[6]

§ 16. Publication of the Panel.— The panel thus drawn is, under some statutory regulations, subject to public inspection;[7] under others, any person may have a copy of it by applying to the clerk or sheriff and paying the fee allowed by law.[8]

§ 17. Service of it upon the Accused.— By statute in some jurisdictions persons held to answer for capital,[9] or other serious

[1] G. S. Mass. 1860, chap. 132, § 37; G. S. Vt., p. 332, § 9; Code Va. 1873, p. 1062, § 22; G. S. N. H., chap. 194, § 17; Bush Dig. Fla., chap. 104, § 29; R. S. W. Va. 1879, chap. 109, § 26; Miller's R. C. Iowa, 1880, § 243; R. S. Del. 1874, chap. 109, § 23; R. S. Me. 1871, chap. 106, § 16; Code Ala. 1876, § 4762.

[2] See, in addition to the cases previously cited, Ferris *v.* People, 35 N. Y. 125; *s. c.* 31 How. Pr. (N. Y.) 140; 48 Barb. (N. Y.) 17; 1 Abb. Pr. (N. s.) 193; State *v.* Guidry, 28 La. Ann. 630; Pratt *v.* Grappe, 12 La. 451; State *v.* Miller, 26 La. Ann. 579; Mapes *v.* People, 69 Ill. 523; Wilhelm *v.* People, 72 Ill. 468; Frieri *v.* People, 2 Abb. App. Dec. (N. Y.) 230, 231 (failure to give notice of the drawing); Friend *v.* Hamill, 34 Md. 298 (informality in the certificate of the drawing).

[3] United States *v.* Collins, 1 Woods (U. S.), 499, 504.

[4] Rafe *v.* State, 20 Ga. 64. Compare State *v.* Revells, 31 La. Ann. 387. See, also, State *v.* Williams, 3 Stew. (Ala.) 454.

[5] Wheeler *v.* State, 42 Ga. 306; Brown *v.* Com., 73 Pa. St. 322; Pasauka *v.* Daus, 31 Tex. 72.

[6] Cox *v.* People, 19 Hun (N. Y.), 430; *s. c.* aff'd. 80 N. Y. 500; 19 Hun, 439. See also Jones *v.* State, 3 Blackf. (Ind.) 37; Campbell *v.* State, 48 Ga. 353; People *v.* Labadie (Mich.), 33 N. W. Rep. 806.

[7] R. S. La. 1876, § 2127. In Nevada by any officer or attorney of the court, Comp. L. Nev. 1873, § 1054.

[8] N. Y. Code Rem. Jus., § 1049. See, also, Cal. Code Civ. Proc., § 221; Comp. L. Mich. 1871, § 5992; Comp. L. Kan. 1879, § 2978; Comp. L. Ariz., chap. 47, § 27.

[9] Stat. 7 Will. III., chap. 3, § 7 (treason and misprision of treason); Stat. 7 Anne, chap. 21, § 11. See Code Ala.

offenses, are entitled to a copy of the panel a designated number of days before their trial. These statutes vary in their terms, some providing for the service of the copy of the panel or array assembled to serve generally for the term, and others for a copy of the special panel assembled to serve in the particular case. Some of them provide for the service of the list of those who have been actually summoned;[2] others for the service of a list of those who have been drawn. Under the former it is not sufficient to serve a list of those who have been drawn merely;[3] nor under the latter will the statutory right be accorded by the service of a long list of persons, most of whom, to the knowledge of the officer, have been excused.[4] No such privilege existed at common law; it can only be claimed where there is a statute granting it, and in cases within such statute.[5] The statutes are generally drawn upon the conception of extending a *privilege* to the accused, which he may *waive* by not demanding it,[6] though the right is a valuable one, of which he can not be deprived against his consent.[7]

1876, § 4782; G. S. N. H. 1867, chap. 243, § 1; R. C. Miss. 1880, § 3057; R. S. Ohio, 1880, §§ 7271, 7273.

[1] R. S. Mo. 1879, §§ 1900, 1904. See, also, R. S. Me. 1871, chap. 134, § 14; R. S. La. 1876, § 992; R. S. 1879, chap. 55, § 1. It is clear that the prisoner can have no right to a list of the jurors in any other case than that provided by statute. Reg. *v.* Dowling, 3 Cox C. C. 509; Driskill *v.* State, 45 Ala. 21. Compare R. S. Ill., chap. 38, § 421; R. S. Ohio 1880, § 7273; Rev. Code Miss. 1880, § 3057; Rev. Stat. West Va. 1879, chap. 55, § 1; Gen. Stat. N. H. 1867, ch. 243, § 1; Stat. Tenn. 1871, §§ 5212, 5251.

[2] Pasch. Dig. Tex. Stat., art. 3022; Tex. Code Crim. Proc. art. 611; Murray *v.* State (Tex.), 3 S. W. Rep. 104.

[3] Harrison *v.* State, 3 Tex. App. 558; Drake *v.* State, 5 Tex. App. 649.

[4] State *v.* Howell, 3 La. Ann. 50, 52. Compare State *v.* Guidry, 28 La. Ann. 631.

[5] Reg. *v.* Dowling, 3 Cox C. C. 509; Driskill *v.* State, 45 Ala. 21.

[6] State *v.* Klinger, 46 Mo. 224, 227; State *v.* Fisher, 2 Nott & McCord (S. C.), 261, 264; State *v.* Cook, 20 La. Ann. 145; State *v.* Jackson, 12 La. Ann. 679; State *v.* Hernandes, 4 La. Ann. 379; Peterson *v.* State, 45 Wis. 535; Craft *v.* Com., 24 Gratt. (Va.) 602, 609; State *v.* Waters, 1 Mo. App. 7; *s. c.* 62 Mo. 196. For stronger reasons, by going to trial without objection, he waives any *informality* or *inaccuracy* in the list known to him to exist. State *v.* Shay, 30 La. Ann. 114; Bell *v.* State, 59 Ala. 55; Pressley *v.* State, 19 Ga. 192.

[7] State *v.* Buckner, 25 Mo. 167.

§ 18. [Continued.] Nature and Extent of this Right. — From this it follows that the prisoner, on the one hand, can require nothing *more* than the statute grants to him. He cannot, for instance, require that the list shall be *read* to him, if he is unable to read; nor that the trial shall be delayed in order that he may have, for the prescribed period of time, a list of the *talesmen* who may have been summoned to supply deficiencies in the regular panel.[1] He cannot, on the other hand, complain that *more* has been done for him than the statute accords, — as that the list was served upon him a *longer* period before the trial than therein prescribed;[2] or that there is a defect in the regular list of jurors summoned for the term (furnished to him as a matter of grace, merely), he being entitled only to a list of those summoned for his trial.[3] Nor can he insist that all named in the list shall attend,[4] nor that *talesmen* shall not be called to supply the place of absentees;[5] nor, in the case of unimportant errors in the list, that the trial shall be delayed until he shall have been supplied, for the statutory length of time, with a perfected list;[6] nor (in the absence of prejudice), that the *Christian names* are not given in full, but only by initials;[7] nor that the name of a *township* from which a juror is drawn has been abbreviated, provided it is intelligible;[8] nor that the *caption* contains nei-

[1] Gardenhire *v.* State, 6 Tex. App. 147; Harris *v.* State, 6 Tex. App. 97; Johnson *v.* State, 4 Tex. App. 268; Drake *v.* State, 5 Tex. App. 649; Sharp *v.* State, 6 Tex. App. 650; State *v.* Buckner, 25 Mo. 167, 171; Green *v.* State, 17 Fla. 669; State *v.* Price, 3 Mo. App. 586; State *v.* Reeves, 11 La. Ann. 685; State *v.* Bunger, 14 La. Ann. 461, State *v.* Bennett, 14 La. Ann. 651; State *v.* Henry, 15 La. Ann. 297; State *v.* Gunter, 30 La. Ann. 539; Colt *v.* People, 1 Park. Cr. (N. Y.) R. 611. But, see, People *v.* Coyodo, 40 Cal. 586.

[2] State *v.* Toby, 31 La. Ann. 736.

[3] Chaney *v.* State, 31 Ala. 342.

[4] Jackson *v.* State, 4 Tex. App. 292, 298; Walker *v.* State, 6 Tex. App. 576.

[5] Stewart *v.* State, 13 Ark. 720, 735; Bates *v.* State, 19 Tex. 122; State *v.* White, 7 La. Ann. 531, State *v.* Bennett, 14 La. Ann. 651; State *v.* Ferray, 22 La. Ann. 423

[6] Goodhue *v.* People, 94 Ill. 37; State *v.* Turner, 25 La. Ann. 573; McCarty *v.* State, 26 Miss. 299; State *v.* Kane, 32 La. Ann. 999; State *v.* Dubord, 2 La. Ann. 732; Swofford *v.* State, 3 Tex. App. 76. In Alabama such defects are cured by statute. Hall *v.* State, 51 Ala. 9.

[7] Aikin *v.* State, 35 Ala. 399; Bill *v.* State, 29 Ala. 34.

[8] State *v.* Brooks, 30 N. J. L. 356.

ther the name of the county, the court, nor the case.[1] In short, technical objections to the caption of the list are not favored.[2] The sheriff's return on the *venire* may be *amended* after a motion to quash, so as to show a due service of a copy of it;[3] and the record need not affirmatively show the fact, in order to sustain a conviction on error or appeal.[4]

§ 19. Summoning the Jurors. — Under the common law and early English statutes the writ of *venire facias*, under which the sheriff, at his own discretion, selected and summoned the panel, assumed great importance, and technical accuracy was required in respect of it.[5] But, since in nearly all the American States,[6] the drawing of the panel precedes the issuing of the process, by whatever name called,[7] by virtue of which the jurors are sum-

[1] *Ibid.*

[2] State *v.* Ward, 14 La. Ann. 673; Aikin *v.* State, 35 Ala. 399.

[3] Gray *v.* State, 55 Ala. 86; Washington *v.* State, 8 Tex. App. 377. In Woodsides *v.* State, 2 How. (Miss.) 665, it was held that the return of the sheriff that he had served the prisoner with a correct list of the jury could not be collaterally questioned.

[4] Benton *v.* State, 30 Ark. 328, 344; Freel *v.* State, 21 Ark. 212; Dawson *v.* State, 29 Ark. 116; Durrah *v.* State, 44 Miss. 789; Logan *v.* State, 50 Miss. 269; Lewis *v.* State, 51 Ala. 1; Mitchell *v.* State, 58 Ala. 417; Paris *v.* State, 36 Ala. 232; Rash *v.* State, 61 Ala. 89. As to the *computation of the time* during which the accused is entitled to have the list before the trial, see 1 East P. C. 112; State *v.* McLendon, 1 Stew. (Ala.) 195; Robertson *v.* State, 43 Ala. 325; Craft *v.* Com., 24 Gratt. (Va.) 602.

[5] See Rogers *v.* Smith, 1 Ad. & El. 772, and many cases there cited. People *v.* McKay, 18 Johns. (N. Y.) 212, 217; State *v.* Dozier, 2 Speers L (S. C.) 211; State *v.* Williams, 1 Rich. L. (S. C.) 188; 2 Hale P. C. 260; 2 Hawk. P. C., chap. 41, § 1.

[6] The States of Maine, New Hampshire, Vermont, Massachusetts, Pennsylvania and West Virginia seem to form exceptions: in these a writ of *venire facias* issues before each drawing, and this is the only process. R. S. Me., chap. 106, § 9; G. S. N. H. 1867, § 7; G. S. Vt. 1863, ch. 37, § 2; G. S. Mass. 1860, p. 681, § 10; 1 Bright. Purd. Pa. Dig. 833, § 34; 2 R. S. Va., chap. 106, § 11. In Connecticut a "warrant" is issued to the town constable directing the drawing. G. S. Conn. 1875, p. 433, § 6.

[7] R. C. Miss. 1880, § 1692; R. S. Ohio, 1880, § 5167; R. C. Md. 1878, p. 560, § 3; Comp. L. Nev. 1873, § 1054; Bush Dig. Fla., chap. 104, § 6; R. S. Wis. 1878, § 2535; G. L. Colo. 1877, § 1471; R. S. La. 1876, § 2127; Code Va. 1873, p. 1060, § 7; G. S. Neb. 1873, p. 643, § 660; Code Ala. 1876, § 4744; Battle Rev. N. C., p. 196, § 2297; Code Ga. 1873, § 3931; Miller's R. C. Iowa, 1880, § 241; R. S. Ill. 1880, chap. 78,

moned, irregularities in this process,[1] or in the mode of its execution[2] or return[3] lose their importance; nor, in general, is

§ 10; R. S. Mo. 1879, § 2786; 2 Ind. Rev. 1876, p. 30, § 2; N. Y. Code Rem. Jus., § 1047; Comp. L. Ariz. 1877, § 2418; G. S. Ky. 1879, p. 574, § 6; Ark. Dig. Stat. 1874, § 3677; Gen. Laws Oreg. 1872, Civ. Code, § 930; Comp. L. Mich. 1871, § 5991; Comp. L. Kan. 1879, § 2976; Cal. Code Civ. Proc., § 225; Rev. N. J. 1877, p. 533, § 13; R. S. Del. 1874, chap. 109, § 8; Stat. Tenn. 1871, § 3991. In Texas this list must be under the seal of the court. R. S. Tex. 1879, § 3046.

[1] Peri *v.* People, 65 Ill. 17; State *v.* Cole, 9 Humph. (Tenn.) 626; White *v.* State, 16 Tex. 206; Murray *v.* State (Tex.), 3 S. W. Rep. 104; *s. c.* 1 S. W. Rep. 522. White *v.* Com., 6 Binn. (Pa.) 179; State *v.* Phillips, 2 Ala. 297; Louw *v.* Davis, 13 Johns. (N. Y.) 227. Compare State *v.* Stedman, 7 Port. (Ala.) 495; State *v.* Cole, 9 Humph. (Tenn.) 627; Bartow *v.* Murry, 2 N. J. L. 97, Kirkpatrick, C. J. diss., (overruling also the opinion of the latter in Sayres *v.* Scudder, and Veal *v.* Brown, *Ibid.* pp. 53, 72); Sharp *v.* Hendrickson, 2 N. J. L. 686; Cox *v.* Haines, *Ibid.* 687; State *v.* Alderson, 10 Yerg. (Tenn.) 523; Bill *v.* State, 29 Ala. 34; Hall *v.* State, 51 Ala. 9; Fields *v.* State, 52 Ala. 348; Aikin *v.* State, 35 Ala. 399; State *v.* Simmons, 6 Jones L. (N. C.) 309; Cordova *v.* State, 6 Tex. App. 207, 222; Haight *v.* Holley, 3 Wend. (N. Y.) 258, 262. *Contra*, a few old cases which blindly adhere to the ancient strictness: People *v.* McKay, 18 Johns. (N. Y.) 212, 217; State *v.* Dozier, 2 Speers L. (S. C.) 211; State *v.* Williams, 1 Rich. L. (S. C.) 188.

[2] People *v.* Williams, 24 Mich. 156, 161. See, also, Kennedy *v.* Com., 14 Bush (Ky.), 340.

[3] People *v.* Jones, 24 Mich. 215; State *v.* Stokely, 16 Minn. 282; Maples *v.* Park, 17 Conn. 338; Fellow's Case, 5 Me. 333; Davis *v.* State, 25 Oh. St. 369; Anon., 1 Pick. (Mass.) 196. Although a return is necessary for the purpose of identifying the juror's drawn, with those present in court or failing to attend (People *v.* Jones, 24 Mich. 215), yet even the omission of a return does not vitiate the array (Rolland *v.* Com., 82 Pa. St. 306, 322), or prevent a juror from taking his seat upon showing that he was in fact summoned. Patterson's Case, 6 Mass. 486. A neglect to sign the return will not vitiate the array, but the court may order it to be indorsed on the writ and signed. Duwar *v.* Spence, 2 Whart. (U. S.) 211; Com. *v.* Miller, 4 Phila. 210; Com. *v.* Green, 1 Ashm. (Pa.) 289, 291; Com. *v.* Chauncey, 2 Ashm. (Pa.) 90; Com. *v.* Parker, 2 Pick. (Mass.) 549. If it omit to name the day of summoning, the jurors being in attendance, may testify that they have been duly summoned and thereafter be sworn. Anon., 1 Pick. (Mass.) 196. Where the issue of the *venire* precedes the drawing, it has been held unnecessary to recite in the return that the panel was drawn *according to law*, for this will be presumed. Com. *v.* Green, 1 Ashm. (Pa.) 289. *Contra*, Eaton *v.* Com., 6 Binn. (Pa.) 447. The statutory provision as to the *time* within which the return shall be made has been regarded as *directory*, so that it is made in time to afford an opportunity for inspecting the panel. Mowry *v.* Starbuck, 4 Cal. 274; State *v.* Squaires, 2 Nev. 226. *Contra*, State *v.* Vegas, 19 La. Ann. 105. Not error to permit sheriff to

it necessary that it issue at all;[1] since, if the designated jurors assemble, it is wholly immaterial how they were brought in. The *number* to be summoned, when not fixed by statute,[2] rests in the *discretion* of the court:[3] and, where fixed by statute, a want of literal compliance with its terms will not vitiate the array.[4] Parties cannot insist upon the attendance at one time of the full panel, so that enough attend for the selection of a jury in the particular case.[5]

amend return: Murray *v.* State (Tex.), 3 S. W. Rep. 104; *s. c.* 1 S. W. Rep. 522; Mullin's Appeal (Pa.) 5 Atl. Rep. 738.

[1] Bird *v.* State, 14 Ga. 43. To the same effect see State *v.* Crosby, Harper Const. Rep. (S. C.) 90; Maher *v.* State, 1 Port. 265; Johnson *v.* Cole, 2 N. J. L. 266; (*contra*, Howell *v.* Robertson, 6 N. J. L. 142); State *v.* Williams, 3 Stew. (Ala.) 454; Lyon *v.* Commercial Ins. Co., 2 Rob. (La.) 267; State *v.* Folke, 2 La. Ann. 744; Trembly *v.* State, 20 Kan. 116, 120; State *v.* Harris, 30 La. Ann. 90; McDermott *v.* Hoffman, 70 Pa. St. 31; State *v.* Perry, Basbee (N. C.) 330; Bennett *v.* State, Mart. & Yerg. (Tenn.) 133; Mackey *v.* People, 2 Colo. 13, 17; United States *v.* Reed, 2 Blatch. (U. S.) 435, 452; Samuels *v.* State, 3 Mo. 68; State *v.* Marshall, 36 Mo. 406; State *v.* Jones, 61 Mo. 232; People *v.* McCann, 3 Parker, Cr. R. (N. Y.) 272; People *v.* Cummings, 3 Park. Cr. R. (N. Y.) 343; People *v.* Robinson, 2 Park. Cr. R. (N. Y.) 235, (overruling McGuire *v.* People, 2 Park. Cr. R. (N. Y.) 148); State *v.* Cavanaugh, 76 Mo. 54.

[2] It was limited by Stat. Will. II., chap. 38, 225, but this was held not to apply to crown cases.

[3] United States *v.* Insurgents, 2 Dall. (U. S.) 335. See, also, United States *v.* Fries, 3 Dall. (U. S.) 515.

[4] Anderson *v.* State, 5 Ark. 444, 453; Ramos *v.* Bringier, 2 Mart. (N. S.) La. 192; Debuys *v.* Mollere, 2 Mart. (N. S.) La. 625; Prall *v.* Peet, 3 La. 274, 280. But *contra* see Harrison *v.* State, 3 Tex. App. 558; Burfey *v.* State, 3 Tex. App. 519; Jones *v.* State, 3 Tex. App. 575; Calthorp *v.* Newton, Cro. Jac. 647. In Louisiana it is provided by statute that it shall not be deemed a good cause of challenge to the array, that the number of jurors actually drawn at any time is not the exact number required by law. R. S. La. 1876, § 2130.

[5] Odom *v.* Gill, 59 Ga. 180; State *v.* Lovenstein, 9 La. Ann. 313; Rolland *v.* Com., 82 Pa. St. 306, 321; Sands *v.* Com., 21 Gratt. (Va.) 871; State *v.* Brown, 12 Minn. 538; State *v.* Stephens, 13 So. Car. 285; State *v.* Klinger, 46 Mo. 224. But see Flower *v.* Livingston, 12 Mart. (La.) 681. In Anon., 1 Bro. (Penn.) 200, it is stated that "all the persons who may be indicted will be entitled to their challenges out of the whole panel; if one single juror neglects to attend, in consequence of being illegally summoned, the right of challenge is infringed." This, however, is now contradicted by the settled rule that the right of challenge is a right to reject, and not a right to select. United States *v.* Marchant, 4 Mason, (U. S.) 158; *s. c.* 12 Wheat. (U. S.) 482. Persons jointly indicted, who elect to be jointly tried, cannot

§ 20. **Special Venire in Default of Jurors.** — If the regular panel is not drawn, or is quashed or exhausted, the business of the court is not therefore to stop, but the court may, under most statutory systems, award a special *venire facias*, returnable forthwith, under which a sufficient number of jurors are summoned to proceed with the public business.[1] A new jury may, it has been held, be thus impaneled while the regular jury is out deliberating upon a verdict,[2] or for the immediate retrial of a criminal case where a jury have failed to agree.[3] As in the case of the regular *venire*,[4] irregularities in the special *venire*,[5] or in its execution,[6] are in general disregarded; though matters of *substance* are insisted upon, — as, where the statute prescribes that the jurors be drawn by the clerk and this is omitted, a *venire* is issued directing the sheriff to summon a certain number.[7]

§ 21 **Special Venire in Capital Cases.** — In many of the States the issuing of a special *venire* in capital cases is provided for by statute. This is in the nature of a *privilege* to the accused, and under some statutes the *venire* is issued only upon the demand of the accused. This right cannot be demanded where, from some cause, the offense has ceased to be capital.[8] It is *waived* by going to trial without objection, with a jury selected

demand a more numerous panel than would be awarded in the case of a single defendant. State *v.* Phillips, 24 Mo. 475.

[1] Russel *v.* State, 53 Miss. 367; Trembly *v.* State, 20 Kan. 116; People *v.* Stuart, 4 Cal. 225; People *v.* Vance, 21 Cal. 400; People *v.* Williams, 43 Cal. 344; People *v.* Divine, 46 Cal. 46; People *v.* Davis, 47 Cal. 93. What is "an entire absence of the regular panel," so as to authorize a special *venire:* State *v.* McCartey, 17 Minn. 76; Blemer *v.* People, 76 Ill. 265; Reed *v.* State, 15 Oh. 217.

[2] Evarts *v.* State, 48 Ind. 422; Winsett *v.* State, 57 Ind. 26; Merrick *v.* State, 63 Ind. 327.

[3] Pierce *v.* State, 67 Ind. 354; Vanderwerker *v.* People, 5 Wend. (N. Y.) 530.

[4] See preceding section.

[5] State *v.* Coleman, 8 So. Car. 237; People *v.* Jones, 24 Mich. 215.

[6] State *v.* Arthur, 39 Ia 631 (summoning "from the body of the county"); Cavanah *v.* State, 56 Miss. 299 (summoning from the assessment roll). See, also, People *v.* Colt, 3 Hill (N. Y.) 432.

[7] Gladden *v.* State, 13 Fla. 623; Gropp *v.* People, 67 Ill. 154; Lincoln *v.* Stowell, 73 Ill. 246; Rockford Ins. Co. *v.* Nelson, 75 Ill. 548; Wright *v.* Stuart, 5 Blackf. (Ind.) 120; Hight *v.* Langdon, 53 Ind. 81.

[8] State *v.* Bullock, 63 N. C. 570.

from the regular panel.[1] It is proper that the accused should be present when the names of the jurors who are thus to be summoned are drawn, where the statute provides for a drawing,[2] though it has been held that he cannot demand this as a right.[3] Although the statute provides that the clerk of the court shall make the drawing, this, it has been held, may be done by a deputy sheriff in open court.[4] As in the case of the regular panel,[5] the disqualification of one or more jurors is no ground for quashing the *venire*, but is a ground of individual challenge merely.[6] While the accused cannot insist that all persons named in the special *venire* shall be brought in,[7] yet the neglect to summon a large number of them ought, it should seem, to vitiate the panel;[8] since in this way the sheriff might omit to summon persons supposed to be favorable to the accused, while summoning others unfavorable to him.[9]

§ 22. **Venire, by Whom Executed and Returned.** — As the summoning officer at common law possessed the entire power of selecting the *venire-men* who were to be brought in, the impartiality of this officer was a matter of great importance, and his disqualification constituted in general the only ground for challenging the array.[10] Under American statutes, where the panel is selected and drawn and a list of the names to be summoned is furnished to the officer, it can be of little importance whether he is the proper officer, or whether he is for any reason disqualified, where he summons *all* the persons named in the list.[11] But a

[1] Jefferson *v.* State, 52 Miss. 767; State *v.* Perry, Busbee (N. C.), 330.

[2] Henry *v.* State, 33 Ala. 389; Hall *v.* State, 40 Ala. 698.

[3] Pocket *v.* State, 5 Tex. App. 552; Cordova *v.* State, 6 Tex. App. 207; Handline *v.* State, 6 Tex. App. 347, 358.

[4] Pocket *v.* State, 5 Tex. App. 552.

[5] *Post*, § 31.

[6] Durrah *v.* State, 44 Miss. 789.

[7] Stewart *v.* State, 13 Ark. 720, 735; Bates *v.* State, 19 Tex. 122; Jackson *v.* State, 4 Tex. App. 292, 298.

[8] Logan *v.* State, 53 Miss. 431.

[9] In a case of murder it is not error for the court to refuse to cause a *venire* to be summoned from *another county* because of prejudice against the accused, until an effort has been made to obtain a jury, free from exception, from the *venire* already summoned. Puryear *v.* Com. (Va.), 1 South East. Rep. 513.

[10] *Post*, § 32.

[11] See Forman *v* Com. (Ky.), 6. S. W. Rep. 579.

fraudulent omission to summon a portion of those whose names are on the list may create a necessity for the issuing of a special venire, or for the summoning of talesmen, which may throw into the hands of the officer the power of selecting, or otherwise prejudice the accused. In such a case, it is still a matter of moment, as it was at common law, that the summoning officer be the lawful officer, and not for any reason disqualified for the performance of the duty. We accordingly find a good many modern holdings which still emphasize the importance of the *venire facias*, or other process by which jurors are brought in, being executed by the proper officer; though some of them proceed in deference to the ancient rule of the common law after the reason of it has ceased, and do not put their conclusions upon the correct ground. By that law, when the sheriff was for any reason incompetent, the *coroner* acted in his place; [1] though the coroner could not act where the sheriff was merely *sick* [2] or *dead*.[3] His absolute disqualification was necessary to qualify the coroner.[4] In case of the *gross ignorance* of the sheriff, it has been held that the court may direct his *deputy* to summon *tales* jurors; [5] and, where the sheriff can act, the deputy usually can.[6] If there be *two sheriffs* and one a party, the other may act.[7] Statutes are found authorizing the court, when the sheriff or his deputies are disqualified, to direct the coroner or any *disinterested person* to summon the jurors,[8] and this may be shown by *affidavit*

[1] Co. Litt. 158*a*; Rex *v.* Smith, 2 Shower, 288; Rex *v.* Dolby, 1 Dow. & Ry. 145; *s. c.* 2 Barn & Cress. 104.

[2] State *v.* Monk, 3 Ala. 415.

[3] Rex *v.* Warrington, 1 Salk. 152.

[4] Reg *v.* Delme, 10 Mod. 198.

[5] Kelly *v.* State, 3 Smed. & M. (Miss.) 518.

[6] Com. *v.* Carson, 3 Phila. 219, 223; Conner *v.* State, 25 Ga. 515.

[7] Rex *v.* Warrington, 1 Salk. 152; Rich *v.* Player, 2 Shower, 286.

[8] Crim. Code Ky., § 193; Johns *v.* Com. (Ky.), 3 S. W. Rep. 369; Forman *v.* Com. (Ky.), 6 S. W. Rep. 579. Phillips *v.* State, 29 Ga. 105; Hanna *v.* People, 86 Ill. 243; State *v.* Hardin, 46 Iowa, 623. A statute providing that "if the case requires it," the court may appoint two citizens for the summons of jurors, was liberally interpreted. "If from any cause," said the court, "bias or partiality, sickness, absence, death, removal or resignation from office, refusal to obey the order to summon special jurors, or if for any other sufficient cause the court determine that the circumstances of the case require it, they may appoint two citizens to perform the duty mentioned in the act." Com. *v.* Carson, 3 Phila. 219.

merely.[1] Where the sheriff and the coroner were both incompetent, under the English practice, the court might, on application, appoint officers called *elisors* to perform the duty;[2] but this practice seems not to have gained a footing in this country.[3]

§ 23. **Of Talesmen.** — Where the requisite number of *veniremen* did not attend, or the panel became reduced by claims of exemption or by challenges, or where otherwise an emergency arose for the summoning of additional jurors, the practice sprang up and was sanctioned by early statutes,[4] of summoning talesmen,[5] or bystanders. In this country the power of summoning such persons seems to be regarded as possessed by courts of record, where not prohibited by statute.[6] The abuses which may spring from the exercise of such a power are too obvious to be pointed out; and we accordingly find that statutes exist prohibiting the summoning of talesmen from the bystanders.[7] There seems to be a disposition on the part of the courts to retain this power, evidently regarding it as advantageous to the dispatch of the public business.[8] Accordingly, it has been held unaffected in the Federal courts by the recent act of Congress[9] already

[1] Harriman *v.* State, 2 G. Greene, 271; State *v.* Hardin, 46 Iowa, 623. Compare People *v.* Welch, 49 Cal. 174.

[2] Co. Litt. 158*a*; Rex. *v.* Edmunds, 4 Barn & Ald. 471, 480.

[3] Statutory provisions against *fraud* in procuring jurors: Thomp. & Mer. Jur., § 84. Punishment by *fine* of non-attending jurors: *Ibid.*, § 83.

[4] St. Hen. VIII., c. 6; 4 & 5 Phil. & M., c. 7.

[5] *Tales de circumstantibus*, — that is, *such of those standing around* as were *probi et legales homines*.

[6] R. S. Ill. 1880, chap. 78, § 13; Comp. L. Kan. 1879, § 2091; 2 Ind. Rev. 1876, p. 392, § 80.

[7] Cal. Code Civ. Proc., § 227; Comp. L. Nev. 1873, § 1222; Comp. L. Utah, 1876, § 1385; Comp. L. Ariz., chap. 47, § 30; R. S. Ohio, 1880, § 5173; Miller's R. C. Ia. 1880, § 2775. As to penalty for seeking jury service, see *ante*, § 84, subsec. 2. Construction of a statute prohibiting *tales* jurors from being summoned from persons found in the court-house or yard if procurable elsewhere: Baker *v.* State, 4 Tex. App. 223; Matthews *v.* State, 6 Tex. App. 23; Johnson *v.* State, 4 Tex. App. 268. See also Frye *v.* State, 7 Tex. App. 94; Hicks *v.* State, 5 Tex. App. 488; Samschen *v.* State, 8 Tex. App. 45.

[8] Matthews *v.* State, *supra*; Frye *v.* State, *supra*; State *v.* Moncla (La.), 2 South Rep. 814; Mullin's Appeal (Pa.), 5 Atl. Rep. 738.

[9] *Ante*, § 14; United States *v.* Rose, 6 Fed. Rep. 136. The power is given by § 804, Rev. Stat. U. S.

referred to. Unless otherwise provided by statute, it exists in the case of *special juries*, as well as in that of common juries.[1]

§ 24. [Continued.] **Under what Circumstances Summoned.** — The true theory of summoning talesmen is that such persons are to be summoned only where it is necessary to supplement or *fill up* a jury which remains incomplete after the exhaustion of the regular panel by excuses, challenges or otherwise. They ought not to be summoned on the one hand, until the regular panel has been exhausted,[2] though the court may summon them without awaiting the return of attachments issued to bring in members of the regular panel.[3] And where separate panels are summoned and in attendance for separate weeks of the term, it is better, and hence proper, where the first panel is exhausted without procuring a jury, to resort to the panel for the second week, rather than summon talesmen.[4] So, where the sheriff is ordered by the court to summon duly qualified jurors "from the county at large," he complies with the first order by summoning them from the first names remaining on the jury list of the county.[5] Nor is it improper, although not authorized by statute, for the court to direct such additional jurors to be drawn by the clerk in the usual way.[6]

§ 25. [Continued.] **Conflicting Rulings on this Subject.** — It is to be regretted, however, that no general rule on this sub-

[1] Rex *v.* Hunt, 4 Barn. & Ald. 430; Snook *v.* Southwood, Ryan & Moo. 429; Gatliff *v.* Bourne, 2 Moo & Rob. 100; Atty. Gen. *v.* Parsons, 2 Mee. & W. 23; Rex *v.* Hill, 1 Car. & P. 667; Rex *v.* Tipping, 1 Car. & P. 668; Baron *v.* Denman, 1 Exch. 769; People *v.* Tweed, 50 How. Pr. (N. Y.) 286; Anon., 2 Dall. (U. S.) 382; Rankin *v.* Goddard, 4 Allen (N. B.) 155; Atlee *v* Shaw, 4 Yeates (Pa.), 236; Rex *v.* Perry, 5 Term Rep. 453; Sparrow *v.* Turner, 2 Wils. 366; Denn *v.* Evaul, 1 N. J. L. 283; Hubley *v.* White, 2 Yeates (Pa.) 133.

[2] Barker *v.* Bell, 49 Ala. 281. Compare State *v* Benton, 2 Dev. & B 196, State *v* Nash, 8 Ired. L. (N. C.) 35; State *v* Lytle, 5 Ired. L. (N C.) 58 Compare Bayoujon *v.* Criswell, 5 Martin (N. s.) (La.) 232.

[3] Barthet *v* Estebene, 5 La. Ann 315.

[4] Lambertson *v.* People, 5 Park. C R. (N. Y.) 200. See also Smith *v* State, 55 Ala. 1.

[5] People *v.* Colt, 3 Hill (N. Y.), 432. See, also, Cavanah *v.* State, 56 Miss. 299.

[6] People *v.* Cummings, 3 Park. C R. (N. Y.) 343, 354.

ject, applicable in all jurisdictions, can be stated. It has been held, on the one hand, in a court of the United States, that it is ground of new trial to order a *tales* where there is no deficiency of regular jurors.[1] On the other hand, a territorial court has held that whether a proper emergency exists for summoning talesmen is for the court to decide according to the nature and amount of the business pending.[2] Coming to the State courts, we find the same difference of opinion. It has been denied by some,[3] and allowed by others,[4] that talesmen may be summoned to supply a *total default* of regular jurors. On the one hand, it has been ruled that, where the regular panel is absent in the jury room making up their verdict in a case, the court cannot call another cause for trial and proceed to impanel a jury composed entirely of bystanders.[5] On the other hand, if a *portion* only of the regular jurors are so absent, talesmen may be summoned to form a jury for the remainder of the panel.[6] If but a *single member* of the regular panel remains, talesmen may be summoned to form a jury with him alone;[7] and if he be challenged off, a jury may nevertheless be formed entirely from the talesmen.[8]

§ 26. [Continued.] **Further of this Subject.** — The *number* of talesmen to be summoned to supply a deficiency is generally regarded as a matter resting in the sound *discretion* of the trial court;[9] and the court may even direct the sheriff, in antici-

[1] United States *v.* Watkins, 3 Cranch C. C. (U. S.) 508.

[2] Territory *v.* Doty, 1 Pinney (Wis.), 396

[3] Rogers *v.* State, 33 Ind. 543; Williams *v.* Com., 91 Pa. St. 493.

[4] Suttle *v.* Batie, 1 Ia. 141; Hunt *v.* Scobie, 6 B. Mon. (Ky.) 469. In Louisiana it is ruled that there can be no objection to summoning talesmen where the regular panel has been exhausted without procuring a single juror. State *v.* Reeves, 11 La. Ann. 686; State *v.* Desmouchet, 32 La. Ann. 1241.

[5] Rogers *v.* State, 33 La. Ann. 543.

[6] Bradley *v.* Bradley, 45 Ind. 67; Rondeau *v.* New Orleans Imp. Co., 15 La. Ann. 160.

[7] Fuller *v.* State, 1 Blackf. (Ind.) 63; Emerich *v.* Sloan, 18 Iowa, 139.

[8] Fuller *v.* State, *supra*.

[9] People *v.* Colt, 3 Hill (N. Y.), 432; McGuffee *v.* State, 17 Ga. 497; State *v.* Lamon, 3 Hawks (N. C.), 175; State *v.* Buckner, 25 Mo. 167, 171; Burk *v.* State, 2 Har. & J. (Md.) 426; Dayton *v.* State, 19 Ohio St. 584; Colt *v.* People, 1 Park. Cr. R. (N. Y.) 611; Com. *v.*

pation of emergency, to bring in a sufficient number of qualified persons to act as talesmen whenever a deficiency may occur;[1] and these are not summoned for a particular case, but for the business of the court generally.[2] While talesmen are ordinarily summoned for a particular case,[3] yet if they sit in a subsequent case, it is an irregularity which is *waived* by not objecting before verdict.[4]

§ 27. [**Continued.**] **By whom and how Summoned.** — By the common law, the selection of talesmen was confided entirely to the *discretion* of the *sheriff*, as was the selection of regular jurors; and this is still the law where not changed by statute;[5] though an order of court controlling his discretion in this matter is no ground for new trial unless prejudice appears.[6] Therefore, the sheriff and his deputies who perform this duty ought to be properly *qualified;* and where there is a statute prescribing the *oath* which they shall take,[7] the omission to administer it will be error for which a conviction will be set aside.[8] Talesmen should possess the qualifications of regular jurors, which will be presumed until the contrary is shown;[9] and while the summoning officer must, of course, judge of their qualifications in the first instance, yet he ought not to *interrogate* them as to their opinions or bias.[10]

Eaton, 8 Phila. 428; Com. *v.* Twitchell, 1 Brewst. (Pa.) 551.

[1] Bac. Abr., Juries D. 337; State *v.* Lamon, 3 Hawks (N. C.), 175; United States *v.* Loughery, 13 Blatch. (U. S.) 267; State *v.* Kane, 32 La. Ann. 999; State *v.* Allen, 47 Conn. 121. The sheriff, or coroner, when discharging the duties of that officer, may of his own motion specially request the attendance of persons to serve as talesmen if necessary. Rex *v.* Dolby, 2 Barn. & Cress. 104. The statutes of a large number of the States now provide that talesmen may be taken from the bystanders or from the body of the county.

[2] Bird *v.* State, 14 Ga. 43. See also State *v.* Dale, 8 Ore. 229; United States *v.* Loughery, 13 Blatch. (U. S.) 267; O'Connor *v.* State, 9 Fla. 215.

[3] Wallace *v.* Columbia, 48 Me. 436; Shields *v.* Niagara Sav. Bank, 3 Hun (N. Y.), 477; *s. c.* 5 Th. & C. (N. Y.) 585.

[4] Howland *v.* Gifford, 1 Pick. (Mass.) 42, note; Wallace *v.* Columbia, 48 Me. 436.

[5] People *v.* Cummings, 3 Park. C. R. (N. Y.) 343, 353.

[6] Capehart *v.* Stewart, 90 N. C. 101.

[7] Rev. St. Tex. art. 3056.

[8] Wyers *v.* State (Tex.) 2 S. W. Rep. 722.

[9] Yelm Jim *v.* Territory, 1 Wash. Terr. 76; O'Connor *v.* State, 9 Fla. 215; Lee *v.* Lee, 71 N. C. 139; McGuffie *v.* State, 17 Ga. 497.

[10] 1 Burr's Trial, p. 421; State *v.* McCartey, 17 Minn. 76; Joy *v.* State, 14 Ind. 139.

CHAPTER III.

OF CHALLENGES

ARTICLE I. — CHALLENGES TO THE ARRAY.
ARTICLE II. — PEREMPTORY CHALLENGES.
ARTICLE III. — CHALLENGES FOR GENERAL DISQUALIFICATION.
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ARTICLE I. — CHALLENGES TO THE ARRAY.

SECTION
31. Of the Various kinds of Challenges.
32. Partiality of the Summoning Officer.
33. Irregularities or Frauds in Selecting the General List.
34. Irregularities in Drawing the Panel.
35. Objection to the Officer who Conducts the Drawing.
36. In the Case of Special or Struck Juries.
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§ **31. Of the Various kinds of Challenges.** — There are two general divisions of challenges: 1. Challenges to the *array* 2. Challenges to the *polls*. In the broadest sense, challenges to the array are grounded upon some objection which, if well taken, vitiates the whole panel or *venire*, and requires its discharge; while challenges to the polls are grounded upon objections to particular jurors. As the entire office of selecting the panel was, at common law, committed to the sheriff or other summoning officer, the usual ground of challenging the array under that system

related to the partiality, "unindifferency," as it was called, or other disqualification of this officer. This ground of challenging the array still subsists in some American jurisdictions; but the more important and frequent ground is a non-compliance with the law in some substantial particular in the selection of the general jury list or in the drawing of the panel therefrom.

§ 32. Partiality of the Summoning Officer.— The partiality of the summoning officer, grounded upon his sustaining such relations to a party as subjected him to the influence of the latter,[1] or upon his being related to the adverse party by consanguinity or affinity,[2] at least within the *ninth degree*,[3] or himself the adverse party to the suit,[4] or interested therein,[5] or the prosecutor in a criminal case,[6] or the advocate of the opposing party is, at common law, a good ground of quashing the array;[7] though the mere fact that he has expressed an opinion adverse to the case of the challenging party, will not be.[8] Attempts by a

[1] Bac. Abr. Juries E.; Co. Litt. 156*a*; Trials per Pais (ed. of 1725), p. 123.

[2] Co. Litt. 156*a*; Bac. Abr. Juries, E.

[3] 3 Bla. Com. 363; Vernon *v.* Manners, 3 Dyer, 319. a. (13); Oulton *v.* Morse, 2 Kerr (N. B.), 77; Vanauken *v.* Beemer, 4 N. J. L. 364; Rector *v.* Hudson, 20 Tex. 234; Munshower *v.* Patton, 10 Serg. & R. (Pa.) 334; Mommsen *v.* West, 1 Leon. 88; Markham *v.* Lee, cited *Ibid.* See also Foot *v.* Morgan, 1 Hill (N. Y.), 654. But not that he was a son of the prosecuting attorney (State *v.* Cameron, 2 Chand. (Wis.) 172), or married to the sister of one who was surety for costs and who had supported the plaintiff's action with his money (Murchison *v.* Marsh, 2 Kerr, N. B. 608), or cousin of the lessor of the plaintiff in ejectment, the lessor not being a party in interest. Anon., 3 Dyer, 300. b. (35); Goodtitle *v.* Thrustout, 2 Stra. 1023.

[4] Cowgill *v.* Wooden, 2 Blackf. (Ind.) 332; Crammer *v.* Crawley, 1 N. J. L. 43; Woods *v.* Rowan, 5 Johns. (N. Y.) 133; Munshower *v.* Patton, 10 Serg. & R. (Pa.) 334. But see State *v.* Judge, 11 La. Ann. 79; Prince *v.* State, 3 Stew. & Port. (Ala.) 253.

[5] People *v.* Tweed, 50 How. Pr. (N. Y.) 286. See also Rex *v.* Johnson, 2 Stra. 1000.

[6] Rex *v.* Shepherd, 1 Leach, C. C. 119.

[7] Co. Litt. 156. b.; Baylis *v.* Lucas, Cowp. 112; Watkins *v.* Weaver, 10 Johns. (N. Y.) 107; Tallman *v.* Woodworth, 2 Johns. (N. Y.) 385; Stubber *v.* Wall, 1 Craw. & Dix (Irish) Cir. 54; Chapman *v.* Macutchin, 1 Craw. & Dix (Irish) Cir. 121.

[8] Friery *v.* People, 2 Keyes (N. Y.), 424; *s. c.* 2 Abb. App., Dec. (N. Y.) 215; 54 Barb. (N. Y.) 319; Ferris *v.* People, 35 N. Y. 125; *s. c.* 31 How. Pr. (N. Y.) 140; 48 Barb. (N. Y.) 17; 1 Abb. Pr. (N. S.) (N. Y.) 193. In *Texas* the only ground of challenging the

party to influence the summoning officer in the performance of his duties will have this effect, without discriminating nicely as to whether prejudice has resulted or not;[1] though where the party is a *corporation*, the mere fact of giving to the sheriff at his request information as to who the *stockholders* are, so that he may avoid summoning them, will not have this effect.[2]

§ 33. Irregularities or Frauds in Selecting the General List. — As already seen, statutes which prescribe the manner of selecting, by county, town, or other officers, the general list of persons liable to jury duty from which the panel is drawn, are generally treated as directory merely.[3] It is hence a general rule that irregularities in the discharge of this duty constitute no ground for challenging an array.[4] If the jurors who have been selected and drawn are individually qualified, that is generally deemed sufficient,[5] and objections to particular jurors are made by challenge to the polls. It has been so held in case of a delay

array in criminal cases is that "the officer summoning the jury has acted corruptly, and has willfully summoned persons upon the jury known to be prejudiced against the defendant, and with a view to cause him to be convicted." Pasc. Dig., art. 3034; R. S. Tex. 1879 (Code Cr. Proc.), art. 624. See Tuttle *v.* State, 6 Tex. App. 556; Coker *v.* State, 7 Tex. App. 83; Castanedo *v.* State, 7 Tex. App. 582. See also Harris *v.* State, 6 Tex. App. 97; Swofford *v.* State, 3 Tex. App. 88; Williams *v.* State, 44 Tex. 34; Bowman *v.* State, 41 Tex. 417.

[1] McDonald *v.* Shaw, 1 N. J. L. 6. See also State *v.* Johnson, 1 N. J. L. 219.

[2] Quinebaug Bank *v.* Tarbox, 20 Conn. 510.

[3] *Ante*, § 13.

[4] People *v.* Tweed, 50 How. Pr. (N. Y.) 280; Maffett *v.* Tonkins, 6 N. J. L. 228; Dolan *v.* People, 64 N. Y. 485; Foust *v.* Com., 33 Pa. St. 338; Jewell *v.* Com., 22 Pa. St. 94; Com. *v.* Walsh, 124 Mass. 32; Woodsides *v.* State, 2 How. (Miss.) 655; Malone *v.* State, 49 Ga. 210; Brinkley *v.* State, 54 Ga. 371; Foster *v.* Speed, 32 La. Ann. 34; Sumrall *v.* State, 29 Miss. 202; State *v.* Neagle, 65 Me. 468. But see Compton *v.* Legras, 24 La. Ann. 259. Irregularities in filling the jury wheel in Pennsylvania: Com. *v.* Lippard, 6 Serg. & R. (Pa.) 395; in the custody of the wheel: Curley *v.* Com., 84 Pa. St. 151; Rolland *v.* Com., 82 Pa. St. 306.

[5] State *v.* Massey, and State *v.* Baldwin, 2 Hill (S. C.), 379; Rafe *v.* State, 20 Ga. 80; Perry *v.* State, 9 Wis. 19; Gettwerth *v.* Teutonia Ins. Co., 29 La. Ann. 30; State *v.* Petrie, 25 La. Ann. 386; Com. *v.* Walsh, 124 Mass. 32; State *v.* Hascall, 6 N. H. 352. *Contra*, that a selection under the provisions of a repealed law is void: State *v.* Da Rocha, 20 La. Ann. 356; State *v.* Morgan, 20 La. Ann. 442.

in returning the list to the clerk of the court,[1] and of informalities of the certificate of selection;[2] though a total failure to record the list, so as to allow the public inspection of it, has been held a ground of such challenge,[3] and so has a total departure from the provisions of the law.[4] That the selection was not made by the officer appointed by the statute,[5] or that it was made by an officer who had never qualified,[6] or by persons to whom the proper officers assumed to delegate their functions,[7] will support such a challenge; but the objection that it was made by an officer whose term had expired, will not, since he was still an officer *de facto*, and the court will not, on such challenge, try the title to a public office.[8] That a great disproportion exists between the number of persons of different *religious beliefs* on the panel,[9] or that, a *rich* man being defendant, there are many *poor* men on the panel,[10] are not, *per se*, grounds of such challenge. Decisions are found to the effect that a *list*, valid on its face, is *conclusive* upon a prisoner as to its regularity;[11] and a monstrous political case resulted in establishing the doctrine in England that it will be no ground of challenge to the array that the list is incomplete through *fraud*.[12] But it is confidently believed that the doctrine in this country is otherwise.[13]

[1] State *v.* Gut, 13 Minn. 341.

[2] Carter *v.* State, 56 Ga. 463; Brinkley *v.* State, 54 Ga. 371. See also Gardiner *v.* People, 6 Park. C. R. (N. Y.) 157, 198; State *v.* Clarkson, 3 Ala. 378.

[3] Mitchell *v.* Likens, 3 Blackf. (Ind.) 258; Mitchell *v.* Denbo, *Ib.* 259.

[4] State *v.* Da Rocha, 20 La. Ann. 356; State *v.* Morgan, 20 La. Ann. 442. As a failure to select from the assessment roll. State *v.* Jenkins, 32 Kan. 477.

[5] Elkins *v.* The State, 1 Tex. App. 539. See also Shackleford *v.* The State, 2 Tex. App. 385.

[6] State *v.* Vance, 31 La. Ann. 398.

[7] State *v.* Newhouse, 29 La. Ann. 821.

[8] State *v.* McJunkin, 7 S. C. 21; Vance *v.* Com., 2 Va. Cas. 162; Carpenter *v.* People, 64 N. Y. 483; Dolan *v.* People, *Ib.* 485; State *v.* Ferray, 22 La. Ann. 423. So, under the old law, it was no ground of challenge that the array was made by a person two days after he had received his discharge as sheriff. Hoare *v.* Broom, Cro. Eliz. 369. But compare Anon., Dyer, 177. b. pl. (34).

[9] Reg. *v.* Mitchel, 3 Cox, C. C. 1.

[10] *Ibid.*, p. 30, per Lefroy, B.

[11] Gardiner *v.* People, 6 Park. C. R. (N. Y.) 157, 198; State *v.* Allen, 1 Ala. 442; State *v.* Clarkson, 3 Ala. 378; State *v.* Brooks, 9 Ala. 9.

[12] Reg. *v.* O'Connell, 11 Cl. & Fin. 155; *s. c.* 1 Cox, C. C. 394. See also Reg. *v.* Fitzpatrick, Craw. & Dix (Irish), 513; Reg. *v.* Conrahy, 1 Craw. & Dix (Irish) Cir. 56. Compare People *v.* Jewett, 3 Wend. (N. Y.) 314, 320.

[13] People *v.* Tweed, 50 How. Pr. (N.

§ 34. Irregularities in Drawing the Panel. — In like manner, statutory provisions respecting the drawing of the panel are generally regarded as directory merely,[1] so that irregularities therein, unless plainly operating to the prejudice of the challenging party, form no ground for challenging the array.[2] Cases are found, however, where a palpable disregard of the statutory provisions have been held sufficient ground for such challenge.[3] Thus, if the clerk put upon the panel the names of persons, at their own request, who have not been regularly drawn, the presence of these interlopers, called *non-jurors*, they not being subject to challenge personally, vitiates the whole panel.[4] Statutes are found which enact that only a material departure from the forms prescribed for the drawing, or the intentional omission of the sheriff to summon one or more of the jurors

Y.) 264; People *v.* Dolan, 64 N. Y. 485; Maffett *v.* Tonkins, 6 N. J. L. 228.

[1] *Ante*, § 15.

[2] Rafe *v.* State, 20 Ga. 64; State *v.* Williams, 3 Stew. (Ala.) 454; Friery *v.* People, 2 Abb. App. (N. Y.) Dec. 215; *s. c.* 2 Keyes (N. Y.) 424; 54 Barb. (N. Y.) 319; Ferris *v.* People, 35 N. Y. 125; *s. c.* 31 How. Pr. (N. Y.) 140; 48 Barb. (N. Y.) 17; 1 Abb. Pr. (N. s.) (N. Y.) 193; State *v.* Guidry, 28 La. Ann. 630; Pratt *v.* Grappe, 12 La. 451; State *v.* Miller, 26 La. Ann. 579; Mapes *v.* People, 69 Ill. 523; Wilhelm *v.* People, 72 Ill. 468; Dotson *v.* The State, 62 Ala. 141. See also Crane *v.* Dygert, 4 Wend. (N. Y.) 675; Rolland *v.* Com., 82 Pa. St. 306, 321. *Contra*, Jones *v.* State (Sup. Ct. Ohio 1851), 8 West. L. J. 508; Lindley *v.* Kindall, 4 Blackf. (Ind.) 189; Friery *v.* People, Abb. App. (N. Y.) Dec. 215; *s. c.* 2 Keyes (N. Y.), 424; 54 Barb. (N. Y.) 319; Gardiner *v.* People, 6 Park. C. R. (N. Y.) 155; People *v.* Rogers, 13 Abb. Pr. (N. s.) (N. Y.) 370; State *v.* Squaires, 2 Nev. 227; People *v.* Ah Chung, 54 Cal. 398; Pierson *v.* People, 18 Hun (N.Y.), 239; Cox *v.* People, 19 Hun (N. Y.), 430; Dolan *v.* People, 24 N. Y. 485; Claussen *v.* La Franz, 1 Iowa, 226, 241; State *v.* Seaborn, 4 Dev. L. (N. C.) 305.

[3] Jones *v.* State, 3 Blackf. (Ind.) 37; Anon., 1 Brown (Penn.), 121; Baker *v.* Steamer Milwaukee, 14 Iowa, 214; Pringle *v.* Huse, 1 Cow. (N. Y.) 432; McCloskey *v.* The People, 5 Park. C. R. (N. Y.) 308. Such persons are termed *non-jurors;* they are mere interlopers, and not being subject to challenge personally, their presence vitiates the whole panel. Norman *v.* Beaumont, Willes, 484; Abbott, C. J., in Rex *v.* Tremaine, 7 Dowl. & Ry. 684, 687; *s. c.* 16 Eng. C. L. 318; *s. c. sub nom.* Rex *v.* Tremearne, 5 Barn. & Cress. 254; 11 Eng. C. L. 218.

[4] McCloskey *v.* People, 5 Park. C. R. (N. Y.) 308; Norman *v.* Beaumont, Willes, 484; Rex *v.* Tremaine, 7 Dowl. & Ry. 684, 687; *s. c.* 16 Eng. C. L. 318; *s. c. sub nom.* Rex *v.* Tremearne, 5 Barn. & Cress. 254; 11 Eng. C. L. 218.

drawn, shall afford ground of challenge: [1] and still other statutes, in various terms, uphold the conclusion that irregularities or informalities in the discharge of this duty will not afford ground for challenging the array.[2]

§ 35. Objections to the Officer who Conducts the Drawing. — Although the officer who conducts the drawing is regarded for many purposes as the substitute of the sheriff at common law,[3] yet he has not the same power which was possessed by that officer corruptly to influence the selection of the jury; and therefore challenges to the array, grounded on an objection that the drawing was conducted by a different officer from the one appointed by law, have not the same force as such a challenge under the old system. Plainly, it will be no objection that the drawing took place by a *deputy* of the statutory officer, if the latter was duly appointed; [4] nor that an officer other than the statutory officers attended and participated in it,[5] nor that one of the statutory officers was temporarily absent, provided no names were drawn during his absence.[6] Objections to the *partiality* of the officer conducting the drawing, such as prevailed on a challenge to the array at common law, have been abrogated by statute in some of the States; [7] and in one State there are holdings to the effect that the fact that the officer who served the jury process, or drew and arrayed the panel, was the *attorney* of the

[1] Cal. Penal Code, § 1059; Comp. L. Nev. 1873, § 1947; Laws Utah, 1878, Code Cr. Proc., § 227; Miller, R. C. Iowa, 1880, §§ 2764, 4400; Stat. at Large, Minn. 1873, p. 1054, § 221; Ark. Dig. Stat. 1874, § 1902; Bullett's Ky. Codes (Crim.), p. 40, § 199. The grounds of challenge stated in such statutes are exclusive. State *v.* Arnold, 12 Iowa, 479; State *v.* Raymond, 11 Nev. 98.

[2] 2 Ind. Stat. 1876, p. 30, § 6; Rev. Code Miss. 1880, § 1694. See Hare *v.* State, 4 How. (Miss.) 189; Thomas *v.* State, 5 *Id.* 20; King *v.* State, 5 *Id.* 730; Laws N. Y. 1881, chap. 442, § 362; Tex. Code Crim. Proc., art. 624.

[3] Gardner *v.* Turner, 9 Johns. (N. Y.) 260; Jones *v.* State, 3 Blackf. (Ind.) 37; Mitchell *v.* Likens, *Id.* 258; Mitchell *v.* Denbo, *Id.* 259.

[4] State *v.* Gay, 25 La. Ann. 472; People *v.* Fuller, 2 Park. C. R. (N. Y.) 16.

[5] Hunt *v.* Mayo, 27 La. Ann. 197; State *v.* Bohan, 19 Kan. 28.

[6] State *v.* Arata, 32 La. Ann. 193.

[7] N. Y. Code Rem. Jus., §§ 1177, 1178. See also Comp. L. Mich. 1871, §§ 6013, 6014.

party, did not disqualify him for the duty.[1] But in another State it is enacted that a person *interested* in a suit cannot participate in the drawing of the panel by which it is to be tried;[2] and in still another State such a challenge has been upheld on the ground that the jury commissioner who assisted in the drawing was a *first cousin* to the challenging party.[3]

§ **36. In the Case of Special or Struck Juries.** — It seems that "*unindifferency*" in the officer by whom a special or struck jury has been nominated is no ground for challenging the array,[4] though *fraud* in the preparation of the list from which such a jury is struck will be.[5]

§ **37. Time of Conducting the Drawing.** — Statutory provisions prescribing the time of conducting the drawing are generally treated as directory,[6] and it has been held no ground of challenging the array that the drawing took place a *greater* length of time[7] prior to the session of the court than that prescribed; but otherwise where it took place within a *shorter* period of time,[8] the object of the statute being to afford parties an opportunity for the inspection of the list.[9]

§ **38. Irregularities in Summoning the Panel.**— From what has preceded,[10] the conclusion follows that irregularities in the

[1] Miles *v.* Pulver, 3 Den. (N. Y.) 84; Wakeman *v.* Sprague, 7 Cow. (N. Y.) 720.

[2] 2 Ind. Stat. 1876, p. 29, § 1.

[3] State *v.* McQuaige, 5 So. Car. 429.

[4] Rex *v.* Edmunds, 4 Barn. & Ald. 471. See also Rex *v.* Despard, 2 Man. & Ryl. 406; Webb *v.* State, 29 Ohio St. 351; Rex *v.* Johnson, 2 Str. 1000; Rex *v.* Burridge, 1 Str. 593; *s. c.* 2 Ld. Raym. 125. See Thomp. & Mer. Jur., § 144, subsec. 2.

[5] Maffett *v.* Tonkins, 6 N. J. L. 224. In *New Jersey*, where the sheriff exercises powers in respect of juries analogous to those possessed at common law, it has been held a good ground for challenging the array of a special jury, that it was returned by the sheriff's deputy, who had not taken the oath of office. Denn *v.* Evall, 1 N. J. L. 283. In *New York* it has been held that the statutory mode of obtaining a special jury must be strictly pursued. People *v.* Tweed, 50 How. Pr. (N. Y.) 262, 263.

[6] Wilson *v.* State Bank, 3 La. Ann. 196, 198; State *v.* Pitts, 58 Mo. 556; State *v.* Knight, 61 Mo. 373.

[7] Crane *v.* Dygert, 4 Wend. (N. Y.) 675. But see State *v.* Hascall, 6 N. H. 352, 360.

[8] Powell *v.* People, 5 Hun (N. Y.), 69.

[9] *Ante*, § 16.

[10] *Ante*, § 19.

procedure by which the panel, selected and drawn, are brought into court, afford no ground for challenging the array; [1] and objections to particular persons summoned are not properly taken by challenge to the *array*, but by challenge to the *polls*.[2]

§ **39. Resummoning Members of Quashed Panel.** — The inutility of challenging the array on the ground of *irregularities* merely, is illustrated by a class of cases which hold that, where such a challenge is sustained and a special *venire facias* issues for want of jurors, the sheriff may resummon the members of the quashed panel,[3] unless it has been quashed by reason of *fraud*.[4]

§ **40. Kinds of Challenges to the Polls.** — It will serve no use to refer to the confusing divisions and subdivisions of challenges to the polls at common law.[5] All such challenges fall into two classes: 1. Peremptory challenges, — that is, challenges for which no reason need be given. 2. Challenges for disqualification, — that is, challenges for which a legal reason must be given. The latter obviously again fall into two subdivisions: 1. Challenges grounded upon general disqualification. 2. Challenges grounded upon disqualification in respect of the particular case. By a common-law classification, challenges

[1] Hart *v.* Tallmadge, 3 Day (S. C.), 381; Rex *v.* Edmunds, 4 Barn. & Ald. 471, 489. See also Rex *v.* Hunt, 4 Barn. & Ald. 430; People *v.* McGeery, 6 Park. Cr. (N. Y.) 653. As a misdescription in the *venire facias* by which the act is called "civil" instead of "criminal:" State *v.* Nerbovig, 33 Minn. 480. Compare under the statute of *California:* People *v.* Coyodo, 40 Cal. 586; People *v.* Welch, 49 Cal. 174; People *v.* Rodriguez, 10 Cal. 50.

[2] Mitchell *v.* State, 43 Tex. 517; Gray *v.* State, 55 Ala. 86; Hall *v.* State, 40 Ala. 698. See also Hayes *v.* Reg., 10 Irish L. 53; Commander *v.* State, 60 Ala. 1; Baker *v.* Harris, 1 Winst. (N. C.) 277.

[3] Caperton *v.* Nickel, 4 W. Va. 137; State *v.* Degonia, 69 Mo. 485; State *v.* Owen, Phill. L. 425; State *v.* McCurry, 63 N. C. 33; Smith *v.* State, 4 Neb. 277. But see Combs *v.* Slaughter, Hard. (Ky.) 62. It has been held that, upon process directed to the coroner, that officer can summon the same panel. Payne *v.* McLean, 1 Up. Can. K. B. (o. s.) 444. Compare Norbury *v.* Kennedy, 3 Crawf. & Dix (Ir.), Cir. 124.

[4] Kell *v.* Brillinger, 84 Pa. St. 276.

[5] See Thomp. & Mer. Jur., §§ 152, 153.

for cause were divided into challenges for *principal cause*, and challenges *to the favor*. The chief importance of this distinction lay in the fact that the former were tried by the *court*, whose decision was *reviewable* on error, while the latter were tried by *triors*, whose decision was *conclusive*.[1] With the abolition of *triors*, the distinction has become unimportant, though still to some extent kept up.

Article II. — Peremptory Challenges.

Section

42. In what Cases Allowed.
43. Nature of this Right.
44. Number of such Challenges.
45. Number in Cases of Persons Jointly Indicted.
46. [Continued.] In Case of Several Parties Plaintiffs or Defendants in a Civil Action.
47. Power of Legislature to Increase or Diminish Number.
48. Canons of Construction Touching the Number of Challenges.
49. Right of Prosecution to Stand Jurors Aside.

§ **42. In what Cases Allowed.** — According to early writers, peremptory challenges were allowed in capital felonies only, *in favorem vitæ*.[2] This statement was not far out of the way, in early times; since all felonies, though strictly punishable by *forfeiture*, were generally also punished by *death*.[3] But, as non-capital felonies were created and multiplied, the statements of these writers became misleading, and they in fact misled many American courts into the conclusion that the right of peremptory challenge existed only in the case of capital felonies.[4] It was

[1] *Post*, § 89.

[2] Co. Litt. 156. b.; 2 Hawk. P. C. 570, B. 2, c. 43, § 5; 2 Hale P. C. 267; 4 Bl. Com. 353; 1 Chit. Cr. L. 535; Trials per Pais (1725), 455; Bac. Abr. Juries E. 2; *Ibid.*, 9; Doctor & Student, 29. See comments upon the foregoing by Lord Chief Baron Pollock in Reg. *v.* Gray, 11 Cl. & Fin. 427, 479; Reading's Case, 7 How. St. Tr. 264. See also Com. Dig. Challenge, c. 1; *Ibid.*, Indictment M.; *Ibid.*, Justices W. 2; Finch Law, Bk. 4, c. 36, p. 414.

[3] 4 Bla. Com. 98.

[4] See United States *v.* Hand, 3 Phila. 403; United States *v.* Cottingham, 2 Blatch. (U. S.) 470; United States *v.* Carrigo, 1 Cranch C. C. (U. S.) 49; United States *v.* McPherson, 1 Cranch C. C. (U. S.) 517; United States *v.* Toms, 1 Cranch C. C. (U. S.) 607; United States *v.* Smithers, 2 Cranch C. C. (U. S.) 38; United States

long the practice in England, though not in Ireland,[1] to admit this right in trials for felonies which were not capital: but finally it was settled in 1843 by the House of Lords, in a case arising in Ireland, that it was a right incidental to all felonies, whether capital or not, both in England and in Ireland.[2] Such challenges are now allowed by statute in all American jurisdictions in all cases of felony, whether capital or not; and in most American jurisdictions in cases of misdemeanor, and in some in civil cases.[3]

§ 43. Nature of this Right. — It is a fundamental principle that the right of peremptory challenge is a right to *reject* and not a right to *select*.[4] Therefore, a party cannot, in general, complain that the court has *excused* jurors without cause,[5] or sustained untenable challenges of the other party, thus driving the objecting party to exhaust his peremptory challenges upon *other members* of the panel, or upon special venire-men or talesmen. The practice of allowing the crown to *stand jurors aside*[6] was supported by the same conception, — the idea being that, so long as the prisoner enjoyed the full number of peremptory challenges allowed him by law, he was not prejudiced. This was illusory; since the sheriff had the power of arraying the panel in such order as suited his discretion, so that, by placing at its head

v. Johns, 4 Dall. (U. S.) 412; United States *v.* Black, 2 Cranch C. C. (U. S.) 195; United States *v.* Krouse, 2 Cranch C. C. (U. S.) 252; United States *v.* White, 5 Cranch C. C. (U. S.) 73; United States *v.* Randall, 1 Deady (U. S.), 524; Shuster *v.* Com., 38 Pa. St. 206.

[1] Rex *v.* Phelan, and Rex *v.* Whelan, 1 Craw. & Dix C. C. 189, and note; Rex *v.* Adams, Jebb C. C. 135, and other unreported cases cited in 6 Irish C. L. 281, 288.

[2] Gray *v.* Reg., 11 Cl. & Fin. 427; *reversing* Reg. *v.* Gray, 6 Ir. C. L. 482.

[3] In recent times they have been allowed in cases of misdemeanor and in civil cases in England, though as a matter of *grace* merely. Creed *v.* Fisher, 9 Exch. 472. The plaintiff in a civil action cannot peremptorily challenge a juror drawn to fill the place of one removed for cause. Huff *v.* Watkins, 15 S. C. 82; Gunter *v.* Graniteville Man. Co., *Id.* 443.

[4] United States *v.* Marchant, 4 Mason (U. S.), 158; *s. c.* 12 Wheat. (U. S.) 480; State *v.* Wise, 7 Rich. L. 412; State *v.* Cazeau, 8 La. Ann. 109; State *v.* Cardoza, 11 So. Car. 195, 249; Maton *v.* People, 15 Ill. 536, 539; Cruce *v.* State, 59 Ga. 83, 90; State *v.* Smith, 2 Ired. L. 402; State *v.* Arthur, 2 Dev. 217; Turpin *v.* State (Sup. Ct. Md., Oct. 1880), 2 Crim. L. Mag. 532; Heskew *v.* State, 17 Tex. App. 161.

[5] *Ante*, § 10; *post*, § 102.

[6] *Post*, § 49.

thirty-five persons publicly known to be obnoxious to the accused he could drive him to exhaust his peremptory challenges against these, after which he would be completely at the mercy of the crown. Moreover, this right of peremptory challenge is confined to the *main issue*,[1] and does not extend to the trial of collateral issues, such as the issue of *identity*,[2] or *insanity*;[3] though, where it exists in civil cases by statute, the defendant may exercise it upon jurors impaneled to execute a *writ of inquiry*.[4] Finally, this right does not exist in the case of *special* or *struck juries*, for the right of striking takes the place of it.[5]

§ **44. Number of such Challenges.** — At common law, the number of such challenges allowed to the accused was *thirty-five*, that is, one short of three complete juries.[6] If he challenged a greater number than that allowed, the barbarism of that law pronounced death in cases of treason, and, in case of felony or *petit* treason, subjected him to *peine forte et dure*, that is, pressing to death,[7] though sometimes he was *mercifully hanged*.[8] In

[1] 2 Hale, P. C. 267; Bac. Abr. Juries E. 9; Foster Cr. L. 42; 4 Bl. Com. 353, 396; Co. Litt. 156. b.; Rex *v.* Ratcliffe, 1 W. Bl. 3, 6; *s. c.* 18 How. St. Tr. 429; Rex *v.* Okey, 1 Levinz, 61; *s. c.* Sid. 72; Sir J. Kelyng, 13; 1 Keble, 244; Reg. *v.* Key, Temple & Mew, 623.

[2] Rex *v.* Oakey, 1 Levinz, 61; *s. c.* Sid. 72; Sir J. Kelyng, 13; 1 Keble, 244 (case of Regicides). See also Rex *v.* Ratcliffe, 1 W. Bl. 3; *s. c.* 18 How. St. Tr. 429.

[3] Freeman *v.* People, 4 Denio (N. Y.), 1, 22.

[4] Opothle-Yoholo *v.* Mitchell, 2 Stew. & Port. (Ala.) 125.

[5] Schwenk *v.* Umsted, 6 Serg. & R. (Pa.) 351; Schuylkill Nav. Co. *v.* Farr, 4 Watts & S. (Pa.) 362; Blanchard *v.* Brown, 1 Wallace Jr. (U. S.), 309; State *v.* Moore, 28 Ohio St. 595; O'Byrne *v.* State, 29 Ga. 36; Cleveland, etc., R. Co. *v.* Stanley, 7 Ohio St. 155. But see McDermott *v.* Hoffman, 70 Pa. St. 31. And where less than twelve of the special jurors appeared, and the jury was completed by talesmen, peremptory challenges were allowed. Cleveland &c. R. Co. *v.* Stanley, *supra*. For this reason a struck jury was never granted at common law for the trial at bar of a capital case (Farrington's Case, Sir T. Jones, 222), since this would deprive the prisoner of his challenges. Rex *v.* Duncombe, 12 Mod. 224.

[6] Co. Litt. 156. b; 2 Hawk. P. C., chap. 43, § 7; 2 Hale P. C. 268; Trials per Pais (1725), 455.

[7] 2 Hale P. C. 268.

[8] Kel. 36. It is inconceivable that this should have been regarded as a matter of importance, since the court clearly had the right to proceed in disregard of such excessive challenging. State *v.* Gainer, 2 Hayw. (N. C.) 140; Funk *v.* Ely, 45 Pa. St. 444.

criminal cases the number allowed to the State and to the accused is regulated by statute in every American jurisdiction,[1] and can seldom be the subject of doubt except in the case of two or more persons jointly indicted. In civil cases the number is variously fixed at *two*,[2] *three*,[3] *four*[4] and

[1] Code Ala. 1876, §§ 4879, 4880; Ark. Dig. 1874, §§ 1912, 1913; Cal. Penal Code, § 1070: People *v.* Clough, 59 Cal. 428; People *v.* Harris, 61 Cal. 136; People *v.* O'Neil, 61 Cal. 435; Laws Colo. 1877, § 873; G. S. Conn. 1875, p. 538, § 5; State *v.* Neuner, 49 Conn. 232; Sess. Laws Conn. 1879, p. 363; Laws Del. 1874, chap. 133, § 16; Bush's Dig. Fla., p. 444, § 34; Code Ga. 1873, § 4643; R. S. Ill. 1880, chap. 38, § 432; 2 Ind. Rev. 1876, p. 393, §§ 81 and 82; Miller's R. C. Iowa, 1880, § 4413; Comp. L. Kan. 1879, §§ 4690 and 4691; Bullitt's Cr. Code, p. 41, §§ 203, 204; R. S. La. 1876, §§ 997, 998; La. Act of 1880, No. 35; State *v.* Everage, 33 La. Ann. 120; State *v.* Demouchet (La.), 3 S. W. Rep. 565; R. S. Me. 1871, chap. 134, § 12; R. C. Md. 1878, p. 563, § 18; G. S. Mass. 1860, chap. 172, § 4; Acts of 1875, chap. 167, § 1; R. C. Miss. 1880, § 3076; R. S. Mo. 1879, §§ 1900, 1902; Comp. L. Mich. 1871, § 7951; Stat. at Large, Minn. 1873, p. 1055; § 231; G. S. Neb., p. 826, § 467; Comp. L. Nev. 1873, § 1960; Gen. Stat. N. H. 1867, p. 493, §§ 8 and 9; Rev. N. J. 1877, p. 280, § 71; p. 530, § 40; p. 531, § 41; Rev. Stat. N. Y. (6th ed.), p. 1029, § 9 *et seq.*; N. Y. Code Cr. Proc. (chap. 442, Laws of 1881), § 370; Battle's Rev. N. C., p. 338, § 77; R. S. Ohio, 1880, §§ 7272, 7274, 7277; Gen. Laws Ore. 1872 (Cr. Code), § 155; 1 Bright. Purd. (Pa.) Dig. §§ 39 and 40; Gen. Stat. R. I. 1872, p. 434, § 34; R. S. So. Car. 1873, p. 747, § 2; Stat. Tenn. 1871, §§ 4013, 4014; R. S. Tex. 1879 (Code Cr. Proc.), arts. 635 and 652; R. L. Vt. 1880, §§ 1653, 1654; Code Va. 1873, p. 1246, §§ 7 and 9; Rev. Stat. W. Va. 1879, chap. 55, §§ 3 and 4; R. S. Wis. 1878, § 4690. Federal Courts: Rev. Stat. U. S., § 819. Construed in United States *v.* Coppersmith, 4 Fed. Rep. 198. Cases removed from State courts are governed by the Federal, and not by the State statute. State *v.* O'Grady, 3 Woods (U. S.), 496. Construction of former Federal statutes: Thomp. & Mer. Jur., § 164; United States *v.* Shackleford, 18 How. (U. S.) 588; United States *v.* Reed, 2 Blatchf. (U. S.) 435; United States *v.* Cottingham, 2 Blatchf. (U. S.) 470; United States *v.* Tallman, 10 Blatchf. (U. S.) 21; United States *v.* Devlin, 6 Blatchf. (U. S.) 71; *s. c.* 7 Int. Rev. Rec. 94.

[2] R. S. Me. 1871, chap. 82, § 66; Comp. L. Mich. 1871, § 6027; Supp. to G. S. Mass., Acts of 1862, chap. 84, § 1; G. S. Vt. App. 1870, p. 1031, No. 39; R. S. So. Car. 1873, p. 523, § 26; Gen. Stat. N. H., chap. 212, § 10; R. S. Ohio, 1880, § 5177; N. Y. Code Rem. Jus., § 1176; Stat. Tenn. 1871, § 4012; G. S. Conn. 1875, title 19, chap. 10, § 16.

[3] Rev. N. J. 1877, p. 530, § 40; R. S. Ill. 1880, chap. 110, § 49; Laws Minn. 1878, chap. 21, § 1; Comp. L. Kan. 1879, § 3799; R. S. Wis. 1878, § 2851; Bush Dig. Fla., chap. 104, § 33; Gen. Laws Ore. 1872 (Civil Code), § 187; R. S. Del. 1874, chap. 109, § 19; Ark. Dig., Stat. 1874, § 3702; R. S. Laws New Mexico, 1880, chap. 68, § 18; Comp. L. Utah, 1876, § 1771.

[4] Code Ala. 1876, § 3016; Cal. Code

five,[1] and in one jurisdiction at *one-fourth* of the jurors summoned.[2]

§ 45. Number in Cases of Persons Jointly Indicted. — Though formerly doubted,[3] it is now generally settled[4] that, where several persons are jointly indicted, they must join in their challenges, and cannot claim for each the number accorded by the common law or by statute, except in cases where the statute accords them this right, which it does in some jurisdictions,[5] either in express terms or by reasonable interpretation.[6] Many statutes, on the other hand, expressly require that defendants jointly indicted shall join in their challenges;[7] and it would

Civ. Proc., § 601; Rev. Stat. W. Va., chap. 109, § 23; Civil Code Prac. La., art. 512; Battle's Rev. N. C., p. 861, § 229*a*; 1 Bright. Purd. (Penn.) Dig., p. 837, § 72; R. C. Miss. 1880, § 1708; Comp. L. Nev. 1873, § 1224; Colo. Civil Code, § 161.

[1] Miller's R. C. Iowa, 1880, § 2771.

[2] G. S. Ky. 1879, p. 572, § 12.

[3] 2 Hale, P. C. 263; 1 Chitty C. L. 535.

[4] United States *v.* Marchant, 4 Mason (U. S.) 158; *s. c.* affirmed, 12 Wheat. (U. S.) 480; United States *v.* Wilson, Baldw. C. C. (U. S.) 81; Hawkins *v.* State, 9 Ala. 137; Bixbe *v.* State, 6 Oh. 86; State *v.* Wise, 7 Rich. L. (S. C.) 412; Hill *v.* State, 2 Yerg. (Tenn.) 246; Maton *v.* People, 15 Ill. 536; State *v.* McGrew, 13 Rich. L. (S C.) 316; United States *v.* Gibert, 2 Sumn. 19; United States *v.* Kelly, 4 Wash. C. C. 528; State *v.* Soper, 16 Me. 293; State *v.* Conley, 39 Me. 78; State *v.* Smith, 2 Ired. L. (N. C.) 402; State *v.* Stoughton, 51 Vt. 362; *s. c.* 8 Reporter, 762; People *v.* Loughlin, 3 Utah, 133.

[5] R. S. Oh. 1880, § 7281; G. S. Neb. 1873, p. 827, § 470; 1 Bright. Purd. Pa. Dig., p. 384, § 43; Battle's Rev. N. C., p. 338, § 77; R. S. Wis. 1878, § 4689. In *Texas* persons jointly indicted are entitled to challenge separately, but not to the same number as is allowed to a single defendant. R. S. Tex. 1879 (Code Crim. Proc.), Art. 635, 652.

[6] United States *v.* Marchant, 4 Mason (U. S.), 158; *s. c.* 12 Wheat. (U. S.) 480; United States *v.* Johns, 4 Dall. (U. S.) 412; Hill *v.* State, 2 Yerg. (Tenn.) 246; Hawkins *v.* State, 9 Ala. 137; Brister *v.* State, 26 Ala. 107; United States *v.* Haskell, 4 Wash. C. C. (Va.) 412, n; Bixbe *v.* State, 6 Oh. 86; Maton *v.* People, 15 Ill. 536; State *v.* McLean, 11 La. Ann. 546; State *v.* Reed, 47 N. H. 466; Cruce *v.* State, 59 Ga. 83; State *v.* Stoughton, 51 Vt. 362; *s. c.* 8 Reporter, 762; Smith *v.* State, 57 Miss. 822; State *v.* Durien, 29 Kan. 688. Compare State *v.* Ford, 37 La. Ann. 443.

[7] Rev. Stat. U. S., § 819; R. S. Mo. 1879, § 1902; Comp. L. Nev. 1873, § 1944; R. C. Miss. 1880, § 3070; Stat. at Large, Minn. 1863, p. 1054, § 219; Gen. Laws Ore. 1872 (Cr. Code), § 154; Code Va. 1873, p. 1247, § 14; Bullitt's Ky. Cr. Code, p. 40, § 198; Cal. Penal Code, § 1056; Ark. Dig. Stat. 1874, § 1920; R. S. Del. 1874, chap. 133,

seem that, where the question is not governed by statute, if, in the judgment of the court, good cause exists for trying the defendants severally, the court may order a *severance*, although they may prefer to be tried jointly.[1] By some statutes the right of *election* is given them, either to be tried separately or jointly.[2] Although the defendants, so jointly indicted, may severally be permitted the statutory number of challenges, this does not increase the *number allowed to the State* beyond the number allowed to it in the case of a single defendant.[3] The prosecution cannot complain of this, since it is a matter of its own choice to proceed against the defendants jointly, when it might have proceeded against them severally.[4] It should be added that whatever view is taken of this question, it has been *usual*, and it is hence *proper*, to allow them to elect to be tried jointly and hence to join in their challenges, or to be tried separately.[5]

§ 46. [Continued.] In Case of Several Parties Plaintiffs or Defendants in a Civil Action.—Where several persons are joined as plaintiffs or defendants in a civil action, the general

§ 16; Laws Utah, 1878 (Code Cr. Proc.), § 225; Rev. Stat. W. Va. 1879, chap. 55, § 8; Comp. L. Ariz., p. 1077, chap. 11, § 300.

[1] Stewart *v.* State, 58 Ga. 577. See Cruce *v.* State, 59 Ga. 83, 88. In the earlier case of Hawkins *v.* State, 13 Ga. 322, it was held that, where the evidence was of such a nature that the acquittal of one would be the acquittal of both, they might be required to join in their challenges.

[2] People *v.* McCalla, 8 Cal. 301; Caldwell *v.* State, 34 Ga. 10; Horne *v.* State, 37 Ga. 80; R. S. Oh. 1880, § 7271; Rev. Stat. W. Va. 1879, chap. 55, § 8.

[3] Mahan *v.* State, 10 Oh. 232; Savage *v.* State, 18 Fla. 909; State *v.* Earle, 24 La. Ann. 38; State *v.* Gay, 25 La. Ann. 472. The statute of *Texas* allows the State one-half the number of peremptory challenges which may be exercised by each of the joint defendants. R. S. Tex. 1879 (Code Cr. Proc.), arts. 635, 652. So in *Louisiana:* La. Acts 1878, No. 24; State *v.* Green, 33 La. Ann. 1408.

[4] Wiggins *v.* State, 1 Lea (Tenn.), 738.

[5] 1 Chitty Cr. L. 535; Charnock's Case, 3 Salk. 81; *s. c.* Holt, 133; 12 How. St. Tr. 1378; Swan and Jeffrey's Case, Foster Cr. L. 104, 106; Grahme's Case, 12 How. St. Tr. 673; State *v.* Monaquo, T. U. P. Charlt. (Ga.) 22; People *v.* McCalla, 8 Cal. 301; State *v.* Yancey, 3 Brev. (S. C.) 306; Com. *v.* James, 99 Mass. 438; United States *v.* Collyer, Whart. on Hom. App. 489. In one old case it was held that they could not insist on separate trials. Noble's Case, 15 How. St. Tr. 731, 746. Compare People *v.* Howell, 4 Johns. (N. Y.) 296, and United States *v.* Sharp, 1 Pet. C. C. (U. S.) 118.

rule, arising upon the express terms or the reasonable interpretation of statutes, is, that the number of peremptory challenges is restricted to each aggregate party considered as a unit, — that is to say, all the parties plaintiff or defendant must join in their challenges.[1] But in one jurisdiction, this rule is restricted, in the case of defendants, to instances where they *plead jointly*,[2] and where they plead separately by different counsel, they are allowed to challenge separately, on the theory that, if the right of challenge could not be exercised without agreement among the parties on either side, it might be lost altogether.[3] But this conception would seem not to apply to parties plaintiff, since they generally join as such by their voluntary action.

§ 47. Power of Legislature to Increase or Diminish Number. — Statutes increasing or diminishing the number of challenges allowed by the common law, do not infringe the provision of American constitutions that "the right of trial by jury shall remain inviolate;"[4] and there is much authority for the conclusion that this may be done by a statute enacted after the com-

[1] Schmidt *v.* Chicago &c. R. Co., 83 Ill. 405. To the same effect, see, Snodgrass *v.* Hunt, 15 Ind. 274: Sodousky *v.* McGee, 4 J. J. Marsh. (Ky.) 267, 269; Stone *v.* Segur, 11 Allen (Mass.), 568; Bryan *v.* Harrison, 76 N. C. 360; State *v.* Reed, 47 N. H. 466; Blackburn *v.* Hays, 4 Coldw. (Tenn.) 227. The statutes of the United States and of many of the States expressly require the parties plaintiff or defendant in a civil case to join in making their peremptory challenges. Rev. Stat. U. S., § 819; Rev. Stat. Mo. 1879, § 2795; Gen. Laws Ore. 1872 (Civil Code), § 187; Miller's Rev. Code Iowa, 1880, §§ 2763, 4399; Stat. at Large, Minn. 1873, p. 812, § 153; Gen. Laws New Mexico, 1880, chap. 68, § 19. The Compiled Laws of Nevada provide that the several persons plaintiffs or defendants must join in a challenge before it can be made, "unless the court otherwise order or direct." § 1224. See also Comp. L. Utah, 1876, § 1387.

[2] Stroh *v.* Hinchman, 37 Mich. 490.

[3] See Frazer *v.* Jennison, 42 Mich. 206.

[4] Walter *v.* People, 32 N. Y. 147, 159. See also Jones *v.* State, 1 Ga. 610; Boon *v.* State, 1 Ga. 618; Com. *v.* Walsh, 124 Mass. 32; State *v.* Wilson, 48 N. H. 398; State *v.* Pike, 49 N. H. 406; Com. *v.* Dorsey, 103 Mass. 412; Hartzell *v.* Com., 40 Pa. St. 462; Warren *v.* Com., 37 Pa. St. 45; Mountfort *v.* Hall, 1 Mass. 443; Hudgins *v.* State, 2 Ga. 173; State *v.* McClear, 11 Nev. 39, 49; Cregier *v.* Bunton, 2 Strob. L. (S. C.) 487; Dowling *v.* State, 5 Sm. & M. (Miss.) 664; State *v.* Ryan, 13 Minn. 370; Stokes *v.* People, 53 N. Y. 164; State *v.* Hoyt, 47 Conn. 518.

mission of the offense for which the prisoner is brought to trial, without infringing his constitutional rights.[1]

§ 48. Canons of Construction touching the Number of Challenges. — Construing these statutes, it is a settled principle, in determining the number of peremptory challenges to which the parties are entitled, to consider the extent of the punishment to which the prisoner *may* be subjected, and not the punishment which actually *was* assessed,[2] and to disregard the fact that the offense charged against him is one for which the court may impose a shorter term of imprisonment,[3] unless the prosecuting attorney announces that he will ask merely for a conviction for a *lower grade* of the crime.[4] In determining whether the action is a *civil* or *criminal* action within the meaning of such statutes, regard is generally had to its *form*. If it proceeds by indictment or information for a public offense, it is a criminal action; if in any other mode, it is a civil action.[5] This is not, however, an unvarying test; for we find that it has been held that a *bastardy* proceeding, prosecuted by the State by information, is a *civil* suit;[6] and so is a complaint under a statute for a *forcible entry and detainer*,[7] and an action prosecuted for the violation of a municipal ordinance in selling *intoxicating liquors;*[8] while another court has taken the view that a proceeding *in rem* by the State against certain intoxicating liquors kept and sold contrary to law, to procure their forfeiture under a statute, is criminal in its nature.[9] The offense of *prosecuting false claims*

[1] State *v.* Hoyt, 47 Conn. 518; Walston *v.* Com., 16 B. Mon. (Ky.) 15; State *v.* Ryan, 13 Minn. 370. Compare Dowling *v.* State, 5 Smed. & M. (Miss.) 664; Rafe *v.* State, 20 Ga. 60; Jesse *v.* State, 20 Ga. 156; Beers *v.* Beers, 4 Conn. 535, 539; Colt *v.* Eves, 12 Conn. 243; Re Penn. Hall, 5 Pa. St. 204, 208; Stokes *v.* People, 53 N. Y. 164.

[2] Fowler *v.* State, 8 Baxt. (Tenn.) 573.

[3] Dull *v.* People, 4 Denio (N. Y.), 91.

[4] People *v.* Comstock, 55 Mich. 405.

[5] See State *v.* Pate, Busb. (N. C.) 244.

[6] *Ibid;* Dorgan *v.* State, 72 Ala. 173; Kremling *v.* Lallman, 16 Neb. 280.

[7] Quinebaug Bank *v.* Tarbox, 20 Conn. 510; Miner *v.* Brown, 20 Conn. 519.

[8] Kleinback *v.* State, 2 Speers L. (S. C.) 418.

[9] Com. *v.* Certain Intoxicating Liquors, 107 Mass. 216.

against the government,[1] or of *counterfeiting*,[2] is not a *felony*, within the meaning of § 819 of Rev. Stat. U. S., and therefore the accused is not entitled to more than *three* peremptory challenges. The fact that the indictment contains *two counts*, stating similar offenses separately, does not increase the number of the defendant's peremptory challenges.[3]

§ 49. Right of Prosecution to stand Jurors aside. — Originally the crown had an unlimited right of peremptory challenge.[4] This was remedied by statute 33 Edw. I., Stat. 4, called the "Ordinance for Inquests," which restricted the right of the crown to challenges for cause shown.[5] It applied to all causes, civil and criminal; and, as it was found in practice to put the crown at a disadvantage, it was evaded by the fiction of allowing the crown's counsel to direct successive jurors to stand aside, without showing any cause against them, until the whole panel had been gone over; after which, in case of a deficiency, the crown was obliged to show cause in respect of such members.[6] As the court had

[1] United States *v.* Daubner, 17 Fed. Rep. 793.

[2] United States *v.* Coppersmith, 2 Flip. (U. S.) 546. In a case of *murder* in *Maine*, the State is entitled to *five:* State *v.* Chadbourne, 74 Me. 506. No right to challenge *talesmen* supplied in place of jurors challenged, under Gen. St. S. C. 523: Burckhalter *v.* Coward, 16 S. C. 435.

[3] Smith *v.* State, 8 Lea (Tenn.), 386; State *v.* Skinner, 34 Kan. 256.

[4] 1 Chitty Cr. L. 533.

[5] The following is the text of the statute: "Of inquests to be taken before any of the justices, and wherein our lord the King is party, howsoever it be, it is agreed and ordained by the King and all his council, that from henceforth, notwithstanding it be alleged, by them that sue for the King, that the jurors of those inquests, or some of them, be not indifferent for the King, yet such inquests shall not remain untaken for that cause; but if they that sue for the King will challenge any of those jurors, they shall assign of their challenge a cause certain, and the truth of the same challenge shall be inquired of according to the custom of the court." This statute was re-enacted in 6 Geo. IV., c. 50, § 29. See Reg. *v.* Frost, 9 Car. & P. 129, 137. It was ruled in a *nisi prius* case shortly after the passage of this last act, that the crown must show cause upon making the challenge. See Sawdon's Case, 2 Lewin C. C. 117. Such, however, is not the law. The later statute made no change in the rule. Mansell *v.* Reg., 8 El. & Bl. 54; Rex *v.* Parry, 8 Car. & P. 836.

[6] Staunford P. C. 162, b.; 2 Hawk. P. C., chap. 43, § 3; 2 Hale P. C. 271; 1 Chitty Cr. L. 534; Bac. Abr. Juries E. 10; 4 Bl. Com. 353; Fitzharris' Case, 8 How. St. Tr. 436; Count Conigsmark's Case, 9 How. St. Tr. 12;

the power of directing the sheriff to summon any number of jurors in its *discretion*, this power of standing them aside placed the prisoner, where the court was disposed to side with the crown, at an enormous disadvantage. Nevertheless, the practice, though often and ably challenged, has apparently stood in England to the present time:[1] was adopted in this country, together with the ancient statute of Edward on which it was founded,[2] and has

Stapleton's Case, 8 How. St. Tr. 503; Lord Grey's Case, 9 How. St. Tr. 128; *s. c.* Skin. 82; Cook's Case, 13 How. St. Tr. 318; Cowper's Case, 13 How. St. Tr. 1108; Layer's Case, 16 How. St. Tr. 135; Brandreth's Case, 32 How. St. Tr. 755, 772; Reg. *v.* Geach, 9 Car. & P. 499; Reg. *v.* Frost, 9 Car. & P. 129; Mansell *v.* Reg., 8 El. &. Bl. 54; Reg. *v.* Dougall, 18 Low. Can. Jur. 85. The panel having been gone over and a jury not procured, the proper practice was to call over the whole of the panel in the same order as before, omitting those who had previously been challenged by the prisoner, and, as each juror appeared, for the prosecuting counsel to state the crown's cause of challenge. If this challenge was not allowed, and the juror remained unchallenged by the accused, he was sworn. Reg. *v.* Geach, 9 Car. & P. 499. The panel might be gone over a second time and the same jurors stood aside a second time, if certain members of the panel, absent when their names were first called, returned in season for the second calling. Cook's Case, 13 How. St. Tr. 311, 317; Mansell *v.* Reg., 8 El. & Bl. 54. In cases of *misdemeanor* this right of standing jurors aside was exercised by the *private prosecutor*. Reg. *v.* McGowen, cited in Reg. *v.* McCartie, 11 Ir. C. L. (N. S.) 188. By the Canada statute (Can. Stat. 37 Vict., chap. 38, § 11) this right cannot be exercised by a private prosecutor in a criminal prosecution for libel. See Reg. *v.* Patteson, 36 Up. Can. Q. B. 129.

[1] Horne Tooke's Case (Anno 1794), 25 How. St. Tr. 1, 25; O'Coigly's Case, 26 How. St. Tr. 1191, 1231; Mansell *v.* Reg., 8 El. & Bl. 54, 72; *s. c.* Deers & B. 375. See also Reg. *v.* Benjamin, 4 Up. Can. C. P. 179; Reg. *v.* Fellows, 19 Up. Can. Q. B. 48.

[2] Com. *v.* Addis, 1 Bro. (Penn.) 285, and cases cited in note; State *v.* Barrontine, 2 Nott & McC. (S. C.) 553; United States *v.* Marchant, 12 Wheat. (U. S.) 480; United States *v.* Wilson, Bald. C. C. (U. S.) 78, 82; Com. *v.* Marrow, 3 Brewst. (Pa.) 402; *s. c. sub nom.* Com. *v.* Marra, 8 Phila. (Pa.) 440; Jewell *v.* Com., 22 Pa. St. 94; Com. *v.* Jolliffe, 7 Watts (Pa.), 585; State *v.* Arthur, 2 Dev. (N. C.) 217; State *v.* Craton, 6 Ired. L. (N. C.) 164; State *v.* Benton, 2 Dev. & Bat. (N. C.) 196; State *v.* Stalmaker, 2 Brevard, (S. C.) 1; Sealy *v.* State, 1 Ga. 213; United States *v.* Douglass, 2 Blatch. (U. S.) 207; Com. *v.* Twitchell, 1 Brewst. (Pa.) 551; Waterford &c. Tp. *v.* People, 9 Barb. (N. Y.) 161; People *v.* Atchinson, 7 How. Pr. (N. Y.) 241; People *v.* Henries, 1 Park. Cr. (N. Y.) 579; State *v.* Shaw, 3 Ired. L. (N. C.) 532; State *v.* Bone, 7 Jones, L. (N. C.) 121. But see Montague *v.* Com., 10 Gratt. (Va.) 767; United States *v.* Shackleford, 18 How. (U. S.) 588.

been retained in some States even after the passage of statutes giving peremptory challenges to the prosecution,[1] though in such cases its retention cannot be defended upon principle.[2]

Article III. — Challenges for General Disqualification.

Section

52. Of Challenges for Cause.
53. Lack of the Statutory Qualifications.
54. Alienage.
55. Ignorance of the English Language.
56. Inability to Read and Write.
57. Party to Another Suit at Same Term.
58. Prior Service as a Juror within a Stated Period.

§ 52. Of Challenges for Cause. — These were divided in the old law into two classes: 1. *Principal* Challenges. 2. Challenges *to the favor*. The former were tried by the court;[3] the latter by persons sworn specially to try them, called *triors*.[4] The former class seems to have included all causes of challenge which were such as matter of law, and which, upon being shown, could accordingly be allowed by the court; the latter appears to have included the almost infinite mass of grounds of challenge of a nature so dubious as not to fall within the former class. The second ground seems to have included everything that might give rise to a suspicion of partiality springing out of the relations of the parties to the venire-man and the circumstances of the par-

[1] Warren *v.* Com., 37 Pa. St. 45; Haines *v.* Com., 100 Pa. St. 317; Smith *v.* Com., *Id.* 324; State *v.* McNinch, 12 So. Car. 89; State *v.* Benton, 2 Dev. & B. (N. C.) 200; State *v.* Stephens, 13 So. Car. 285.

[2] Sealy *v.* State, 1 Ga. 213; Reynolds *v.* State, 1 Ga. 222; United States *v.* Butler, 1 Hughes (U. S.), 457. The latter case was tried before Chief Justice Waite in the United States Circuit Court for the District of South Carolina, April, 1877.

[3] People *v.* Stout, 4 Park. Cr. (N. Y.) 71, 109; State *v.* Potter, 18 Conn. 166, 171.

[4] Rex *v.* Kirwan, cited in Finlay's Irish Dig., p. 347; People *v.* Dewick, 2 Park. Cr. (N. Y.) 230; Mima Queen *v.* Hepburn, 2 Cranch C. C. (U. S.) 3; United States *v.* Watkins, 3 Cranch (U. S.), 443; Boon *v.* State, 1 Ga. 618; Copenhaven *v.* State, 14 Ga. 22; McGuffie *v.* State, 17 Ga. 497; McCormick *v.* Brookfield, 4 N. J. L. 69; Joice *v.* Alexander, 1 Cranch C. C. (U. S.) 528; Reason *v.* Bridges, 1 Cranch C. C. (U. S.) 478; McCormick *v.* Brookfield, 4 N. J. L. 69, 72.

ticular case.[1] With the general abolition of the practice of swearing triors to determine challenges to the favor,[2] the distinction between these two kinds of challenges has so far disappeared in this country that it may now be disregarded;[3] and these latter are in turn divided into challenges for "*implied bias*" and challenges for "*actual bias*."[4]

§ 53. Lack of the Statutory Qualifications.— First, then, as to challenges for general disqualification; and of these a numerous class is grounded upon a lack of the statutory qualifications for jury duty. Here it may be premised that in general it must appear that the juror is qualified *at the time of service*, and not merely that he was qualified when the jury list was prepared.[5] Such challenges have been made, and allowed or denied, under various statutes, according to the facts of the case on the ground of *non-residence;*[6] not a *voter*, though if he has qualified

[1] Co. Litt. 157*a*.

[2] The practice of ascertaining the qualifications of jurors by triors seems to have been abolished in some States at an early date. State *v.* Baldwin, 1 Const. Rep. (S. C.) 296; McGowan *v.* State, 9 Yerg. (Tenn.) 184; State *v.* Wall. 9 Yerg. (Tenn.) 349; Rollins *v.* Ames, 2 N. H. 350; State *v.* Potter, 18 Conn. 166, 171; State *v.* Knight, 43 Me. 11.

[3] The distinction is retained in several jurisdictions, by statutes (cited in the next note), drawn upon the model of the statute of New York, under the name of "General Causes of Challenge and Particular Causes of Challenge."

[4] New York Code Crim. Proc. 1881, §§ 374–378; Ark. Dig. 1874, §§ 1907–1911; Cal. Penal Code, §§ 1071–1074; Bullitt's Ky. Cr. Code, p. 41, §§ 206–210; Gen. Laws Ore. 1872 (Civil Code), §§ 181–185; Stat. at Large, Minn. 1873, p. 1055, §§ 233–237; Sess. Laws, Minn. 1878, chap. 24; Comp. L. Nev. 1873, §§ 1961–1964; Comp. L. Ariz. 1877, chap. 11, §§ 317–320; Sess. Laws, Utah, 1878 (Code Cr. Proc.), §§ 239–242. This system is found in the Iowa Revision of 1860 (§§ 4768–4771), but not in the later codes of 1873 and 1880.

[5] 2 Hawk. P. C., c. 43, § 13; Kelley *v.* People, 55 N. Y. 565; Armsby *v.* People, 2 Thomp. & C. (N. Y.) 157; State *v.* Williams, 2 Hill (S. C.), 381; Orcutt *v.* Carpenter, 1 Tyler (Vt.), 250; Conway *v.* Clinton, 1 Utah, 215. But see State *v.* Middleton, 5 Port. (Ala.) 484, 486; State *v.* Ligon, 7 Port. (Ala.) 167. Compare People *v.* Shafer, 1 Utah, 260.

[6] This happens where the veniremen, having been a resident, has left the county with the purpose of not returning; but otherwise where he has left it for a temporary purpose, intending to return (People *v.* Stoncifer, 6 Cal. 405, 410); or where, after removal, he has acquired a new residence outside the county. Graham *v.* Trimmer, 6 Kan. 231. Residence for

he need not be registered;[1] not a *freeholder*, which means a freeholder of the county wherein the issue is tried,[2] though it will be sufficient if he has an *equitable interest* in land,[3] as where he holds it by an ordinary *title bond;*[4] not a *householder*, which term does not refer to the holding of a house,[5] but is used to designate the *head* or *master* of a *family;*[6] not a *taxpayer*, which means one who has not been *assessed* for taxes, and not one who possesses taxable property not listed.[7]

two months, *animo manendi*, sufficient: State *v.* France, 76 Mo. 681. Where an *unorganized county* is attached to an organized county for judicial purposes, a resident of the former is qualified in respect of the latter. Groom *v.* State (Tex.), 3 S. W. Rep. 668.

[1] Craft *v.* Com., 24 Gratt. 602; State *v.* Courtney, 28 La. Ann. 789; State *v.* Salge, 1 Nev. 455. The constitutionality of a statute prescribing this qualification has been denied. Gibbs *v.* State, 3 Heisk. (Tenn) 72; Gunter *v.* Patton, 2 Heisk. (Tenn.) 257. Under the Michigan statute an *alien* is qualified, if a *voter*. People *v.* Scott, 56 Mich. 154; People *v.* Rosevear, *Id.* 158.

[2] 2 Hawk. P. C., c. 43, § 13; Day *v.* Com., 3 Gratt. 630; Wills *v.* State, 69 Ind. 286. See also State *v.* Cooper, 83 N. C. 671; 21 Vin. Abr. 250, § 21. But *contra*, see New Orleans &c. R. Co. *v.* Hemphill, 35 Miss. 17. A statutory requirement of freehold qualification for *talesmen* will not by implication be extended to members of the *regular panel*. State *v.* Wincroft, 76 N. C. 38. See also State *v.* Wiley, 88 N. C. 691. In Texas a juror is disqualified who is not a *freeholder* in the State or a *householder* in the county. Rev. St. Tex., art. 3009; Boren *v.* State (Tex.), 4 S. W. Rep. 463, 466.

[3] Com. *v.* Helmondoller, 4 Gratt. (Va.) 536; State *v.* Ragland, 75 N. C. 12; Com. *v.* Carter, 2 Va. Cas. 319.

[4] Hawkins, *ubi supra;* New Orleans &c. R. Co. *v.* Hemphill, 35 Miss. 17. See also Com. *v.* Burcher, 2 Rob. (Va.) 826; Kerby *v.* Com., 7 Leigh (Va.), 747; Com. *v.* Cunningham, 6 Gratt. (Va.) 695. But one who has sold all the land owned by him when his name was put upon the list of jurors, and has taken a mortgage thereof to secure payment of the purchase money, is no longer a competent juror. Kelley *v.* People, 55 N. Y. 565; 2 Th. & C. (N. Y.) 157.

[5] Nelson *v.* State, 57 Miss. 286; State *v.* Wincroft, 76 N. C. 38. One court has held that one who "rents a room and boards" is a householder within such a statute (Robles *v.* State, 5 Tex. App. 347); but this is an obvious judicial aberration.

[6] Bowne *v.* Witt, 19 Wend. (N. Y.) 475; Sylvester *v.* State, 72 Ala. 201 (house in wife's name). Compare Calhoun *v.* Williams, 32 Gratt. (Va.) 19; Bradford *v.* State, 15 Ind. 347; Thomp. Homest. & Ex., § 65.

[7] People *v.* Thompson, 34 Cal. 671. Compare State *v.* Doan, 2 Root (Conn.), 451; State *v.* Heaton, 77 N. C. 505 (taxes assessed but collector *enjoined*); State *v.* Wincroft, 76 N. C. 38 (*conclusiveness* of finding of trial court on the question): State *v.* Jennings, 15 Rich. L. (S. C.) 176 (excludes those who pay *poll taxes* only). In North Carolina *tales jurors* and members of the

§ 54. **Alienage.** — This has always been held good ground of challenge, though the objection is *waived* if not taken before the juror is sworn.[1]

§ 55. **Ignorance of the English Language.** — Unquestionably the court has power to discharge a venire-man who is ignorant of the English language,[2] although such a disqualification is not mentioned in the statute;[3] and the better opinion is that this is a ground of challenge,[4] though one court has held the contrary.[5]

original panel must have *paid* their taxes for the *preceding year;* otherwise as to special venire-men. State *v.* Carland, 90 N. C. 668. That is, for the year preceding the time when he was placed on the jury list, though not for the year preceding the trial: Sellers *v.* Sellers (N. C.), 3 South East. Rep. 917.

[1] Hollingsworth *v.* Duane, 4 Dall. (U. S.) 353; Rex *v.* Sutton, 8 Barn. & Cress. 417; *s. c.* 15 Eng. L. & Eq. 252; Com. *v.* Thompson, 4 Phila. (Pa.) 215; Borst *v.* Beecker, 6 Johns. 332. It has been held that the objection may be made even after verdict, if the fact was not discovered until then: Schumacker *v.* State, 5 Wis. 324; State *v.* Vogel, 22 Wis. 471); but we shall hereafter see (*post*, § 116), that the weight of authority is greatly the other way. It is stated in one case to have been decided that alienage was not a good cause of challenge, (Mima Queen *v.* Hepburn, 2 Cranch C. C. (U. S.) 3); but it seems from a conflicting report of the same case on appeal that the question was one of non-residence merely, and besides the objection was not taken until after the juror had been sworn. *S. c.* 7 Cranch (U. S.), 290, 297. The objection, though taken at the proper time, has been held unavailing where the accused went to trial *without exhausting his peremptory challenges.* Territory *v.* Hart (Mont.), 14 Pac. Rep. 768, 774. Under some systems one who has *declared his intention* of becoming a citizen under the Act of Congress, is competent. State *v.* Pagels (Mo.), 4 S. W. Rep. 931; Rev. St. Mont., § 780; Territory *v.* Harding (Mont.), 12 Pac. Rep. 750.

[2] State *v.* Ring, 29 Minn. 78; Atlas Mining Co. *v.* Johnston, 23 Mich. 36; State *v.* Rousseau, 28 La. Ann. 579; People *v.* Arceo, 32 Cal. 40; State *v.* Marshall, 8 Ala. 302; Montague *v.* Com., 10 Gratt. (Va.) 767, 772.

[3] Sutton *v.* Fox, 55 Wis. 531; *s. c.* 42 Am. Rep. 744.

[4] Lyles *v.* State, 41 Tex. 172; Yanez *v.* State, 6 Tex. App. 429; Etheridge *v.* State, 8 Tex. App. 133; McCampbell *v.* State, 9 Tex. App. 124; Nolen *v.* State, 9 Tex. App. 119. The same view was taken at *nisi prius* in Fisher *v.* Philadelphia, 4 Brewst. (Pa.) 395, and by the Supreme Court of Louisiana in State *v.* Push, 23 La. Ann. 14 (disregarding Gay *v.* Ardry, 14 La. 288); State *v.* Gay, 25 La. Ann. 472; State *v.* Tazwell, 30 La. Ann. 884.

[5] Trinidad *v.* Simpson (Colo.) 22 Alb. L. J. 109; *s. c.* 10 Cent. L. J. 149; 5 Colo. 65. This last decision had reference to trials in a portion of the State of Colorado in which nearly all the inhabitants spoke and understood

§ 56. **Inability to Read and Write.** — This, though not a disqualification at common law,[1] is made such by statute in one State,[2] and perhaps in others. Although such a statute excepts cases where the requisite number who can read and write are not to be found in the county, the judge has no right to dispense with the statutory qualification because the county is *sparsely populated*.[3]

§ 57. **Party to another Suit at same Term.** — It has been made a statutory cause of challenge that a juror has a suit pending for trial at the term of court for which he has been summoned as a juror.[4]

§ 58. **Prior Service as a Juror within a Stated Period.** — Prior service as a juror within a stated period is made by some statutes, levelled against a well known class of persons called "professional jurors," a ground of challenge.[5]

only the Spanish language. It proceeded upon the impracticability of administering justice without the aid of the inhabitants of those counties; suggested that the proceedings could be made known to the jurors by means of *interpreters;* and held that the statute of the State which provided that judicial proceedings must be conducted in the English language (Civil Code Colo., § 405), would be satisfied by a *record* in that language.

[1] *Ante*, § 10.

[2] The Texas statute has been construed to mean inability to read and write the English language. Wright *v.* State, 12 Tex. App. 163.

[3] Garcia *v.* State, 12 Tex. App. 335.

[4] Riley *v.* Bussell, 1 Heisk. (Tenn.) 294; Plummer *v.* People, 74 Ill. 361.

[5] Brooks *v.* Bruyn, 35 Ill. 392; Bissell *v.* Ryan, 23 Ill. 566; Barker *v.* Hine, 54 Ind. 542; Christie *v.* State, 44 Ind. 408; Kassebaum *v.* State, 45 Ind. 277; Demaree *v.* State, 45 Ind. 299; Williams *v.* State, 45 Ind. 299. For the construction of such statutes, see Burden *v.* People, 26 Mich. 162; Gracia *v.* State, 5 Tex. App. 337; Tuttle *v.* State, 6 Tex. App. 556; Myers *v.* State, 7 Tex. App. 640; Etheridge *v.* State, 8 Tex. App. 133; State *v.* Thorne, 81 N. C. 555. See Prov. Inst. *v.* Burnham, 128 Mass. 458; Famulener *v.* Anderson, 15 Oh. St. 473. That such a statute applies to one who had been summoned as a *talesman* in a street-opening case: Williams *v.* Grand Rapids, 53 Mich. 271.

Article IV. — Challenges for Disqualification in Respect of the Particular Case.

Subdivision I. — Challenges Grounded on Consanguinity, Affinity, Interest, Affection.

Section

59. Grounds of Principal Challenge at Common Law.
60. Member of the Grand Jury.
61. Consanguinity and Affinity.
62. [Continued.] Whether the Party so Related to the Venire-man must be a Party to the Record.
63. Members of Public Corporations.
64. Members of Private Corporations and Societies.
65. Interest in the Suit.
66. Membership in Associations for the Suppression of Crime.
67. Business Relations.
68. Prior Service in the Same or a Similar Case.

§ 59. Grounds of Principal Challenge at Common Law. — These statutory grounds of challenge are not, in the view of some courts, exclusive of others which existed at common law.[1] Indeed, it has been held not within the power of the legislature, under a *constitution* preserving the right of trial by jury, to deprive an accused person of the right of challenge for *actual bias*, which was a challenge to the favor at common law.[2] It is

[1] Birdsong *v.* State, 47 Ala. 68; Smith *v.* State, 55 Ala. 1 (overruling Boggs *v.* State, 45 Ala. 30; Lyman *v.* State, 45 Ala. 72, and restoring State *v.* Marshall, 8 Ala. 302); Chouteau *v.* Pierre, 9 Mo. 3; State *v.* West, 69 Mo. 401; Lyles *v.* State, 41 Tex. 172; Lester *v.* State, 2 Tex. App. 433; Williams *v.* State, 44 Tex. 34; Caldwell *v.* State, 41 Tex. 86; Trinidad *v.* Simpson (Sup. Ct. Col.), 22 Alb. L. J. 409; *s. c.* 10 Cent. L. J. 149; Quesenberry *v.* State, 3 Stew. & Port. (Ala.) 308; Dumas *v.* State, 63 Ga. 600. Thus, it has been held a good ground of challenge that a juror had grossly *misbehaved* on a former occasion, by declaring that he had tried to acquit every one whom the judge desired to convict, and also that he "would as lief swear on a spelling book as a bible, because he was a Tom Paine man." McFadden *v.* Com., 23 Pa. St. 12, 17. At *nisi prius*, however, it was ruled by Coleridge, J., to be no ground for a challenge, that the juror had sat on several cases during the assize, and in no instance had consented to a verdict for the crown. Sawdon's Case, 2 Lewin, C. C. 117. Nor that, in a previous case, the juror had shown some dissatisfaction with the law as laid down by the judge in favor of the challenging party. Pearse *v.* Rogers, 2 Fos. & Fin. 137.

[2] State *v.* McClear, 11 Nev. 39.

important, then, to bear in mind what were the grounds of challenge for principal cause at common law. These, according to Chief Baron Gilbert, were as follows: "All causes of objection from partiality or incapacity, consanguinity and affinity, are contained in the writ; if the juror be under the power of either party, as if counsel, serjeant of the robes, or tenant, these are expressly within the intent of the writ; so that, if he has declared his opinion touching the matter, or has been chosen arbitrator by one side, or done any act by which such an opinion might be conceived, as if he has eaten and drank at the expense of either party after he is returned. All incapable persons, as infants, idiots and people of non-sane memory, are likewise excluded." [1]

§ **60. Member of the Grand Jury.** — To these may be added another which has come down to the present day, namely, that the person challenged was a member of the *grand jury* which returned the indictment; [2] but the mere fact that he was the *bailiff* who attended upon the grand jury which returned the indictment is not a disqualification, unless it appears that he knew something of their proceedings touching the particular case.[3]

The statutory causes of challenge for "implied bias" are held to be exclusive of all others under this head. People *v.* Cotta, 49 Cal. 166; People *v.* Welch, 49 Cal. 174, 178. See also State *v.* Thomas, 19 Minn. 484. But the definition of "actual bias" is sufficiently broad to embrace the most important objections formerly taken to the favor.

[1] Gilb. Hist. C. P. 95. Other old authorities, show that all of the foregoing were principal grounds of challenge. Co. Litt. 157. a; Bac. Abr. Juries E. 5; Trials per Pais (6th ed.), 137, *et seq.* Serjeant Hawkins enumerates still others as allowed in criminal cases, namely, that the person challenged had been a member of the grand jury that returned the indictment; had a claim to the forfeiture which would ensue from the conviction; had declared an opinion beforehand of the defendant's guilt, or had "given his dogs the names of the King's witnesses." 2 Hawk. P. C., chap. 43, § 27, *et seq.*

[2] So enacted by Stat. 25 Edw. III., c. 3. See Oates' Case, 10 How. St. Tr. 1082; Cook's Case, 13 How. St. Tr. 311, 339; Rex *v.* Percival, 1 Sid. 243; Young *v.* Slaughterford, 11 Mod. 228; Com. *v.* Hussey, 13 Mass. 221. In an action for malicious prosecution, for causing the plaintiff to be indicted, he may challenge any of the jurors who were on the grand jury that found the indictment. Rogers *v.* Lamb, 3 Blackf. 155.

[3] Spittorff *v.* State (Ind.), 8 North East. Rep. 911.

§ 61. **Consanguinity and Affinity.** — This is reckoned according to the rule of the *civil law*,[1] as distinguished from that of the *canon law*, which latter was the English law of descent.[2] In so reckoning, we reckon from one of the persons up to the common ancestor and then down to the other.[3] Thus, under this rule *first cousins* are related to each other in the *fourth degree*.[4] *Affinity* is the relationship which springs from the marriage tie, and which subsists between one marital partner and the blood relatives of the other.[5] The rule will be best illustrated by the statement that the blood relatives of the wife stand in the same degree of affinity to the husband as they stand in consanguinity to her. It is important to bear in mind that, in theory of law, if one of the parties to the marriage which created the affinity be *dead*, the affinity still subsists if there be *issue living*;[6] otherwise the tie is broken and the disqualification removed.[7] This consanguinity or affinity between a party and a juror disqualified the latter at common law, when it existed within the *ninth degree*.[8]

[1] 4 Kent Com. 412, 413.

[2] 4 Kent Com. 374.

[3] *Ibid.* See an instructive note by the reporter to Hardy *v.* Sprowle, 32 Me. 310.

[4] For illustrations of the rule in its application to challenges, see Hardy *v.* Sprowle, 32 Me. 310; Hudspeth *v.* Herston, 64 Ind. 133; Rust *v.* Shackleford, 47 Ga. 538; Morrison *v.* McKinnon, 12 Fla. 552; Hartford Bank *v.* Hart, 3 Day (Conn.), 491; Churchill *v.* Churchill, 12 Vt. 661; State *v.* Perry, 1 Busb. (N. C.) 330; Trullinger *v.* Webb, 3 Ind. 198; Denn *v.* Clark, 1 N. J. L. 446; O'Connor *v.* State, 9 Fla. 215. That the *father* of the venire-man is second cousin to the defendant's *mother* disqualifies under Mo. R. S., § 1894: State *v.* Walton, 74 Mo. 270.

[5] See the definition of Chancellor Walworth in Paddock *v.* Wells, 2 Barb. Ch. (N. Y.) 331, 333; also Dailey *v.* Gaines, 1 Dana (Ky.), 529.

[6] Co. Litt. 156*a*; *Ibid.* 157*a*; Paddock *v.* Wells, 2 Barb. Ch. (N. Y.) 331; Mounson *v.* West, 1 Leon. 88; Jaques *v.* Com., 10 Gratt. (Va.) 690; Dearmond *v.* Dearmond, 10 Ind. 191.

[7] Cain *v.* Ingham, 7 Cow. (N. Y.) 478; Carman *v.* Newell, 1 Den. (N. Y.) 25; Vannoy *v.* Givens, 23 N. J. L. 291; State *v.* Shaw, 3 Ired. L. (N. C.) 532.

[8] 3 Bl. Comm. 363; 1 Chitty Cr. L. 541; Tidd's Pr. 853. Lord Coke stated the rule to be that if a juror be of kin to either party in any degree, however remote, he is disqualified to serve. Co. Litt. 157*a*. But this, if ever the common law, is certainly not such at the present day. No disqualification that venire-man is *husband* of *third cousin* of defendant. Todd *v.* Gray, 16 S. C. 635. Nor that *uncle* of party married *aunt* of venire-man, and that *two uncles* of venire-man married *aunts* of the party, — all the marriages being dissolved by death, and no issue

§ 62. [Continued.] **Whether the Party so related to the Venire-man must be a Party to the Record.** — The general rule is that, in order that a juror shall be disqualified for this cause, he must stand so related to a party to the suit. It is ordinarily not enough that he is so related to one of the *counsel*,[1] or to a *brother*,[2] or *sister*,[3] or *nephew*[4] of the party. So, it has been held not a ground of such challenge that a juror was married to the widow of the prosecutor's *uncle*,[5] or that he was the *father-in-law* of the prosecuting attorney,[6] or a *half-uncle* of the plaintiff's *wife*.[7] But it has been held not necessary that the party who stands in this relationship to the challenged juror should be the beneficial party in the full sense; and accordingly the rule applies so as to sustain the challenge where an *administrator* is the party related to the juror.[8] On the other hand, the reason of the rule excludes the juror where he is related to one who is a beneficial party, though not a party to the record, — as where a *corporation* is a party and the juror is related to a member or *shareholder*.[9] Other cases extend the rule still further,— holding that a juror is excluded, in a prosecution for arson, who is related to the person whose house is alleged to have been burned;[10] or who, in the case of a slave indicted for robbery, is related to the owner of the slave;[11] or who, in the case of a jail-keeper indicted for a negligent escape, is related to the prisoners who escaped.[12] But, in an action by a municipal corporation to

living. Bigelow *v.* Sprague, 140 Mass. 425.

[1] Funk *v.* Ely, 45 Pa. St. 444; Wood *v.* Wood, 52 N. H. 422; Piper *v.* Lodge, 16 Serg. & R. 214. *Aliter*, where the counsel have a *lien* for their *fees* upon the proceeds of the suit. Melson *v.* Dickson, 63 Ga. 685; *s. c.* 36 Am. Rep. 128.

[2] Johnson *v.* Richardson, 52 Tex. 481.

[3] Chase *v.* Jennings, 38 Me. 44.

[4] Rank *v.* Shewey, 4 Watts (Pa.), 218.

[5] Oneal *v.* State, 47 Ga. 229.

[6] State *v.* Jones, 64 Mo. 391.

[7] Eggleston *v.* Smiley, 13 Johns. (N. Y.) 133.

[8] Trullinger *v.* Webb, 3 Ind. 198.

[9] Co. Litt. 157*a*; Quinebaugh Bank *v.* Leavens, 20 Conn. 87; Georgia Railroad *v.* Hart, 60 Ga. 550; Young *v.* Marine Ins. Co., 1 Cranch C. C. (U. S.) 452.

[10] Jaques *v.* Com., 10 Gratt. (Va.) 690.

[11] State *v.* Anthony, 7 Ired. L. (N. C.) 234.

[12] State *v.* Baldwin, 80 N. C. 390. But, in an action against a sheriff for

recover over against a wrong-doer the damages which it had been compelled to pay through his negligence, the *husband* of the plaintiff in the original action is not competent by reason of affinity.[1]

§ 63. Members of Public Corporations. — The rule of the common law, established by Lord Mansfield,[2] and generally followed in this country,[3] where not changed by statute, as it frequently has been,[4] excludes from the jury

the act of his deputy, a *release* of the deputy rendered the deputy's father competent as a juror. Seavy *v.* Dearborn, 19 N. H. 351.

[1] Faith *v.* Atlanta (Ga.), 4 South East. Rep. 3.

[2] Hesketh *v.* Braddock, 3 Burr. 1847. See also Day *v.* Savadge, Hob. 85. Compare Martin *v.* Reg., 12 Irish L. 399.

[3] Wood *v.* Stoddard, 2 Johns. (N. Y.) 194; Garrison *v.* Portland, 2 Ore. 123; Boston *v.* Tileston, 11 Mass. 468; Hawkes *v.* Kennebeck, 7 Mass. 461; Watson *v.* Tripp, 11 R. I. 98; *s. c.* 15 Am. L. Reg. 282; Alexandria *v.* Brockett, 1 Cranch C. C. (U. S.) 505; Diveny *v.* Elmira, 51 N. Y. 507; Hawes *v.* Gustin, 2 Allen (Mass.), 402; State *v.* Williams, 30 Me. 484; Dively *v.* Cedar Falls, 21 Iowa, 565; Cramer *v.* Burlington, 42 Iowa, 315; Kendall *v.* Albia (Iowa), 34 N. W. Rep. 833; Ford *v.* Umatilla County (Ore.), 16 Pac. Rep. 33; Davenport Gas Company *v.* Davenport, 13 Iowa, 229; Gibson *v.* Wyandotte, 20 Kan. 156; Eberle *v.* St. Louis Public Schools, 11 Mo. 247; Fine *v.* St. Louis Public Schools, 30 Mo. 166; Columbus *v.* Goetchius, 7 Ga. 139; Russell *v.* Hamilton, 3 Ill. 56; Bailey *v.* Trumbull, 31 Conn. 581; Hearn *v.* Greensburgh, 51 Ind. 119; Johnson *v.* Americus, 46 Ga. 80; Rose *v.* St. Charles, 49 Mo. 509; Fulweiler *v.* St. Louis, 61 Mo. 479. But *contra*, see Middletown *v.* Ames, 7 Vt. 166; Omaha *v.* Olmstead, 5 Neb. 446; *s. c.* 16 Am. L. Reg. 356; Kemper *v.* Louisville, 14 Bush (Ky.), 87. Member of city council disqualified, if city a party. Boston *v.* Baldwin, 139 Mass. 315. *Cases not within the rule:* Phillips *v.* State, 29 Ga. 105; Phipps *v.* Mansfield, 62 Ga. 209. Holder of municipal bonds, incompetent where municipality is a party: Jefferson County *v.* Lewis, 20 Fla. 980.

[4] New York Code Rem. Just., § 1179; 1 Bright. Purd. (Penn.) Dig., p. 837, § 73; G. S. Mass. 1860, chap. 132, § 30; Gen. Stat. R. I. 1872, p. 434, § 32; Bush's Dig. Fla., chap. 104, § 25; R. S. So. Car. 1873, p. 53, § 27; Comp. L. Mich. 1871, § 6015; R. S. Me. 1871, chap. 82, § 76; Rev. N. J. 1877, p. 530, § 39; Comp. L. Mich. 1871, §§ 460, 3329; R. S. Ill. 1880, chap. 24, § 174; *Ib.*, chap. 139, § 47; *Ib.*, chap. 34, § 32; R. S. La. 1876, § 2134; Supp. to Ga. Code of 1873, § 409; R. S. W. Va. 1879, chap. 33, § 63; R. S. Wis. 1878, § 2850; Stat. at Large, Minn. 1873, p. 217, § 5; G. S. Neb. 1873, p. 232, § 5; R. S. Mo. 1879, § 2801; Comp. L. Kan. 1879, § 1391. Such statutes have been held not unconstitutional as invading the right of trial by an impartial jury. Com. *v.* Reed, 1 Gray, 472. See also Com. *v.* Worcester, 3 Pick. 462; Com. *v.* Ryan, 5 Mass. 90; State *v.* Wells, 46

the inhabitants of a town or city which is a party to the action.[1]

§ 64. Members of Private Corporations and Societies. — The same rule excludes from the jury box a member of a private corporation which is a party to a suit, or immediately interested in the question to be tried.[2] Thus, in an action between the trustees of two religious societies, involving the right of possession of lands, the members of each society are, by reason of interest, incompetent as jurors.[3] But the rule does not disqualify a juror who has been active in forming a company, but who has never been a shareholder in it.[4] And it is no objection that the juror is an officer or stockholder in another corporation, organized for a similar purpose to that of the corporation which is a party to the suit.[5] Nor, according to the better opinion, does the fact that the venire-man and the opposite party to the suit are members in the same *benevolent organization*, such as the

Iowa, 662. Construction of such statutes: Baltimore &c. R. Co. *v.* Pittsburgh &c. R. Co., 17 W. Va. 812; Doyal *v.* State, 70 Ga. 134. One who would find for the city if the evidence was equally balanced is disqualified. Omaha *v.* Kane, 15 Neb. 657.

[1] A city defendant has no right of challenge on the ground that, though a resident, the venire-man is not a tax-payer. Hollenbeck *v.* Marshalltown, 62 Iowa, 21. Nor on the ground that he *is* a tax-payer. Conklin *v.* Keokuk (Iowa), 35 N. W. Rep. 444. But it is a good ground of challenge by the party adverse to the city. Kendall *v.* Albia (Iowa), 34 N. W. Rep. 833; and see note to same.

[2] Respublica *v.* Richards, 1 Yeates (Pa.), 480; Silvis *v.* Ely, 3 Watts & S. (Pa.) 421; Fleeson *v.* Savage S. M. Co., 3 Nev. 157. Compare Williams *v.* Smith, 6 Cow. (N. Y.) 166; Peninsular R. Co. *v.* Howard, 20 Mich. 18; Page *v.* Contocook Valley R. Co., 21 N. H. 438. So, of a juror who has given his note to a railway company to aid in building its road: Michigan &c. R. Co. *v.* Barnes, 40 Mich. 383.

[3] Cleage *v.* Hyden, 6 Heisk. (Tenn.) 73.

[4] Portland &c. Ferry Co. *v.* Pratt, 2 Allen (N. B.), 17. Compare Williams *v.* Smith, 6 Cow. (N. Y.) 166; Com. *v.* Boston &c. R. Co., 3 Cush. (Mass.) 25.

[5] Craig *v.* Fenn, Car. & M. 43; Miller *v.* Wild Cat Gravel Rd. Co., 52 Ind. 51. No objection that a party and a juror are both *stockholders* in the same corporation, it not being interested in the suit: Brittain *v.* Allen, 2 Dev. L. (N. C.) 120. On a trial of an indictment for passing counterfeit money, it is no objection that a juror is a *director* in the bank whose money was counterfeited: Billis *v.* State, 2 McCord (S. C.), 12.

Masonic Fraternity, disqualify.[1] Nor, in an action by a grand lodge of this order, are members of subordinate lodges disqualified by reason of interest in the suit.[2] So, a *church member* is not incompetent as a juror in a case to which a church of his denomination is a party.[3] But if the church is such an important one that its tenets are above the law of the land, and if belief in those tenets renders it unconscientious for him to enforce the human as against the divine law, the venire-man will be disqualified, — especially in a case where the venire-man is a member of the *Mormon church*, and the accused is on trial for bigamy, and the divine law, as graciously revealed to the saints of that church, commands *polygamy*, while the human law is so wicked as to condemn it.[4] On the trial of a criminal action for unlawfully selling intoxicating liquors, members of a *social club*, apparently organized for the purpose of getting liquor for their own use, — are not, for that reason, subject to challenge by the defendant.[5]

§ **65. Interest in the Suit.** — Any direct or contingent interest in the result of the suit about to be tried, disqualifies the venire-man. Thus, if he is interested in a *similar* suit, or in one depending on the event of the particular suit,[6] or if he is under indictment for an offense *similar* to that charged against the prisoner,[7] this will disqualify him: but the fact that the plaintiff *has had* a suit against the challenged venire-man, similar to the one about to be tried, will at most support a challenge to the favor.[8] So, if the venire-man is an *executor*, though not a party, and the recovery will benefit the estate;[9] or, if he is bound as a

[1] Purple *v.* Horton, 13 Wend. (N. Y.) 11, 23. *Contra*, Brittain *v.* Allen, 2 Dev. L. (N. C.) 120.

[2] Burdine *v.* Grand Lodge, 37 Ala. 478.

[3] Barton *v.* Erickson, 14 Neb. 164.

[4] United States *v.* Miles, 2 Utah, 19; *s. c.* 103 U. S. 304.

[5] Boldt *v.* State (Wis.), 35 N. W. Rep. 935.

[6] Courtwright *v.* Strickler, 37 Iowa, 382; Lord *v.* Brown, 5 Den. (N. Y.) 345; Davis *v.* Allen, 11 Pick. (Mass.) 466; Flagg *v.* Worcester, 8 Cush. (Mass.) 69; Gardner *v.* Lanning, 2 N. J. L. 651. But see Com. *v.* Boston &c. R. Co., 3 Cush. (Mass.) 25.

[7] McGuire *v.* State, 37 Miss. 369.

[8] Austin *v.* Cox, 60 Ga. 520.

[9] Smull *v.* Jones, 6 Watts & S. (Pa.) 122. Compare Gratz *v.* Benner, 13 Serg. & R. (Pa.) 110, a decision which it is difficult to understand. For a further illustration of disquali-

surety for the *costs* of the suit,[1] or for the *appearance* of the accused.[2] Moreover, if the venire-man once had a direct interest in the pending suit, he is disqualified since the fact of his ceasing to have such an interest would not purge him of the bias which he thereby acquired,[3] though this objection would not be good after verdict.[4]

§ 66. Membership in Associations for the Suppression of Crime. — The decisions on this branch of the inquiry are not in a satisfactory state. We shall see hereafter that prejudice against the particular crime with which the accused stands charged does not disqualify a venire-man.[5] Upon analogous grounds, some courts have reached the conclusion that membership in a society organized for the prosecution of crimes of the nature of the one with which the accused is charged, does not disqualify,[6] unless

tication of an administrator by reason of contingent interest in the event of the suit, see Mecker *v.* Potter, 5 N. J. L. 586. A juror has been permitted to release his interest in lands claimed in ejectment, in order that he might sit upon the trial. Isaac *v.* Clarke, 2 Gill. (Md.) 1.

[1] Glover *v.* Woolsey, Dudley (Ga.), 85.

[2] State *v.* Prater (S. C.), 2 South East. Rep. 108; Brazleton *v.* State, 11 Reporter, 291; People *v.* McCollister, 1 Wheeler C. C. (N. Y.) 391; Anderson *v.* State, 63 Ga. 675. This objection was held to be good as against the *son-in-law* and *brother-in-law* of the surety (Schorn *v.* Williams, 6 Jones L. (N. C.) 575; Woodbridge *v.* Raymond, Kirby (Conn.), 279), but denied as against *tenant*. Brown *v.* Wheeler, 18 Conn. 199.

[3] Phelps *v.* Hall, 2 Tyler (Vt.), 401.

[4] Bradshaw *v.* Hubbard, 6 Ill. 390, 394.

[5] United States *v.* Hanway, 2 Wall. Jr. 139; Williams *v.* State, 3 Ga. 453; Parker *v.* State, 34 Ga. 262; United States *v.* Noelke, 17 Blatch. (U. S.) 554; *s. c.* 1 Fed. Rep. 426; 9 Reporter, 505; United States *v.* Borger (U. S. Cir. Ct. S. D. N. Y., May, 1881), 7 Fed. Rep. 193; United States *v.* Duff (same court, Jan., 1881), 6 Fed. Rep. 45, 48.

[6] State *v.* Wilson, 4 Ia. 407; Boyle *v.* People, 4 Colo. 176; Com. *v.* Livermore, 4 Gray (Mass.), 18; Com. *v.* O'Neil, 6 Gray (Mass.), 343; Musick *v.* People, 40 Ill. 268. Compare Missouri &c. R. Co. *v.* Munkers, 11 Kan. 223; Reg. *v.* Nicholson, 8 Dowl. P. C. 422; *s. c.* 4 Jur. 558; United States *v.* Borger, 7 Fed. Rep. 193; *s. c.* 12 Reporter, 134. The refusal of the judge to ask venire-men whether they belong to any association formed for the purpose of enforcing the law under which the defendant is indicted, has been held no ground of exception, if the defendant's counsel disclaims any knowledge or suspicion of such connection and assigns no ground for making the request. Com. *v.* Thrasher, 11 Gray, 55; Reg. *v.* Stewart, 1 Cox C. C. 174. *Contra*, Lavin *v.* People, 69 Ill. 303.

the relation of the venire-man to the society is such as to render him liable to contribute towards the *expenses of the prosecution*.[1] But he is disqualified if he has participated in the prosecution of the accused person, or belongs to a committee the members of which have agreed to indemnify each other against any action which the accused might prosecute against any of them for *false imprisonment*.[2]

§ 67. **Business Relations.** — That the venire-man is the *inferior* or *dependent* in business relations of the opposite party to the suit, will generally disqualify. Thus, if he is his *surety*, and the rendition of a judgment against him will diminish the probability of his being exonerated;[3] or if he is his *tenant*,[4] although *distress for rent* may have been abolished;[5] or is his *clerk*,[6] or other *employé*,[7] or even his *partner* in business.[8] But the mere fact that an *innkeeper* is a party and the venire-man is his *guest* does not disqualify the latter;[9] and while, as elsewhere seen,[10] a *shareholder* in a *corporation* is disqualified from serving

[1] Some cases make no mention of this distinction. Musick *v.* People, 40 Ill. 268. Compare Mylock *v.* Saladine, 1 W. Bl. 480; People *v.* Lee, 5 Cal. 353; People *v.* Graham, 21 Cal. 261.

[2] Fleming *v.* State, 11 Ind. 234; Pierson *v.* State, 11 Ind. 341. *Contra*, that *subscribers* to a *general fund* to secure counsel for the prosecution of the defendant are not disqualified: Heacock *v.* State, 13 Tex. App. 97. That members of the "Law and Order League," who contribute to its funds are not disqualified on trial of a complaint for selling intoxicating liquors: Com. *v.* Burroughs (Mass.), 13 North East. Rep. 884. *Aliter*, if the League had initiated or was conducting the particular prosecution. *Ibid.*; Com. *v.* Moore, 143 Mass. 136; *s. c.* 9 North East. Rep. 884.

[3] Ferriday *v.* Selser, 4 How. (Miss.) 506.

[4] Co. Litt. 157. a.; Bac. Abr. Juries E. 343; Anon., 2 Dyer, 176. a. pl. (27); Pipher *v.* Lodge, 16 Serg. & R. (Pa.) 214; Harrisburg Bank *v.* Foster, 8 Watts (Pa.), 304. But that the opposite party to the suit is a tenant to the juror is ground of challenge to the favor only. People *v.* Bodine, 1 Denio (N. Y.), 306.

[5] Hathaway *v.* Helmer, 25 Barb. (N. Y.) 29.

[6] Hubbard *v.* Rutledge, 57 Miss. 7.

[7] Central R. Co. *v.* Mitchell, 63 Ga. 173. See Co. Litt. 157. b.; Gilb. Hist. C. P. 95; 3 Bl. Com. 363; Bac. Abr. Juries E.; 2 Tidd Pr. 853. But not if he was merely in his employ a year before. East Line &c. R. Co. *v.* Brinker (Tex.), 3 S. W. Rep. 99.

[8] Stumm *v.* Hummell, 39 Ia. 478.

[9] Cummings *v.* Gann, 52 Pa. St. 484.

[10] *Ante*, § 64.

as a juror where the corporation is a party, yet this does not extend so far as to exclude from such service an *employé of a shareholder*.[1]

§ 68. **Prior Service in the Same or a Similar Case.** — It is a ground of challenge that the venire-man has sat as a juror upon a former trial of the same action.[2] But the fact of having sat at the same term upon the trial of an action brought by the same plaintiff against other defendants and having returned a verdict for the plaintiff, does not disqualify,[3] unless the cause involves the same questions, determinable on the same evidence as the one about to be tried.[4] One court holds,[5] and others deny[6] that the fact of the juror having sat on a former trial of the same action, which resulted in a *mistrial*, will operate to exclude him, where not discovered until after he has been impaneled and sworn. Nor does this rule extend so far as to disqualify venire-men who have sat on the trial of other defendants jointly indicted with the defendant in the particular case, but who had severed for the purposes of their trial.[7] Nor is a venire-man, who has sat on a jury which has found the defendant guilty upon one indictment, thereby disqualified from sitting upon his trial under another indictment at the same term, although for a similar offense.[8]

[1] Frederickton Boom Co. *v.* McPherson, 2 Hannay (N. B.), 8.

[2] Co. Litt. 157. b.; Argent *v.* Darrell, 2 Salk. 648. For the construction of statutes asserting this disqualification, see Dunn *v.* State, 7 Tex. App. 600; Jacobs *v.* State, 9 Tex. App. 278; Willis *v.* State, 9 Tex. App. 297; State *v.* Sheeley, 15 Iowa, 404; State *v.* Leicht, 17 Iowa, 28.

[3] Dew *v.* McDivitt, 31 Oh. St. 139; *s. c.* 17 Am. L. Reg. 621; Algier *v.* Steamer Maria, 14 Cal. 167; Nugent *v.* Trepagnier, 2 Martin (La.), 205; Smith *v.* Wagenseller, 21 Pa. St. 491.

[4] Spear *v.* Spencer, 1 G. Greene (Iowa), 534; Garthwaite *v.* Tatum, 21 Ark. 336. But see Sheppard *v.* Cook, 2 Hayw. (N. C.) 238.

[5] Weeks *v.* Medler, 20 Kan. 57.

[6] Whitner *v.* Hamlin, 12 Fla. 18; Atkinson *v.* Allen, 12 Vt. 619.

[7] Regicide's Case, 5 How. St. Tr. 978 (Resolution 7); *s. c.* Sir J. Kelyng. 9. See also Cranburne's Trial, 13 How. St. Tr. 222, 235; Thomas *v.* State, 36 Tex. 315; Bowman *v.* State, 41 Tex. 417; United States *v.* Wilson, Baldwin, C. C. 84; Rex *v.* Hanly, 1 Craw. & Dix Cir. (Irish), 188, note.

[8] United States *v.* Watkins, 3 Cranch C. C. (U. S.) 578; Com. *v.* Hill, 4 Allen (Mass.), 591.

Subdivision 2. — Challenges Grounded on Bias, Prejudice, Scruple, Opinion.

SECTION

71. Grounds of Challenge the same for the State as for the Accused.
72. Bias, Prejudice, Opinion.
73. Kinds of Bias and Prejudice that do not Excuse.
74. Conscientious Scruples against Capital Punishment.
75. Conscientious Scruples against Capital Punishment on Circumstantial Evidence.
76. Opinions Touching the Merits of the Particular Case.
77. Nature of the Opinion which Disqualifies.
78. [Continued.] Must be of a Fixed and Positive Character.
79. Opinions which do not Disqualify.
80. Opinions which will Require Evidence to Remove them.
81. Newspaper Reports of Former Trial.
82. Statutes Removing Common-Law Disqualification.
83. Declaration of Venire-Man that he can Render an Impartial Verdict.

§ 71. Grounds of Challenge the same for the State as for the Accused. — Here it should be observed that, in respect of the *grounds* of challenge, though not always in respect of the *number* of the challenges, the rights of the State and the accused are precisely the same. The bias, prejudice or opinion which will disqualify the venire-man when entertained against the case of the accused, will equally disqualify him when entertained against the case of the prosecution.[1] Indeed, it has been held, under a statute which is little less than declaratory of the generally accepted rule, that a juror cannot be interrogated as to *which side* his opinion favors or disfavors, and accordingly that it is not necessary, in order to reverse a judgment for overruling a challenge to a juror entertaining a disqualifying opinion, to show that the opinion was unfavorable to the complaining party.[2] But the better opinion would seem to be that the party complaining of the disallowance of his challenge ought to show that the juror was prejudiced *against him*, and therefore that he *waives* his ground of complaint by not interrogating the juror as to the *direction* of his opinion.[3]

[1] State *v.* West, 69 Mo. 401, 403; Com. *v.* Lesher, 17 Serg. & R. (Pa.) 155; Commander *v.* State, 60 Ala. 1; 1 Burr. Tr. 495; Pierson *v.* State, 18 Tex. App. 524.

[2] People *v.* Williams, 6 Cal. 206. State *v.* Shelledy, 8 Iowa, 477.

[3] State *v.* Eller, 85 N. C. 585.

§ 72. **Bias, Prejudice, Opinion.** — Some useless casuistry has been expended upon a supposed distinction between *prejudice* and *bias*, resulting in the conclusion that, while prejudice is a prejudgment of the particular case, bias is a predisposition or leaning, from some other cause, toward one side or the other of it.[1] As the usual mental conception which is conveyed by the word prejudice is a condition of the mind, founded in opinion, which has resulted in bias more or less complicated with *ill feeling*, and as plain men on a jury panel will not ordinarily take any essential distinction between the two expressions, — it must follow that refinements upon this subject can serve no useful purpose in the administration of justice.

§ 73. **Kinds of Bias and Prejudice that do not excuse.** — A general prejudice against crime,[2] or prejudice against the particular *crime* with which the accused stands charged,[3] or against the *criminal business* for which he is prosecuted;[4] or against the particular *unlawful act* for the alleged doing of which the action is brought, it being a civil action;[5] or against the class of actions to which his suit belongs;[6] or even a prejudice against the *defendant* himself, arising solely from the fact of his being engaged in a criminal or unlawful business, and therefore tantamount to

[1] Thomp. & Mer. Jur., § 191. Compare the following cases: Com. *v.* Webster, 5 Cush. (Mass.) 297; Winnesheik Ins. Co. *v.* Schneller, 60 Ill. 473; People *v.* Reyes, 5 Cal. 347, 349; Willis *v.* State, 12 Ga. 444, 448; McCausland *v.* McCausland, 1 Yeates (Pa.), 372, 378; Willis *v.* State, 12 Ga. 444, 448, per Nisbet, J.

[2] State *v.* Burns, 85 Mo. 47; *s. c.* aff'd, 16 Mo. App 555.

[3] United States *v.* Hanway, 2 Wall. Jr. (U. S.) 139; Williams *v.* State, 3 Ga. 453; Parker *v.* State, 34 Ga. 262; United States *v.* Noelke, 17 Blatch. (U. S.) 554; *s. c.* 1 Fed. Rep. 426; 9 Reporter, 505; State *v.* Nelson, 58 Iowa, 208.

[4] United States *v.* Noelke, 17 Blatchf. (U. S.) 554.

[5] Davis *v.* Hunter, 7 Ala. 135. In an action for the killing of sheep by dogs, a juror who said that he had such a bias or prejudice about the matter of dogs killing sheep as would interfere with his impartial judgment in the case, was held to have been properly excused, upon a challenge for cause. Anson *v.* Dwight, 18 Iowa, 241.

[6] That is, against *slander* suits. Young *v.* Bridges, 34 La. Ann. 338. Or against *personal damage* suits. McCarthy *v.* Railway Co. (Mo.), 4 S. W Rep. 516.

a prejudice against the business merely;[1] or a prejudice against the kind of *defense* which he sets up, *e. g.*, *insanity*;[2] or an unfavorable opinion of his *nationality*,[3] or of his *character*, derived from general reputation,[4] — will not excuse the venire-man, provided he is able, for the time being, to lay aside his unfavorable opinion and give the accused a fair trial according to the evidence.[5] So, on a trial for murder, the result of an anarchical conspiracy, a prejudice against *socialists*, *communists* and *anarchists* is not of itself a disqualification.[6] On the other hand, a belief that the accused is *innocent*, although the law presumes him to be such;[7]

[1] United States *v.* Borger, 7 Fed. Rep. 193; United States *v.* Duff, 6 Fed. Rep. 45, 48. The fact that the venire-man is prejudiced against the *business* of the challenging party but not against him, is not a sufficient ground of challenge for principal cause. Maretzek *v.* Cauldwell, 2 Abb. Pr. (N. S.) 407; *s. c.* 5 Robt. 660; United States *v.* Noelke, 17 Blatchf. (U. S.) 554; Elliott *v.* State, 73 Ind. 10. Though it has been held that a man who in order to suppress *liquor-selling*, would stop short of *mob violence* only, ought to be excused. Albrecht *v.* Walker, 73 Ill. 69. See also Winnesheik Ins. Co. *v.* Schueller, 60 Ill. 465; Swigart *v.* State, 67 Ind. 287; *s. c.* 21 Alb. L. J. 278; Keiser *v.* Lines, 57 Ind. 431. Compare Elliott *v.* State, 73 Ind. 10. In a similar case a juror is properly rejected whose prejudice against the defendant's business is such that he cannot give the testimony of a person engaged in the same business as the defendant the same weight which he could the testimony of other persons. Robinson *v.* Randall, 82 Ill. 515. *Contra*, Shields *v.* State, 95 Ind. 299. *Alter*, where the business is *per se* unlawful. This distinction was overlooked in Meaux *v.* Whitehall, 8 Bradw. (Ill.) 173. One who believes that only an immoral man would sell liquor is incompetent on the trial of an application for a license. Chandler *v.* Ruebett, 83 Ind. 139.

[2] People *v.* Carpenter, 38 Hun (N. Y.), 490; *s. c.* 102 N. Y. 238; Hall *v.* Com. (Pa.), 12 Atl. Rep. 163; *s. c.* 11 Cent. Rep. 183; Butler *v.* State, 97 Ind. 378; provided the prejudice is not unreasonable. *Ibid.*

[3] Balbo *v.* People, 19 Hun (N. Y.), 424; *s. c.* affirmed, 80 N. Y. 484. Compare People *v.* Christie, 2 Park. Cr. (N. Y.) 579; *s. c.* 2 Abb. Pr. (N. Y.) 256; People *v.* Keyes, 5 Cal. 347; People *v.* Gar Soy (Sup. Ct. Cal., Dec. 1880), 23 Alb. L. J. 418.

[4] People *v.* Lohman, 2 Barb. (N. Y.) 450; People *v.* Knickerbocker, 1 Park. Cr. (N. Y.) 302; People *v.* Allen, 43 N. Y. 28; Anderson *v.* State, 14 Ga. 710; Willis *v.* State, 12 Ga. 444; State *v.* Schnapper, 22 La. Ann. 43; People *v.* Mahoney, 18 Cal. 180; State *v.* Davis, 14 Nev. 439, 450; Monroe *v.* State, 23 Tex. 210.

[5] See preceding cases, and also Martin *v.* State, 25 Ga. 494.

[6] The Anarchists' Case (Spies *v.* People), 122 Ill. 1; *s. c.* 12 North East. Rep. 865.

[7] 1 Burr. Tr. 425, per Marshall, C. J.: State *v.* West, 69 Mo. 401, 403, per Henry, J. See also Com. *v.* Lesher, 17 Serg. & R. (Pa.) 155; Commander *v.* State, 60 Ala. 1.

an expressed wish or desire that he may prevail;[1] an expressed opinion by one who has signed a petition for his pardon, that he has been already sufficiently punished;[2] a feeling of *unwillingness* on the part of the venire-man to *trust himself* as a juror on the trial;[3] a *preference* in case the evidence is *evenly balanced*,[4] such as would incline the mind of the juror to *lean* one way or the other,[5]—have generally, though not always, been held good grounds of challenge. It is not ground of rejecting a venire-man that he has an *unfriendly feeling* towards one of the *attorneys* of the challenging party.[6]

§ 74. Conscientious Scruples against Capital Punishment.—It is now settled that these are good grounds of challenge in a

[1] Mason *v.* State, 15 Tex. App. 534; Pike County *v.* Griffin &c. Plank Road Co., 15 Ga. 39.

[2] Asbury Ins. Co. *v.* Warren, 66 Me. 523.

[3] Com. *v.* Webster, 5 Cush. (Mass.) 295, 298; Montague *v.* Com., 10 Gratt. (Va.) 767, overruling upon this point Lithgow *v.* Com., 2 Va. Cas. 297; McLaren *v.* Birdsong, 24 Ga. 265; Edwards *v.* Farrar, 2 La. Ann. 307; Dejarnette *v.* Com. (Va.), 11 Reporter, 653; O'Brien *v.* People, 36 N. Y. 276; *s. c.* in court below, 48 Barb. (N. Y.) 274; Walter *v.* People, 32 N. Y. 147; *s. c.* 6 Park. Cr. (N. Y.) 15; 18 Abb. Pr. 147. See the dissenting opinion of Brockenbrough, J., in Lithgow *v.* Com., 2 Va. Cas. 297.

[4] Mima Queen *v.* Hepburn, 7 Cranch (U. S.), 290; Meaux *v.* Whitehall, 8 Bradw. (Ill.) 173. Accordingly, it has been held that venire-men may be interrogated as to which way they would be inclined to decide the case, if, upon hearing the testimony, they should find it evenly balanced. Chicago &c. R. Co. *v.* Adler, 56 Ill. 345; Chicago &c. R. Co. *v.* Buttoff, 66 Ill. 347; Galena &c. R. Co. *v.* Haslan, 73 Ill. 494; Richmond *v.* Roberts, 98 Ill. 472. This seems to be an exception to the general rule that *hypothetical questions* are not to be put to the venire-man on his *voir dire* with a view of testing his competency. See State *v.* Arnold, 12 Iowa, 479; State *v.* Davis, 14 Nev. 439; State *v.* Leicht, 17 Iowa, 28; State *v.* Ward, 14 La. Ann. 673; State *v.* Bennett, 14 La. Ann. 651; State *v.* Bill, 15 La. Ann. 114. But in one jurisdiction such a disposition does not disqualify, provided the venire-man states that if the evidence were against the party toward whom he would be inclined if it were equally balanced, he would do his duty as a juror under the instructions of the court. McFadden *v.* Wallace, 38 Cal. 51; Trenor *v.* Central Pacific R. Co., 50 Cal. 222.

[5] Chicago &c. R. Co. *v.* Adler, 56 Ill. 345, with which compare Richmond *v.* Roberts, 98 Ill. 472. See also Curry *v.* State, 4 Neb. 545; Sam *v.* State, 13 Sm. & M. (Miss.) 189, 193; Richey *v.* Missouri &c. R. Co., 17 Mo. App. 581.

[6] Hutchinson *v.* State, 19 Neb. 262.

capital case,[1] without reference to the grounds upon which such scruples arise; [2] though some courts have held such venire-men competent where they were confident of their ability to do justice between the State and the accused, notwithstanding such scruples,[3] but this seems to be an unsound view.[4] This rule of

[1] United States *v.* Cornell, 2 Mason (U. S.), 91, 104; United States *v.* Ware, 2 Cranch C. C. (U. S.) 477; O'Brien *v.* The People, 36 N. Y. 276; *s. c.* 48 Barb. (N. Y.) 274; Lowenburg *v.* The People, 5 Park. Cr. (N. Y.) 414, 425; United States *v.* Wilson, Baldwin, C. C. (U. S.) 83; Clore's Case, 8 Gratt. (Va.) 606; Lewis *v.* State, 9 Smed. & M. (Miss.) 115; Williams *v.* State, 32 Miss. 389; State *v.* Kennedy, 8 Rob. (La.) 590; Com. *v.* Twombly, 10 Pick. (Mass.) 480, note; Burrell *v.* State, 18 Tex. 713; Hyde *v.* State, 16 Tex. 445; White *v.* State, 16 Tex. 207; Kennedy *v.* State, 19 Tex. App. 618; Jackson *v.* State, 74 Ala. 26; Garrett *v.* State, 76 Ala. 18; Montague *v.* Com., 10 Gratt. (Va.) 767; People *v.* Sanchez, 24 Cal. 17; Waller *v.* State, 40 Ala. 325; People *v.* Tanner, 2 Cal. 257; Pierce *v.* State, 13 N. H. 536, 556; State *v.* Ward, 39 Vt. 225; Etheridge *v.* State, 8 Tex. App. 133; Com. *v.* Sherry, Whart. on Hom. 481; Martin *v.* State, 16 Ohio, 364; Haywood *v.* Calhoun, 2 Ohio St. 164; St. Louis *v.* State, 8 Neb. 405; Williams *v.* State, 3 Ga. 453; Russell *v.* State, 53 Miss. 367; White *v.* State, 52 Miss. 216; Fortenberry *v.* State, 55 Miss. 403; Jones *v.* State, 2 Blackf. (Ind.) 475; Gross *v.* State, 2 Ind. 329; Driskill *v.* State, 7 Ind. 338; Fahnestock *v.* State, 23 Ind. 231; Greenley *v.* State, 60 Ind. 141; Stephenson *v.* State (Ind.), 4 North East. Rep. 360; Monday *v.* State, 32 Ga. 672; State *v.* West, 69 Mo. 401; People *v.* Wilson, 3 Park. Cr. (N. Y.) 199; State *v.* Mullen, 14 La. Ann. 570; State *v.* Reeves, 11 La. Ann. 685; State *v.* Clark, 32 La. Ann. 559; Metzger *v.* State, 18 Fla. 481; State *v.* Hing, 16 Nev. 307; People *v.* Damon, 13 Wend. (N. Y.) 351. *Contra*, Com. *v.* Gross, 1 Ashm. (Pa.) 281, 287 (overruled by Com. *v.* Lesher, 17 Serg. & R. (Pa.) 155). In United States *v.* McMahon, 4 Cranch C. C. (U. S.) 573, the question was submitted to triors. Compare People *v.* Ryan, 2 Wheel. Cr. Cas. (N. Y.) 47; People *v.* Jones, Edm. Sel. Cas. (N. Y.) 112. It was so established by statute in New York as early as 1801, in respect of Quakers. 2 Rev. Stat. N. Y. 734, § 12.

[2] Waller *v.* People, 32 N. Y. 147, 161; O'Brien *v.* People, 36 N. Y. 276, 278; Gordon *v.* People, 33 N. Y. 501; People *v.* Stewart, 7 Cal. 140, 143, per Murray, C. J. See also Com. *v.* Webster, 5 Cush. (Mass.) 295, 298; Atkins *v.* State, 16 Ark. 568. It is no evidence of the existence of the conscientious scruples in question that a juror, when interrogated upon the subject, simply says that he "would not like for a man to be hung." Smith *v.* State, 55 Miss. 410.

[3] Williams *v.* State, 32 Miss. 389; People *v.* Wilson, 3 Park. Cr. (N. Y.) 199; Stratton *v.* People, 5 Colo. 276.

[4] Waller *v.* State, 40 Ala. 325. A juror who stated upon the *voir dire* that he did not think he could do the prisoner justice, was held incompetent, although he subsequently stated that he could come to the trial with an

exclusion applies, although the offense is one for which capital punishment *may* be given, although a lower degree of punishment may be assessed [1] by the jury.[2]

§ 75. Conscientious Scruples against Capital Punishment on Circumstantial Evidence. — For the same reason the veniremen will be excused where he declares that his conscientious scruples against capital punishment are limited to cases in which circumstantial evidence is relied upon for a conviction,[3] since the law recognizes such evidence as of equal value with other evidence,[4] although the particular case depends on direct testimony.[5] But it has been held that *some prejudice* against convicting on circumstantial evidence is not sufficient ground of challenge for cause.[6]

§ 76. Opinions Touching the Merits of the Particular Case. — This is by far the most frequent ground of challenge in criminal cases. The American law in respect of it is in such a state of confusion that no success can be hoped for in reconciling conflicting opinions, or even in arraying the decisions in logical order.[7] A disqualifying opinion is at common law a *principal* cause of challenge, as distinguished from a cause of challenge *to the favor;* [8] though under that system a challenge to the favor may

unbiased and unprejudiced mind. Wright *v.* Com., 32 Gratt. (Va.) 941.

[1] People *v.* Tanner, 2 Cal. 257. See also Caldwell *v.* State, 41 Tex. 87; State *v.* Melvin, 11 La. Ann. 535; Driskill *v.* State, 7 Ind. 338; Greenley *v.* State, 60 Ind. 141; People *v.* Majors, 65 Cal. 138.

[2] Spain *v.* State, 59 Miss. 19; Cooper *v.* State, *Id.* 267.

[3] Schafer *v.* State, 7 Tex. App. 239; Clanton *v.* State, 13 Tex. App. 139; Jones *v.* State, 57 Miss. 684; State *v.* Pritchard, 15 Nev. 74; Smith *v.* State, 55 Ala. 1; People *v.* Ah Chung, 54 Cal. 398; State *v.* West, 69 Mo. 401; Gates *v.* People, 14 Ill. 433; *s. c.* 2 Am. L. Reg. 671; State *v.* Bunger, 11 La. Ann. 607; State *v.* Pritchard, 15 Nev. 74.

[4] Smith *v.* State, 55 Ala. 1; People *v.* Ah Chung, 54 Cal. 398; State *v.* West, 69 Mo. 401; Gates *v.* People, 14 Ill. 433; Jones *v.* State, 57 Miss. 685; State *v.* Bunger, 11 La. Ann. 607.

[5] Coleman *v.* State, 59 Miss. 484.

[6] State *v.* Shields, 33 La. Ann. 991.

[7] See the observations of Clark, J., in Rothschild *v.* State, 7 Tex. App. 519, 542; also People *v.* Reynolds, 16 Cal. 128.

[8] Pringle *v.* Huse, 1 Cow. (N. Y.) 432; Ex parte Vermilyea, 6 Cow. (N. Y.) 555; People *v.* Vermilyea, 7 Cow. (N. Y.) 108; People *v.* Allen, 43 N. Y

be taken on this ground and submitted to triors,[1] whose decision in favor of competency will be conclusive, notwithstanding the court might have ruled otherwise on a challenge for principal cause.[2] At common law, it was necessary not merely that the venire-man should have *formed*, but also that he should have *expressed* a disqualifying opinion, in order to support a challenge for principal cause,[3] — the reason being that one who has expressed an opinion is likely to be restrained by his own pride from recanting it. But numerous American holdings make the *existence* of such an opinion, admitted by the venire-man on his *voir dire*, a good cause of challenge.[4]

28; Rice *v.* The State, 1 Yerg. (Tenn.) 432; McGowan *v.* The State, 9 Yerg. (Tenn.) 184; Com. *v.* Lesher, 17 Serg. & R. (Pa.) 156.

[1] Freeman *v.* People, 4 Den. (N. Y.) 9, 35; People *v.* Honeyman, 3 Den. (N. Y.) 121; Smith *v.* Floyd, 18 Barb. (N. Y.) 522; People *v.* McMahon, 2 Park. Cr. (N. Y.) 663; Anderson *v.* State, 14 Ga. 709; Ray *v.* State, 15 Ga. 223; Stout *v.* People, 4 Park. Cr. (N. Y.) 132; Schoeffler *v.* State, 3 Wis. 823.

[2] People *v.* Allen, 43 N. Y. 28.

[3] 1 Burr. Tr. 44, per Marshall, C. J.; State *v.* Godfrey, Brayt. (Vt.) 170; United States *v.* Watkins, 3 Cranch C. C. (U. S.) 565; United States *v.* Devaughan, 3 Cranch C. C. (U. S.) 84; State *v.* Madoil, 12 Fla. 151; Boardman *v.* Wood, 3 Vt. 570; State *v.* Clark, 42 Vt. 629; State *v.* Phair, 48 Vt. 366; State *v.* Tatro, 50 Vt. 483; Noble *v.* People, 1 Ill. 29; Hudgins *v.* State, 2 Ga. 173; Boon *v.* State, 1 Ga. 619; Reynolds *v.* State, 1 Ga. 228; Baker *v.* State, 15 Ga. 498; Griffin *v.* State, 15 Ga. 476. One of the grounds alleged against Mr. Justice Chase on the trial of his impeachment was that, in the trial of Callender's Case, he had coupled these two elements together, though he had put the question in the disjunctive on the previous trial of Fries' Case (Chase Tr. 117; Fries' Case, Whart. St. Tr. 610, 614; Callender's Case, Whart. St. Tr. 688, 696); and the invective launched against the traverser by John Randolph on this ground showed that distinguished man to be a better orator than lawyer; for it was only the *expression* of a disqualifying opinion at common law that afforded ground of challenge. Hawk. P. C., chap. 43, § 28; Rex *v.* Edmunds, 4 Barn. & Ald. 471, 492.

[4] Osiander *v.* Com., 3 Leigh (Va.), 780; Armistead's Case, 11 Leigh (Va.), 657; State *v.* Wilson, 38 Conn. 126; United States *v.* Hanway (Walsh's Case), 2 Wall. Jr. (U. S.) 139; United States *v.* Wilson, Bald. C. C. 84; People *v.* Christie, 2 Park. Cr. (N. Y.) 579; *s. c.* 2 Abb. Pr. (N. Y.) 256; Com. *v.* Knapp, 9 Pick. (Mass.) 496, 498; Com. *v.* Webster, 5 Cush. (Mass.) 295, 298; People *v.* Hettick, 1 Wheeler Cr. C. (N. Y.) 399; People *v.* Melvin, 2 Wheeler Cr. C. (N. Y.) 265; People *v.* Johnson, 2 Wheeler Cr. C. (N. Y.) 361, 367; Romaine *v.* State, 7 Ind. 63; Stewart *v.* State, 13 Ark. 720; Maize *v.* Sewell, 4 Blackf. (Ind.) 447; Front *v.* Williams, 29 Ind. 18.

§ 77. **Nature of the Opinion which Disqualifies.** — By the common law the fact that a venire-man had *declared* his opinion that the accused was guilty, that he would be hanged, and the like, was good cause of challenge,[1] unless it should appear that the declaration was made from his own knowledge of the cause, and not out of any ill-will to the party.[2] This exception carries us back to the early days of jury trial, when jurors were summoned *de vicineto*, because they had knowledge of the controversy to be tried, and therefore sat in the character of *witnesses* as well as in that of triors. It is unsuited to modern conceptions, and, though approved in England as late as 1821,[3] and in a few instances in this country,[4] it is not in general the law with us; but here the question usually is whether, from any cause, the juror has such a bias of mind as may disqualify him from deciding impartially.[5] In some States the fact that the venire-man has been *summoned as a witness*, is a good cause of challenge.[6]

[1] 2 Hawk. P. C., chap. 43, § 28; Cook's Case, 13 How. St. Tr. 333; Barbot's Case, 18 How. St. Tr. 1233; Layer's Case, 16 How. St. Tr. 137; O'Coigly's Case, 26 How. St. Tr. 1227; Horne Tooke's Case, 25 How. St. Tr. 17.

[2] 2 Hawk. P. C., chap. 43, § 28. See also Brooke's Abr., Challenge, pl. 90, citing 21 Hen. VII. 29; Bac. Abr., Juries, E. 5; Rex *v.* Edmunds, 4 Barn. & Ald. 471, 490. See also Brook's Abr., Challenge, 55, and Fitzherbert's Abr., Challenge, 22, citing the charge of Babington to the triors in the Year Book, 7 Hen. VI. fol. 25; Trials per Pais (1725), 189.

[3] By Lord Tenterden in Rex *v.* Edmunds, *supra*.

[4] State *v.* Spencer, 21 N. J. L. 196, 198; State *v.* Fox, 29 N. J. L. 566; Pettis *v.* Warren, Kirby, 426. See also State *v.* Howard, 17 N. H. 171, 192.

[5] Trial of Aaron Burr, vol. I, p. 414, opinion of Marshall, C. J.; Blake *v.* Millspaugh, 1 Johns. (N. Y) 316; Durell *v.* Mosher, 8 Johns. (N. Y.) 445; Ex parte Vermilyea, 6 Cow. (N. Y.) 555; People *v.* Mather, 4 Wend. (N. Y.) 229, 241; People *v.* Van Alstyne, MS., cited in 6 Cow. (N. Y.) 565; People *v.* Vermilyea, 7 Cow. 108; Solander *v.* People, 2 Col. 48, 59; Boon *v.* Georgia, 1 Ga. 618, 622; State *v.* Williams, 3 Stew. (Ala.) 454; Waters *v.* State, 51 Md. 430; Hudgins *v.* State, 2 Ga. 173. If a juror has *knowledge* of the facts in controversy, he should be sworn and examined as a witness, so that he may be cross-examined, and so that his testimony shall not be given for the first time in the jury room out of the presence of the parties. Rex *v.* Perkins, Holt, 403; Hauser *v.* Com., 5 Am. L. Reg. (N. S.) 668; Dunbar *v.* Parks, 2 Tyler (Vt.), 217; Green *v.* Hill, 4 Tex. 465; United States *v.* Fourteen Packages, Gilp. (U. S.) 236; Fellows' Case, 5 Me. 333; Rondeau *v.* New Orleans &c. Co., 15 La. 160.

[6] Com. *v.* Joliffe, 7 Watts (Pa.),

§ 78. [Continued.] **Must be of a Fixed and Positive Character.** — Expressed in the varying terms of judicial opinions, the opinion concerning the merits of the case on trial which disqualifies the venire-man must be a *fixed*, *settled*, *absolute*, *positive*, *decided*, *substantial*, *deliberate* or *unconditional* opinion,[1] no matter from what *source* derived.[2] But the source is so far material

585; Atkins *v.* State, 60 Ala. 45; Commander *v.* State, 60 Ala. 1; State *v.* Underwood, 2 Overton (Tenn.), 92; Hook *v.* Page, 1 Overton (Tenn.), 250. But see Fellows's Case, 5 Me. 333; Handly *v.* Call, 30 Me. 9; Bell *v.* State, 44 Ala. 393; Rondeau *v.* New Orleans Co., 15 La. 160. Where this is so, the juror does not render himself competent by disclaiming all knowledge of the case. West *v.* State, 8 Tex. App. 119. Nor is the error of putting him on the jury cured by omitting to call him as a witness. Atkins *v.* State, 60 Ala. 45. But it has been held no cause of challenge that the venire-man was examined as a witness on a former trial of the same cause before arbitrators. Harper *v.* Keen, 11 Serg. & R. (Pa.) 280. Nor that, in a criminal case, he had been called on a former trial as a witness for the State to testify against the general character of the prisoner. Fellows's Case, 5 Me. 333.

[1] Schoeffler *v.* State, 3 Wis. 823; People *v.* King, 27 Cal. 507; Jackson *v.* State, 77 Ala. 18; People *v.* Bodine, 1 Den. (N. Y.) 308; State *v.* Howard, 17 N. H. 192; Staup *v.* Com., 74 Pa. St. 458; Rafe *v.* State, 20 Ga. 60; Osiander *v.* Com., 3 Leigh (Va.), 780; Armistead *v.* Com., 11 Leigh (Va.), 657; Lithgow *v.* Com., 2 Va. Cas. 297; Sprouce *v.* Com., 2 Va. Cas. 375; Jackson *v.* Com., 23 Gratt. (Va.) 919; Thompson *v.* Updegraff, 3 W. Va. 629; Brown *v.* Com., 2 Leigh (Va.), 769; State *v.* George, 8 Rob. (La.) 535; State *v.* Brown, 4 La. Ann. 505; Wright *v.* State, 18 Ga. 383; People *v.* Stout, 4 Park. Cr. (N. Y.) 71, 117. See also State *v.* Kingsbury, 58 Me. 238. Judges frequently use the term "opinion" as synonymous with "fixed opinion." See Reynolds *v.* State, 1 Ga. 222, with which decision compare Hudgins *v.* State, 2 Ga. 173, 180; Maddox *v.* State, 32 Ga. 581.

[2] Boon *v.* State, 1 Ga. 631; Logan *v.* State, 50 Miss. 269, 275; Lycoming Fire Ins. Co. *v.* Ward, 90 Ill. 545; Leach *v.* People, 53 Ill. 311; Smith *v.* Eames, 4 Ill. 76; Carson *v.* State, 50 Ala. 134; Hall *v.* State, 51 Ala. 9; State *v.* Davis, 14 Nev. 439, 450; Payne *v.* State, 3 Humph. (Tenn.) 375; Rice *v.* State, 1 Yerg. (Tenn.) 432; McGowan *v.* State, 9 Yerg. (Tenn.) 184; Coleman *v.* Hagerman, MS., cited in 6 Cow. (N. Y.) 564; People *v.* Mather, 4 Wend. (N. Y.) 229, 244; Greenfield *v.* People, 74 N. Y. 277; Norfleet *v.* State, 4 Sneed (Tenn.), 340; Sam *v.* State, 31 Miss. 480; Goodwin *v.* Blachley, 4 Ind. 438; Meyer *v.* State, 19 Ark. 156; Fouts *v.* State, 7 Ohio St. 471; Armistead *v.* Com., 11 Leigh (Va.), 657; Staup *v.* Com., 74 Pa. St. 458; People *v.* Mallon, 3 Lans. (N. Y.) 224; Lithgow *v.* Com., 2 Va. Cas. 297; Sprouce *v.* Com., 2 Va. Cas. 375; Conway *v.* Clinton, 1 Utah, 215; Wright *v.* Com., 32 Gratt. (Va.) 941; Jackson *v.* Com., 23 Gratt. (Va.) 919; Gardner *v.* People, 4 Ill. 84; Neely's Case, 13 Ill. 685. But see Clore's Case, 8 Gratt. (Va.) 607; Trial of Aaron Burr, p. 370;

that disqualifying opinions which have been derived from an *authentic source*,[1] as from hearing the *evidence upon a former trial* of the same case,[2] or from *conversations with witnesses*,[3] or

Moses *v.* State, 10 Humph. (Tenn.) 456; *s. c.* 11 Humph. (Tenn.) 232; McGowan *v.* State, 9 Yerg. (Tenn.) 184; Payne *v.* State, 3 Humph. (Tenn.) 375; Balbo *v.* People, 80 N. Y. 484, 492, 493, per Andrews, J.; State *v.* McClear, 11 Nev. 39, 67; Logan *v.* State, 50 Miss. 269, 275; State *v.* Brette, 6 La. Ann. 652; Gray *v.* People, 26 Ill. 344; Armistead *v.* Com., 11 Leigh (Va.), 657; Maddox *v.* State, 32 Ga. 581; Neely *v.* People, 13 Ill. 685; People *v.* Cottle, 6 Cal. 227; People *v.* Edwards, 41 Cal. 640; People *v.* Reynolds, 16 Cal. 128, 133; People *v.* Brotherton, 43 Cal. 530; *s. c.* 1 Green's Cr. L. 739; People *v.* Gehr, 8 Cal. 359; Ruff *v.* Rader, 2 Mont. 211. The juror's statement that the opinion is "unqualified" receives weighty consideration. State *v.* Gillick, 10 Iowa, 98. The source of the opinion is material only as throwing doubt upon its disqualifying character, where doubts arise on that question. Wormeley *v.* Com., 10 Gratt. (Va.) 658, 687. The numerous cases which hold that opinions based upon *rumor* merely do not disqualify, are reconcilable with the foregoing only upon the ground that such opinions are not, from their nature, of that fixed character which will not yield to evidence. Alfred *v.* State, 3 Swan (Tenn.), 581. See also Major *v.* State, 4 Sneed (Ky.), 597; People *v.* Hayes, Edm. Sel. Cas. (N. Y.) 582; Carson *v.* State, 50 Ala. 134; Curley *v.* Com., 84 Pa. St. 151. In the view of these cases "belief" is synonymous with a "fixed opinion." But see Neely *v.* People, 13 Ill. 685; Bales *v.* State, 63 Ala. 30, 36. In the California Penal Code "belief" is used as synonymous with "unqualified opinion." Cal. Penal Code, § 1074, subsec. 8.

[1] Troxdale *v.* State, 9 Humph. (Tenn.) 411.

[2] Ex parte Vermilyea, 6 Cow. (N. Y.) 555; People *v.* Vermilyea, 7 Cow. (N. Y.) 121; Grissom *v.* State, 4 Tex. App. 374; Jacobs *v.* State, 9 Tex. App. 278; Willis *v.* State, *Id.* 297; Jackson *v.* Com., 23 Gratt. (Va.) 919; Apperson *v.* Logwood, 12 Heisk. (Tenn.) 262; Lloyd *v.* Nourse, 2 Rawle (Pa.), 49; Garthwaite *v.* Tatum, 21 Ark. 336; Irvine *v.* Kean, 14 Serg. & R. (Pa.) 292; State *v.* McClear, 11 Nev. 39, 67; McGuffie *v.* State, 17 Ga. 497; State *v.* Webster, 13 N. H. 491; Studley *v.* Hall, 22 Me. 198; Sam *v.* State, 13 Smed. & M. (Miss.) 189. One who has formed an opinion from reading the evidence on the trial of an *accomplice* is so disqualified. Brown *v.* State, 70 Ind. 576. *Contra*, that the mere fact of having heard such evidence does not disqualify. Thompson *v.* State, 19 Tex. App. 593.

[3] People *v.* Johnson, 46 Cal. 78; Logan *v.* State, 50 Miss. 275; State *v.* George, 8 Rob. (La.) 535, 537; Goodwin *v.* Blachley, 4 Ind. 438; Dugle *v.* State, 100 Ind. 259 (by statute); Bishop *v.* State, 9 Ga. 121. But see State *v.* Guidry, 28 La. Ann. 630. The mere circumstance that a juror has listened to the testimony, or has conversed with witnesses in a case, is not a cause of challenge, if he has formed no opinion based upon such testimony or conversation. Page *v.* Com., 27 Gratt. (Va.) 954; Thomson *v.* People, 24 Ill. 60; Parchman *v.* State, 2 Tex. App. 228; Shields *v.* State, 8 Tex.

with a *party*,[1] or with one who heard the witnesses testify on a former trial or examination,[2] will be a good ground of challenge. Within this rule, a mere *impression*, not amounting to a fixed or settled opinion,[3] will not disqualify; though if, on examination, what the juror calls an impression appears to be a fixed opinion, the challenge will be sustained.[4] Conversely, what the juror calls an *opinion* may turn out on examination to be a slight *impression* which will yield to evidence, in which case the challenge will be overruled.[5] It is but another expression of the same idea that an *indefinite opinion* does not disqualify.[6] In short, the rule cannot be better stated than in the language of Chief Justice Shaw in the celebrated trial of Professor Webster for the murder of Dr. Parkman: "The opinion or judgment," said he, "must be something more than a vague impression, formed from casual observation with others, or from reading imperfect, abbreviated newspaper reports. It must be such an opinion upon the merits of the question as would be likely to bias or pervert a candid judgment upon a full hearing of the evidence. If one has formed what in some sense might be called an opin-

App. 427; Harper *v.* Kean, 11 Serg. & R. (Pa.) 280; Ray *v.* State, 2 Kan. 405; Lycoming Ins. Co. *v.* Ward, 90 Ill. 545; State *v.* Ayer, 23 N. H. 301; Com. *v.* Reid, 8 Phila. (Pa.) 385; United States *v.* Duff (U. S. Cir. Ct. S. D. New York, Jan. 1881, Benedict, D. J.), 6 Fed. Rep. 45; McCune *v.* Com., 2 Rob. (Va.) 777; Monroe *v.* State, 23 Tex. 10. Compare Moran *v.* Com., 9 Leigh (Va.), 651. Such conversations as to incidental or collateral matters do not disqualify. Walker *v.* State, 102 Ind. 502.

[1] Rogers *v.* Rogers, 14 Wend. (N. Y.) 131; Young *v.* Marine Ins. Co., 1 Cranch C. C. (U. S.) 452.

[2] Nelms *v.* State, 13 Smed. & M. (Miss.) 500, 504; Quesenberry *v.* State, 3 Stew. & Port. (Ala.), 308; Sam *v.* State, 13 Smed. & M. (Miss.) 189; Ned *v.* State, 7 Porter (Ala.), 187. But see Jackson *v.* Com., 23 Gratt. (Va.) 919.

[3] People *v.* Honeyman, 3 Denio (N. Y.), 121; People *v.* Symonds, 22 Cal. 348; Gold Mining Co. *v.* Nat. Bank, 96 U. S. 640; Noe *v.* State, 4 How. (Miss.) 330; White *v.* State, 52 Miss. 216; State *v.* Ward, 14 La. Ann. 673; State *v.* Coleman, 27 La. Ann. 691; State *v.* Hugel, 27 La. Ann. 375; State *v.* Medlicott, 9 Kan. 257; Travis *v.* Com., 106 Pa. St. 597.

[4] Greenfield *v.* The People, 74 N. Y. 277, 283.

[5] Payne *v.* The State, 3 Humph. (Tenn.) 375; State *v.* Wilson, 38 Conn. 126, 138; Norfleet *v.* The State, 4 Sneed (Tenn.), 340, 343; Palmer *v.* The People, 4 Neb. 68, 75; Com. *v.* Lenox, 3 Brewst. (Pa.) 249; United States *v.* Reynolds, 1 Utah, 319.

[6] State *v.* Hoyt, 47 Conn. 518.

ion, but which yet fell far short of exciting any bias or prejudice, he might conscientiously discharge his duty as a juror."[1]

§ 79. **Opinions which do not Disqualify.** — Lord Mansfield's standard that "a juror should be as *white as paper*,"[2] has long since been discarded as impracticable,[3] and that of Chief Justice Marshall, laid down in the trial of Aaron Burr, has been generally substituted in its place. "Were it possible," said he, "to obtain a jury without any prepossessions whatever, respecting the guilt or innocence of the accused, it would be extremely desirable to obtain such a jury: but this is perhaps impossible, and therefore will not be required. The opinion which has been avowed by the court is, that light impressions which may fairly be supposed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions which will close the mind against the testimony that may be offered in opposition to them, which will combat that testimony, and resist its force, do constitute a sufficient objection to him."[4] *Improper expressions* of opinion, shown to have been made in a spirit of levity, have been often overlooked;[5] but if the venire-man has talked about the case and

[1] Com. *v.* Webster, 5 Cush. (Mass.) 295, 297. See also State *v.* Pike (Sup. Ct. N. H.), 11 Am. L. Reg. 233, and particularly the opinion of Lomax, J., in Clore's Case, 8 Gratt. (Va.) 606, 617.

[2] Mylock *v.* Saladin, 1 W. Bl. 480, 481.

[3] McCausland *v.* McCausland, 1 Yeates (Pa.), 372, 378; O'Mara *v.* Com., 75 Pa. St. 424, 428; Reynolds *v.* United States, 98 U. S. 145, 156.

[4] Trial of Aaron Burr, vol. 1, p. 416. See also Boon *v.* State, 1 Ga. 618, 625; Nelms *v.* State, 13 Smed. & M. (Miss.) 500, 504; Smith *v.* Eames, 4 Ill. 76; Leach *v.* People, 53 Ill. 311; Black *v.* State, 42 Tex. 377; State *v.* Desmouchet, 32 La. Ann. 1241.

[5] John *v.* State, 16 Ga. 200; Monghon *v.* State, 59 Ga. 308; Com. *v.* Flanagan, 7 Watts & S. (Pa.) 415, 421; Lovett *v.* State, 60 Ga. 257; Simms *v.* State, 8 Tex. App. 230; Com. *v.* Hailstock, 2 Gratt. (Va.) 564; State *v.* Diskin, 35 La. Ann. 46; Johnson *v.* State, 11 Lea (Tenn.), 47. Compare State *v.* Revells, 35 La. Ann. 342; State *v.* Coleman, 20 S. C. 441. It was so held in the case of one of the venire-men summoned on the trial of Aaron Burr, who on his *voir dire*, admitted as follows: "I met an intimate friend to whom I observed that I had come to town with a hope of being placed on this jury, and if I were, I would hang Colonel Burr at once without further

has strong opinions, he should be rejected.[1] Accordingly it is no longer a ground of disqualification that the juror has *heard much* about the case, provided he has formed no opinion thereon;[2] nor that what he has heard has impressed itself upon his mind as a fact, provided the *impression* is such as will *readily yield to the evidence* presented in the case.[3] Of this character are many opinions formed from *reading newspapers*[4] and from other sources of so unsubstantial a character that a contradiction from the same source would be as readily accepted as true,[5] — but, as

inquiry. 1 Burr. Tr. 423., *Contra*, Brakefield *v.* State, 1 Sneed (Tenn.), 215. Compare State *v.* Coleman, 20 S. C. 441.

[1] Ward *v.* State, 19 Tex. App. 664.

[2] State *v.* Howard, 17 N. H. 171; State *v.* Potter, 18 Conn. 166; Com. *v.* Thrasher, 11 Gray (Mass.), 57.

[3] Scranton *v.* Stewart, 52 Ind. 68; McGregg *v.* State, 4 Blackf. (Ind.) 101; Van Vacter *v.* McKillip, 7 Blackf. (Ind.) 578; Morgan *v.* Stevenson, 6 Ind. 169; Rice *v.* State, 7 Ind. 332; Lithgow *v.* Com., 2 Va. Cas. 297, 313; Ulrich *v.* People, 39 Mich. 245; State *v.* George, 8 Rob. (La.) 535; State *v.* Coleman, 27 La. Ann. 691, 692; State *v.* De Rance, 34 La. Ann. 186; State *v.* Dugay, 35 La. Ann. 327; State *v.* Walton, 74 Mo. 270; State *v.* Baber, *Id.* 292. Compare State *v.* Johnson, 33 La. Ann. 889; Guetig *v.* State, 66 Ind. 94; Noe *v.* State, 92 Ind. 92; Conaster *v.* State, 12 Lea (Tenn.), 436. A juror whose frame of mind is such that he is in doubt as to whether the opinion he has formed would readily yield to the evidence ought to be excluded. Dejarnette *v.* Com., 11 Reporter, 653; *s. c.* 75 Va. 867. Compare Stout *v.* People, 4 Park. Cr. (N. Y.) 71, 111.

[4] State *v.* Meyer, 58 Vt. 457; Spence *v.* State, 15 Lea (Tenn.), 539; Bohanan *v.* State, 18 Neb. 57; State *v.* Wilson, 85 Mo. 130; Dolan *v.* State, 40 Ark 454; Allison *v.* Com., 99 Pa. St. 17; Gradle *v.* Hoffman, 105 Ill. 147; State *v.* Meaker, 54 Vt. 112; State *v.* Hoyt, 47 Conn. 518; People *v.* Oyer & Terminer Court, 83 N. Y. 436. *Contra*, in McHugh *v.* State, 38 Oh. St. 153, it is held that one who has formed and *expressed* an opinion of guilt, from newspaper accounts, in a capital case, is disqualified.

[5] People *v.* Stout, 4 Park. Cr. (N. Y.) 71; People *v.* Johnson, 2 Wheeler Cr. Cas. (N. Y.) 361, 369; Lowenberg *v.* People, 5 Park. Cr. (N. Y.) 414, 423; Eason *v.* State, 6 Baxter (Tenn.), 466, 477; State *v.* Potter, 18 Conn. 166; State *v.* Wilson, 38 Conn. 126; O'Connor *v.* State, 9 Fla. 215; Montague *v.* State, 17 Fla. 662; Bradford *v.* State, 15 Ind. 347; State *v.* Benton, 2 Dev. & B. (N. C.) 196; Morgan *v.* State, 31 Ind. 193; Clem *v.* State, 33 Ind. 418; Cluck *v.* State, 40 Ind. 263; Scranton *v.* Stewart, 52 Ind. 68; Fahnestock *v.* State, 23 Ind. 231; Meyer *v.* State, 19 Ark. 156; State *v.* Spaulding, 24 Kan. 1; People *v.* Reynolds, 16 Cal. 128; Shoetller *v.* State, 3 Wis. 823; People *v.* Mallon, 3 Laus. (N. Y.) 224; Lithgow *v.* Com., 2 Va. Cas. 297; Holt *v.* People, 13 Mich. 224; King *v.* State, 5 How. (Miss.) 730; State *v.* Flower, Walker (Miss.), 318; State *v.* Raymond, 11 Nev. 98; People *v.* King, 27 Cal. 507; People *v.* Williams, 17 Cal.

all opinions, founded on the belief of facts derived from the testimony of others, are of this character, it is obvious that we get no safe rule from the use of this expression. Such opinions may involve the rankest prejudice. Great care should therefore be exercised in interrogating the venire-man who entertains them, as to the strength of his belief in them.[1] Such opinions are frequently disregarded in the venire-man, on the ground of their being *hypothetical* opinions merely.[2]

142; State *v.* Morea, 2 Ala. 275; Hudgins *v.* State, 2 Ga. 133; State *v.* Cockman, 2 Winst. (N. C.) 95; State *v.* Ellington, 7 Ired. L. (N. C.) 61; Waters *v.* State, 51 Md. 430; *s. c.* 8 Reporter, 560; Little *v.* Com., 25 Gratt. (Va.) 921; United States *v.* McHenry, 6 Blatchf. (U. S.) 503; Brown *v.* Com., 2 Leigh (Va.), 769; McCune *v.* Com., 2 Rob. (Va.) 771; Irvine *v.* Lumbermen's Bank, 2 Watts & S. (Pa.) 190; Wright *v.* State, 4 Humph. (Tenn.) 194; Cooper *v.* State, 16 Ohio St. 328; Frazier *v.* State, 23 Ohio St. 551; State *v.* Dove, 10 Ired. L. (N. C.) 469; Hart *v.* State, 57 Ind. 102; State *v.* Bone, 7 Jones L. (N. C.) 121; State *v.* Collins, 70 N. C. 241; Sanchez *v.* People, 4 Park. Cr. (N. Y.) 535; Union Gold M. Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. 565; State *v.* Johnson, Walker (Miss.), 392; Sam *v.* State, 13 Smed. & M. (Miss.) 189; Lee *v.* State, 45 Miss. 114; State *v.* Bunger, 14 La. Ann. 461; State *v.* Lartigue, 29 La. Ann. 642; State *v.* Hinkle, 6 Iowa, 380; State *v.* Sater, 8 Iowa, 420; State *v.* Lawrence, 38 Iowa, 51; McGregg *v.* State, 4 Blackf. (Ind.) 101; Plummer *v.* People, 74 Ill. 361; Thompson *v.* State, 24 Ga. 297; People *v.* McCauley, 1 Cal. 379; Skinner *v.* State, 53 Miss. 399; State *v.* Hoyt, 47 Conn. 518. Within this category are impressions formed from vague and floating *rumors*, of whose authenticity the venire-man has no just grounds of belief. Payne *v.* State, 3 Humph. (Tenn.) 375; People *v.* O'Loughlin, 3 Utah, 133. It is obvious that this rule must be guardedly applied. Eason *v.* State, 6 Baxt. (Tenn.) 466, 477.

[1] Trimble *v.* State, 2 G. Greene (Ia.), 404; Armistead *v.* Com., 11 Leigh (Va.), 657; People *v.* Johnston, 46 Cal. 78; Gardner *v.* People, 4 Ill. 83; Rothschild *v.* State, 7 Tex. App. 519; Moses *v.* State, 10 Humph. (Tenn.) 456; Neely *v.* People, 13 Ill. 685; Brown *v.* State, 70 Ind. 577; State *v.* Ricks, 32 La. Ann. 1098. But see Epes' Case, 5 Gratt. (Va.) 676; Smith *v.* Com., 6 Gratt. (Va.) 696; Smith *v.* Com., 7 Gratt. (Va.) 593; Dejarnette *v.* Com., 75 Va. 867.

[2] Durell *v.* Mosher, 8 Johns. (N. Y.) 445. See also Com. *v.* Hughes, 5 Rand. (Va.) 655; State *v.* Farrow, 74 Mo. 531; People *v.* Johnson, 2 Wheeler Cr. Cas. 361, 369; People *v.* Fuller, 2 Park. Cr. (N. Y.) 16; Mann *v.* Glover, 14 N. J. L. 195; State *v.* Spencer, 21 N. J. L. 197; Burk *v.* State, 27 Ind. 430; State *v.* Williams, 3 Stew. (Ala.) 454; Osiander *v.* Com., 3 Leigh (Va.), 780; State *v.* Flower, Walker (Miss.), 318; People *v.* Murphy, 45 Cal. 137; Jackson *v.* Com., 23 Gratt. (Va.) 919; Moran *v.* Com., 9 Leigh (Va.), 651; Loeffener *v.* State, 10 Ohio St. 598; State *v.* Ostrander, 18 Iowa, 435; State *v.* Hoyt, 47 Conn. 518; Jackson *v.*

§ 80. Opinions which will require Evidence to Remove them. — Opinions which will *require evidence to remove them* disqualify the juror in the opinion of many courts.[1] Other courts, following the lead of Chief Justice Marshall in Burr's case, lay this test aside, reasoning that "the fact that it would take evidence to remove an opinion would appear to be only the natural adjunct of every opinion formed upon rumor."[2] But not only the opinion of Chief Justice Marshall,[3] but all other judicial opinion, so far as known, is to the effect that, if the venire-man has acquired that *fixed* and *positive* opinion which disqualifies him — if, in other words, he has made up his judgment in the case — the law will not trust him to change that opinion or that judgment after hearing the evidence.[4] A venire-man entertain-

Com., 23 Gratt. (Va.) 919, 928; Wright *v.* Com., 32 Gratt. (Va.) 941, 943; Balding *v.* State (Tex.), 9 S. W. Rep. 579.

[1] United States *v.* Wilson, Baldwin (U. S.), 85; People *v.* Mather, 4 Wend. (N. Y.) 229; Eason *v.* The State, 6 Baxt. (Tenn.) 466, 476; Com. *v.* Knapp, 9 Pick. (Mass.) 496; Cotton *v.* State, 31 Miss. 504; White *v.* Moses, 11 Cal. 68; Fahnestock *v.* State, 23 Ind. 231; Armistead *v.* Com., 11 Leigh (Va.), 657; People *v.* Mallon, 3 Lans. (N. Y.), 224; Stephens *v.* People, 38 Mich. 739; People *v.* Cottle, 6 Cal. 227; People *v.* Gehr, 8 Cal. 359; Conway *v.* Clinton, 1 Utah, 215; Rothschild *v.* State, 7 Tex. App. 519; United States *v.* Hanway, 2 Wall. Jr. (U. S.) 139; Ruff *v.* Rader, 2 Mont. 211; Moses *v.* State, 10 Humph. (Tenn.) 456; Sam *v.* State, 13 Smed. & M. (Miss.) 189; Alfred *v.* State, 37 Miss. 296; State *v.* Bunger, 11 La. Ann. 607; Collins *v.* People, 48 Ill. 145; Gray *v.* People, 26 Ill. 344; Cancemi *v.* People, 16 N. Y. 501; Olive *v.* State, 11 Neb. 1; Polk *v.* State, 45 Ark. 165 (overruling Casey *v.* State, 37 Ark. 67).

[2] Per Lewis, P. J., in State *v.* Barton, 8 Mo. App. 15, 17; *s. c.* 71 Mo. 288. See also State *v.* Core, 70 Mo. 491; State *v.* Greenwade, 72 Mo. 298; State *v.* Davis, 29 Mo. 397; State *v.* Carson, 50 Ala. 134; Bales *v.* State, 63 Ala. 30; Reynolds *v.* United States, 98 U. S. 145; Curley *v.* Com., 84 Pa. St. 151 (the juror Lorah); Ortwein *v.* Com., 76 Pa. St. 414; Estes *v.* Richardson, 6 Nev. 128; People *v.* King, 27 Cal. 507; Wilson *v.* State, 94 Ill. 299; Ogle *v.* State, 33 Miss. 383; Thomas *v.* State, 36 Tex. 316; Post *v.* State, 10 Tex. App. 579; O'Mara *v.* Com. 75 Pa. St. 424; Myers *v.* Com., 79 Pa. St. 308; State *v.* Lawrence, 38 Iowa, 51; State *v.* Medlicott, 9 Kan. 257; Guetig *v.* State, 66 Ind. 94; People *v.* Brown, 48 Cal. 253; People *v.* Welch, 49 Cal. 174; Stout *v.* State, 90 Ind. 1.

[3] 1 Burr Tr. 416.

[4] Com. *v.* Lesher, 17 Serg. & R. (Pa.) 155, 156; United States *v.* Wilson, Bald. C. C. (U. S.) 84; Rothschild *v.* State, 7 Tex. App. 519; People *v.* Johnson, 46 Cal. 78; State *v.* Ricks, 32 La. Ann. 1098; Burr's Trial, vol. I, p. 416. See also Fouts *v.* State, 7 Ohio St. 471; Trimble *v.* State, 2 G. Greene

ing such an opinion is not to be put upon the jury in the confidence that he can render an impartial verdict; since, under such circumstances, his effort to justify such a confidence might incline him too far in the opposite direction.[1] Therefore, if he has an opinion which it would require *strong evidence* to change, it is an abuse of discretion to admit him, although he may testify that he believes he can render an impartial verdict.[2] If his opinion of guilt is so strong that he can only admit the *possibility* of innocence, he must be rejected.[3] An *intimate* friend of the deceased, who has expressed the opinion that the defendant is guilty of his murder, is incompetent, although he states on his *voir dire* that he can give the accused a fair trial.[4]

§ 81. Newspaper Reports of Former Trial. — Again, one court has taken the view that opinion derived from reading news-

(Ia.), 404; Staup *v.* Com., 74 Pa. St. 458; People *v.* Gehr, 8 Cal. 359; Baker *v.* Harris, 1 Winst. (N. C.) 277; Conway *v.* Clinton, 1 Utah, 215; Cotton *v.* State, 32 Tex. 614; Black *v.* State, 42 Tex. 377; Goodwin *v.* Blachley, 4 Ind. 438; Irvine *v.* Kean, 14 Serg. & R. (Pa.) 292; Sam *v.* State, 13 Smed. & M. (Miss.) 189, 194; Alfred *v.* State, 37 Miss. 296; Logan *v.* State, 50 Miss. 275; State *v.* Bunger, 11 La. Ann. 607; Eason *v.* State, 6 Baxter (Tenn.), 466, 476; People *v.* Weil, 40 Cal. 268; Stephens *v.* People, 38 Mich. 739; State *v.* Miller, 29 Kan. 43; State *v.* Carrick, 6 Nev. 120. The *mind of the court* must be satisfied that the challenged juror is free from bias and prejudice and not merely that of the juror himself. Morton *v.* State, 1 Kan. 468; Cooper *v.* State, 16 Ohio St. 328, 332; People *v.* Woods, 29 Cal. 135. But see Thomas *v.* State, 36 Tex. 315. It seems that the fact that the venire-man has formed an *unqualified opinion* does not now disqualify in *California*. People *v.* Cochran, 61 Cal. 548.

[1] Rice *v.* State, 1 Yerg. (Tenn.) 432, 434; State *v.* Allen, 46 Conn. 531, 549. The penetrating mind of Aaron Burr, when on trial for treason against the United States, appreciated the force of this last proposition, as will be seen from the following extract from the report of his trial: "Mr. Bott (a juror): 'I have gone as far as to declare that Col. Burr ought to be hanged.' Mr. Burr: 'Do you think that such declarations would now influence your judgment? Would not the evidence alter your opinion?' Mr. Bott: 'Human nature is very frail. I know that the evidence ought, but it might or might not influence me. I have expressed myself in this manner, perhaps, within a fortnight; and I do not consider myself a proper juryman.' Mr. Burr: '* * * I will take Mr. Bott under the belief that he will do me justice.'" 1 Burr's Trial, 426.

[2] Palmer *v.* State, 42 Ohio St. 596 (Johnson, J., dissenting).

[3] Olive *v.* State, 11 Neb. 1.

[4] State *v.* Jackson, 37 La. Ann. 768.

paper reports of a former trial may or may not disqualify, according to the fullness of the reports, the attention with which they have been read, and other circumstances. Accordingly, we find that such opinions have operated to disqualify [1] or not,[2] according to the circumstances, and the extent to which the particular courts were disposed to relax the strict rule. Following back and forth the oscillations of the pendulum, we find that one court has hit upon the conception that the inquiry is to be addressed to the *present condition of the mind* of the venire-man, and that a disqualifying opinion, formerly entertained, which has changed and passed away, furnishes no ground of exclusion.[3] Another court has taken the view that, after a venire-man has expressed a positive opinion, he ought not to be heard on his *voir dire* to say that he *then* had no opinion.[4]

§ 82. Statutes removing Common-law Disqualification. — The advance in the popular intelligence and the wide dissemination of a knowledge of current events through the medium of the press, have rendered it impracticable to secure a jury of intelligent men for the trial of causes which have excited much public attention, and have resulted in the necessity of trying such causes before juries composed of the more ignorant portion of the community. To remedy this evil, statutes have recently been passed in several States, removing the common-law ground of

[1] Staup *v.* Com., 74 Pa. St. 458. Compare with this case Myers *v.* Com., 79 Pa. St. 308. See also State *v.* Clark, 42 Vt. 629; Greenfield *v.* People, 74 N. Y. 277 (compare Balbo *v.* People, 19 Hun (N. Y.), 424; *s. c.* 80 N. Y. 484); Carroll *v.* State, 5 Neb. 31; Smith *v.* State, 5 Neb. 181; Guetig *v.* State, 66 Ind. 94; State *v.* Culler, 82 Mo. 623. In *Ohio* a juror is rendered incompetent by statute who forms an opinion from reading reports of the testimony of witnesses as to the facts of the case. Laws 1872, p. 11. This includes *newspaper reports*. Frazier *v.* State, 23 Ohio St. 551.

[2] Grissom *v.* State, 4 Tex. App. 374. See also Smith *v.* Com., 6 Gratt. (Va.) 697; Smith *v.* Com., 7 Gratt. (Va.) 593; State *v.* Brown, 71 Mo. 454; Reynolds *v.* United States, 98 U. S. 145; Ortwein *v.* Com., 76 Pa. St. 414; Weston *v.* Com., 111 Pa. St. 251 (newspaper account of trial of one *jointly indicted* with defendant).

[3] Rothschild *v.* State, 7 Tex. App. 544; Grissom *v.* State, 8 Tex. App. 386, 396.

[4] Norfleet *v.* State, 4 Sneed (Tenn.), 340, 345.

challenge explained in the preceding sections, provided the venire-man shall declare on oath that he verily believes that he can render an impartial verdict according to the evidence, and that his previously formed opinion or impression will not bias or influence his verdict.[1] Such statutes have been held not unconstitutional as invading the right of trial by jury.[2]

§ 83. Declaration of Venire-man that he can render an Impartial Verdict.— It has come to this, under many recent statutes and holdings, especially in cases where the opinion was formed from newspaper reports, that it is not error to seat the venire-man, where he declares on oath that, notwithstanding his previous opinion, he believes that he can render an *impartial verdict* on the evidence, — a statement which the natural pride of many men would lead them to make.[3] But if he *hesitates* in saying

[1] Laws of New York 1872, chap. 475, p. 1133; Laws of Michigan 1873, act 117, p. 162; Laws Colo. 1877, § 872; Ill. Stat. 1885, p. 1422. The Michigan statute has been interpreted as declaratory of the previously existing law in that State. Stevens *v.* People, 38 Mich. 739; Ulrich *v.* People, 39 Mich. 245. See also Palmer *v.* People, 4 Neb. 68, 75, construing a similar statute in that State. For the construction of the New York statute see Thomas *v.* People, 67 N. Y. 218; Abbott *v.* People, 86 N. Y. 460; People *v.* Otto, 101 N. Y. 690; *s. c.* 5 North East. Rep. 788; People *v.* Crowley, 102 N. Y. 234; *s. c.* 6 North East. Rep. 384; People *v.* Carpenter, 102 N. Y. 238; *s. c.* 6 North East. Rep. 584; People *v.* Buddenseick (N. Y.), 9 North East. Rep. 44; Balbo *v.* People, 19 Hun (N. Y.), 421; *s. c.* 80 N. Y. 484; Phelps *v.* People, 6 Hun (N. Y.), 401; *s. c.* 72 N. Y. 334; Cox *v.* People, 19 Hun (N. Y.), 430; *s. c.* affirmed, 80 N. Y. 500; Manke *v.* People, 17 Hun (N. Y.), 410; Pender *v.* People, 18 Hun (N. Y.), 560; Greenfield *v.* People, 13 Hun (N. Y.), 242; *s. c. reversed*, 74 N. Y. 227. Cases construing the Nebraska statute: Carroll *v.* State, 5 Neb. 32; Smith *v.* State, 5 Neb. 181.

[2] Stokes *v.* People, 53 N. Y. 164, 173; Jones *v.* People, 2 Colo. 351; Cooper *v.* State, 16 Oh. St. 328.

[3] People *v.* Willett, 36 Hun (N. Y.), 500; People *v.* Casey, 96 N. Y. 115 (under N. Y. Code, § 376); Jones *v.* People, 6 Colo. 452 (under a statute); State *v.* Kilgore, 93 N. C. 533; State *v.* George, 37 La. Ann. 786; Allison *v.* Com., 99 Pa. St. 17 (Mercur, J., dissenting); State *v.* Spaulding, 24 Kan. 1; State *v.* Core, 70 Mo. 491; Zimmerman *v.* State, 56 Md. 536; Stout *v.* State, 90 Ind. 1; People *v.* Cornetti, 92 N. Y. 85; Murphy *v.* State, 15 Neb. 383; Doll *v.* State (Ohio), 15 North East. Rep. 293; State *v.* Sopher (Iowa), 30 N. W. Rep. 917; State *v.* Bryant (Mo.), 6 S. W. Rep. 102; State *v.* Walton, 74 Mo. 270; State *v.* Barton, 71 Mo. 288; State *v.* Brown, 71 Mo. 454; Hall *v.* Com. (Pa.), 12 Atl. Rep. 163; *s. c.* 11 Centr. Rep. 183.

whether his previously formed opinion would influence his verdict, he should be rejected.

And the judge may still, in his discretion, reject him. State *v.* Barnes, 34 La. Ann. 395 (Bermudez, C. J., and Levy, J., dissenting). The fact that a *large number* of venire men were called before the jury was finally obtained, does not show that the jury was prejudiced against the accused, or unfavorable to him, or moved by improper motives. People *v.* Beckwith (N. Y.), 15 North East. Rep. 53.

CHAPTER IV.

OF THE DETAILS OF PRACTICE IN CHALLENGING AND IMPANELING.

ARTICLE I. — CHALLENGING, IMPANELING, SWEARING.
ARTICLE II. — OBJECTIONS AND THE WAIVER AND REVIEW OF THE SAME.

ARTICLE I. — CHALLENGING, IMPANELING, SWEARING.

SECTION

88. Discretion of the Court in Respect of Impaneling the Jury.
89. [Continued.] Illustrations.
90. Power of Court to Discharge Jurors after they have been Sworn.
91. Time and Order of Challenging.
92. [Continued.] Right to hold Peremptory Challenges in Reserve.
93. Retraction of Challenge or of Acceptance.
94. Order of Challenging as between the Parties.
95. Mode of Impaneling
96. Impaneling by Lot.
97. Challenging the Polls of a Special Jury.
98. Ground of Challenge must be Specifically Stated.
99. Triors of Challenges.
100. The Court as a Substitute for Triors.
101. Examination of the *Venire-man* on the *Voir Dire*.
102. What Questions may be put to the *Venire-man*.
103. [Continued.] Questions Touching Religious or Political Opinions, Affiliations, etc.
104. Swearing Singly or in a Body.
105. Time of Swearing.
106. Reswearing the Jury.
107. Swearing for the Term.
108. Form of the Oath.
109. [Continued.] In Particular Cases.

§ 88. Discretion of the Court in respect of Impaneling the Jury. — In the superintendence of the process of impaneling the jury, a large *discretion* is necessarily confided to the judge, which discretion will not be revised on error or appeal, unless it appears

to have been grossly abused or exercised contrary to law.[1] The exercise of this discretion is generally upheld, in *excusing* juror, on grounds personal to him,[2] or because he is manifestly dis-

[1] Head *v.* State, 44 Miss. 731, 750. See also Gilliam *v.* Brown, 43 Miss. 641; McCarty *v.* State, 26 Miss. 302; Marsh *v.* State, 30 Miss. 627; State *v.* Marshall, 8 Ala. 302; Smith *v.* State, 55 Ala. 1, 10; McAllister *v.* State, 17 Ala. 434; Johnson *v.* State, 58 Ga. 491; Thomas *v.* State, 27 Ga. 287; Powers *v.* Presgroves, 38 Miss. 227; Grady *v.* Early, 18 Cal. 108; Garrison *v.* Portland, 2 Ore. 123; State *v.* Shelledy, 8 Iowa, 477; Chase *v.* State, 46 Miss. 683; State *v.* Ostrander, 18 Iowa, 435; Pierce *v.* State, 13 N. H. 536; Hubotter *v.* State, 32 Tex. 479; Ray *v.* State, 4 Tex. App. 450; Gardenhire *v.* State, 6 Tex. App. 147; Dixon *v.* State, 2 Tex. App. 530; Harkins *v.* State, 6 Tex. App. 452; Walker *v.* Kennison, 34 N. H. 257; Wilson *v.* State, 31 Ala. 371; Funkhouser *v.* Pogue, 13 Ark. 295; Heyl *v.* State (Ind.), 10 North East. Rep. 916; *s. c.* 109 Ind. 589; Deig *v.* Morehead (Ind.), 11 *Id.* 458; *s. c.* 110 Ind. 451. Even where a statute makes it "the imperative duty of the court, before administering to the juror the oath, to ascertain that he is possessed of the qualifications required by law," it is not necessary that it should appear, on appeal or error, that the judge plied him with questions; but if he was satisfied from his personal knowledge of the man, his answers to other questions, or his reputation for integrity and intelligence, or otherwise, that he was qualified, it will be sufficient, and his judgment will not be reviewed. James *v.* State, 53 Ala. 380.

[2] *Ante*, § 11; State *v.* Moncla (La.), 2 South. Rep. 814; Ray *v.* The State, 4 Tex. App. 450; Com. *v.* Livermore, 4 Gray (Mass.), 18; Atlas Mining Co. *v.* Johnston, 23 Mich. 37; Ware *v.* Ware, 8 Me. 42; Hurley *v.* State, 29 Ark. 17, 22; State *v.* Ward, 39 Vt. 225; Maner *v.* State, 8 Tex. App. 361; O'Brien *v.* Vulcan Iron Works, 7 Mo. App. 257; Watson *v.* State, 63 Ind. 548; State *v.* Dickson, 6 Kan. 209; Dodge *v.* People, 4 Neb. 220; Anderson *v.* Wasatch &c. R. Co., 2 Utah, 518. But *contra*, see Montague *v.* Com., 10 Gratt. (Va.) 767; Boles *v.* State, 13 Smed. & M. (Miss.) 398; Parsons *v.* State, 22 Ala. 50. The action of the court in excusing jurors will be regarded as proper, although no cause appears of record. State *v.* Whitman, 14 Rich. L. (S. C.) 113; State *v.* Breaux, 32 La. Ann. 222. It was so held where it appeared from the record that the juror was excused "to relieve him from embarrassment." John *v.* State, 16 Fla. 554. But see Montague *v.* Com., 10 Gratt. (Va.) 767. A sheriff has no power to excuse jurors. But an appellate court will not infer that a sheriff who has excused a portion of the panel did so from improper motives, nor that such action prejudiced any party. Ayers *v.* Metcalf, 39 Ill. 307. The power of the court to excuse a juror for satisfactory reasons, is not impaired by a statutory provision to the effect that "the first twelve persons who shall appear, as their names are drawn and called, and shall be approved as indifferent between parties, shall be sworn, and shall be the jury to try the cause." Atlas &c. Co. *v.* Johnston, 23 Mich. 37. A *struck juror* may be excused for a sufficient reason. Stewart *v.* S' 1 Oh. St. 66. But

qualified by reason of physical or mental infirmities,[1] — as where he is *deaf*,[2] *intoxicated*[3] or *ill*,[4] or because of serious *illness* in his *family*.[5] So, the court may, *ex mero motu*, examine venire-men for grounds of partiality and direct them to *stand aside*, although not challenged by either party,[6] and although not subject to challenge;[7] though in some jurisdictions venire-men thus stood aside are not *excused*, but may be called and tried upon challenges, if the regular panel is exhausted without securing a jury;[8] and the court has authority, either to examine the venire-man or any other *witnesses*, to ascertain such matters of fact as will enable it to exercise this power discreetly.[9] It may exercise this power where the venire-man is ignorant of the English language,[10] unless

where jurors are summoned upon a special *venire*, it has been held that no venire-man can be excused until his name is regularly called in court. Foster *v.* State, 8 Tex. App. 248; Robles *v.* State, 5 Tex. App. 346. Excusing *talesmen* who reside more than two miles from the court-house under a recent Ala. statute. Steel *v.* State (Ala.), 3 South. Rep. 547.

[1] Mansell *v.* Reg., 8 El. & Bl. 54, 80.

[2] Atlas Mining Co. *v.* Johnston, 23 Mich. 36; Jesse *v.* State, 20 Ga. 156.

[3] Bullard *v.* Spoor, 2 Cow. (N. Y.) 430; Pierce *v.* State, 13 N. H. 536, 555; Nolen *v.* State, 2 Head (Tenn.), 520.

[4] Jewell *v.* Com., 22 Pa. St. 94; Ray *v.* State, 4 Tex. App. 450; Hubbard *v.* Gale, 105 Mass. 511.

[5] Parsons *v.* State, 22 Ala. 50, 53. It has, however, been held that the juror should be excused only in those cases of such a serious character as to demand his personal attention, and that the decision of the court upon this point may be reviewed. Boles *v.* State, 13 Smed. & M. 398; Parsons *v.* State, *supra*.

[6] Atlas Mining Co. *v.* Johnston, 23 Mich. 36; Lore *v.* State, 4 Ala. 173; Pierce *v.* State, 13 N. H. 536; State *v.* Jones, 80 N. C. 415; State *v.* Prater (S. C.), 2 S. E. Rep. 108; State *v.* Dodson, 16 S. C. 459; State *v.* Coleman, 20 S. C. 448; White *v.* State, 52 Miss. 216; Stagner *v.* State, 9 Tex. App. 440, 455; Lewis *v.* State, 9 Smed. & M. (Miss.) 115; Marsh *v.* State, 30 Miss. 627; State *v.* Van Waggoner (La.), 3 South. Rep. 119. *Contra*, Van Blaricum *v.* State, 16 Ill. 364; Denn *v.* Pissant, 1 N. J. L. 220.

[7] Hartford Bank *v.* Hart, 3 Day, 491; Goodrich *v.* Burdick, 26 Mich. 39; State *v.* Lewis, 28 La. Ann. 84; State *v.* Williams, 30 Me. 484; Watson *v.* State, 63 Ind. 548; Stout *v.* Hyatt, 13 Kan. 232; Atchison &c. R. Co. *v.* Franklin, 23 Kan. 75.

[8] Boardman *v.* Wood, 3 Vt. 570, 577; United States *v.* Watkins, 3 Cranch C. C. (U. S.) 578; State *v.* Howard, 17 N. H. 171, 180. See in this connection *ante*, § 49.

[9] State *v.* Benton, 2 Dev. & B. (N. C.) 196, 221; White *v.* State, 52 Miss. 217; Pierce *v.* State, 13 N. H. 536.

[10] Atlas Mining Co. *v.* Johnston, 23 Mich. 36; O'Neil *v.* Lake Superior Iron Co. (Mich.), 35 N. W. Rep. 162; State *v.* Rosseau, 28 La. Ann. 579; People *v.* Arceo, 32 Cal. 40; State *v.* Marshall, 8

in the particular jurisdiction this constitutes no disqualification:[1] and, in capital cases, where the venire-man discloses a fixed opinion against capital punishment:[2] and, according to a case applicable to a period in our political history through which we have happily passed, where the venire-man entertains a present and unrelenting hostility against the government of the United States.[3] Caution should obviously be observed in the exercise of this discretion; since, at least under some systems, by excusing or discharging a great number of the regular panel, the court and the parties may be driven to filling it up by summoning talesmen from that well-known disreputable class of court idlers called "professional jurors."[4] A remedy for excusing an unreasonable number of venire-men, thereby reducing the panel below the number required to make a jury, has been conceded in one jurisdiction to exist in the form of a challenge to the array of those remaining;[5] though the right to make this challenge is *waived* by objecting in another form, and if the jury are sworn without a challenge to the array, it seems that it becomes a legal jury, although the objection, taken in another form, was erroneously overruled.[6] The failure of the court to exercise this dis-

Ala. 302; State *v.* Guidry, 28 La. Ann. 630. In Campbell *v.* State, 48 Ga. 353, it was held that the court had no right to purge the panel of jurors, returned for service during the term, of such jurors as could neither write the English language nor read the Constitution of the United States, and of the State of Georgia. It was held that a challenge to the array after such purging ought to have been sustained. Whether this decision can be supported is doubtful. It is certainly true that the grounds upon which these jurors were excused do not constitute a cause of challenge. White *v.* State, 52 Miss. 216, 224; American Ins. Co. *v.* Mahone, 56 Miss. 180; Citizens' Bank *v.* Strauss, 26 La. Ann. 736; State *v.* Lewis, 28 La. Ann. 84; Com. *v.* Wunnemore, 1 Brewst. (Pa.) 356; *s. c.* 2 Brewst. (Pa.) 378. But it has been held that although a challenge is allowed upon this ground, a new trial will not be granted, unless it appears that the defendant has suffered in consequence of such ruling. Citizens' Bank *v.* Strauss, *supra*.

[1] *Ante*, §§ 10. 55.

[2] United States *v.* Cornell, 2 Mason (U. S.), 91; Waller *v.* State, 40 Ala. 325; Russell *v.* State, 53 Miss. 367; White *v.* State, 52 Miss. 216; Fortenberry *v.* State, 55 Miss. 403.

[3] Klinger *v.* State, 13 Wall. (U. S.) 257.

[4] State *v.* Ostrander, 18 Iowa, 435, 449; Bissell *v.* Ryan, 23 Ill. 566; People *v.* Honeyman, 3 Denio (N. Y.), 121.

[5] Smith *v.* Clayton, 29 N. J. L. 358.

[6] Smith *v.* Clayton, 29 N. J. L. 358; Gropp *v.* People, 67 Ill. 154; Emerick *v.* Sloan, 18 Iowa, 140; Suttle *v.* Batie,

cretion of standing jurors aside of its own motion, for a cause of challenge known to the court and to the parties, cannot, of course, be assigned for error; since the objection is waived by failing to challenge.[1] Moreover, statutes prescribing the formal details of impaneling are frequently regarded as *directory*, and hence as yielding to this judicial discretion, where no prejudice appears.[2]

§ 89. [**Continued.**] **Illustrations.**— It is within the discretion of the court to direct the names of twelve of the regular panel in attendance to be omitted in impaneling a jury for a given cause, — as, for example, where such jurors are deliberating in the jury room,[3] or have recently rendered a verdict in another case.[4] In the absence of statutory provisions, according to one view, after the jurors are returned into court, all subsequent proceedings in the process of impaneling the jury are left to the discretion of the court.[5] The court may, accordingly, in its discretion, when a case comes on for trial, break up and re-arrange the panels, if more than one is in attendance.[6] Within the scope of this discretion are such questions as the *order* in which the name of the jurors shall be called.[7] But the court cannot, of course, depart from the essential requirements of the law. Thus, where jurors have been summoned upon a special *venire* for the trial of a capital case, the court cannot take a portion of them for the trial of another case;[8] and a trial justice has no right,

1 Iowa, 141. A challenge to the array may be waived after it has been taken, by the challenging party consenting to the removal of the objectionable persons from the panel. Whitley *v.* State, 38 Ga. 50.

[1] State *v.* Benton, 2 Dev. & B. (N. C.) 196; Murphy *v.* State, 37 Ala. 142; Bellows *v.* Weeks, 41 Vt. 590; Young *v.* State, 23 Ohio St. 577; Skinner *v.* State, 53 Miss. 399; State *v.* Christian, 30 La. Ann. 367.

[2] Murray *v.* State (Tex.), 3 S. W. Rep. 104.

[3] State *v.* Pitts, 58 Mo. 556; Kimbrough *v.* State, 62 Ala. 248.

[4] Alexander *v.* Oshkosh, 33 Wis. 277.

[5] Walker *v.* Kennison, 34 N. H. 257.

[6] Watson *v.* Walker, 33 N. H. 131, 144; Ware *v.* Ware, 8 Me. 42; Durant *v.* Ashmore, 2 Rich. L. (S. C.) 184.

[7] State *v.* Sims, 2 Bailey (S. C.), 29; State *v.* Crank, 2 Bailey (S. C.), 66; Kleinback *v.* State, 2 Speers L. (S C.) 418; State *v.* Brown, 3 Strob. L. (S. C.) 508.

[8] Bates *v.* Bates, 19 Tex. 124.

of his own motion, without any exception being taken by either party, to quash a panel and issue a new *venire*.[1]

§ 90. Power of Court to Discharge Jurors after they have been Sworn. — Although there are some holdings to the contrary,[2] the sound and prevailing opinion is that the court is not bound to suffer the cause to proceed after discovering a fact going to the disqualification of a juror, in consequence of which any verdict which may be rendered may be set aside.[3] The obnoxious juror may be excluded,[4] although sworn, at any time before evidence has been introduced.[5] So, the court may discharge a

[1] Cross *v.* Moulton, 15 Johns. (N. Y.) 470.

[2] See State *v.* Williams, 3 Stew. (Ala.) 454; Ward *v.* State, 1 Humph. (Tenn.) 253; Smith *v.* State, 55 Ala. 1, 7; State *v.* Morea, 2 Ala. 275; Gearhart *v.* Jordan, 11 Pa. St. 325; State *v.* Stephens, 11 So. Car. 319; United States *v.* Randall, 2 Cranch C. C. (U. S.) 412.

[3] Mitchell *v.* State, 43 Tex. 512, 516; Wormeley's Case, 10 Gratt. (Va.) 658; Muirhead *v.* Evans, 6 Exch. 447. In this last case, it was discovered, during the examination of the first witness, that there were thirteen jurors in the box. It was impossible to ascertain which juror was last sworn. Twelve of this jury were afterwards re-sworn, and the trial of the case proceeded. This practice was held to be correct. See upon this point Davis *v.* State, 9 Tex. App. 634; Bullard *v.* State, 38 Tex. 504.

[4] State *v.* Reeves, 11 La. Ann. 685; Robinson *v.* State, 33 Ark. 180; State *v.* Vestal, 82 N. C. 563; State *v.* Vann, 82 N. C. 631; Nolen *v.* State, 2 Head (Tenn.), 520; Hines *v.* State, 8 Humph. (Tenn.) 597; State *v.* Cummings, 72 N. C. 469; Pannell *v.* State, 29 Ga. 681; Isaac *v.* State, 2 Head (Tenn.), 458; Lewis *v.* State, 3 Head (Tenn.), 127. The court may, in its discretion, give the prosecution in a criminal case the privilege to re-examine a juror after his acceptance by the State's attorney, but before his acceptance by the defendant. The allowance of a challenge for cause shown upon the re-examination constitutes no error. Belt *v.* People, 97 Ill. 461.

[5] Spoford's Case, Clayton, 78; People *v.* Damon, 13 Wend. (N. Y.) 351; Lewis *v.* State, 9 Smed. & M. (Miss.) 115; McGuire *v.* State, 37 Miss. 369; Tooel *v.* Com., 11 Leigh (Va.), 714; Spong *v.* Lesher, 1 Yeates (Pa.), 326; Smith *v.* State, 55 Miss. 513; State *v.* Adair, 66 N. C. 298; Com. *v.* Twombly, 10 Pick. (Mass.) 480, note; State *v.* Davis, 80 N. C. 412; Haynes *v.* Crutchfield, 7 Ala. 189; Edwards *v.* Farrar, 2 La. Ann. 307; Tweed's Case, 13 Abb. Pr. (N. Y.) (N. S.) 371, note; People *v.* Wilson, 3 Park. Cr. (N. Y.) 199; United States *v.* Morris, 1 Curt. C. C. (U. S.) 23; Gilliam *v.* Brown, 43 Miss. 641; Williams *v.* State, 32 Miss. 389; Cornelius *v.* State, 12 Ark. 782; Evans *v.* State, 6 Tex. App. 513; Stone *v.* People, 3 Ill. 326; Jefferson *v.* State, 52 Miss. 767; Jackson *v.* State, 51 Ga. 402; Dilworth *v.* Com. 12 Gratt. (Va.) 689, 705; Watkins *v.* State, 66 Ga.

juror who has been sworn, if it appear that he will be *physically unable* to sit through the trial.[1] The discharge or excusing of a juror after the jury has been sworn and charged with the prisoner, will not operate to discharge him, but will operate as a *mistrial* merely. A new jury may be called. The eleven who remain may,[2] except where the rule has been changed by statute,[3] be put upon the prisoner again, and he may be allowed to exercise upon them his right of challenge anew.

§ 91. Time and Order of Challenging. — There can be no challenge, either to the array or to the polls, until a panel sufficiently numerous to compose a full jury appears.[4] By the common law, all challenges must be made before the juror is sworn;[5] but statutes exist in several American jurisdictions which

601. It has been held by one court that the *sufficiency of the reasons* for such an exclusion will be examined on *appeal*, and unless they are found to be sound, the judgment will be reversed. Black *v.* State, 9 Tex. App. 328.

[1] Fletcher *v.* State, 6 Humph. (Tenn.) 249; Silsby *v.* Foote, 14 How. (N. Y.) 218; *s. c.* 1 Blatch. 444.

[2] Rex *v.* Edwards, Russ. & Ry. 223; *s. c.* 4 Taunt. 309; 3 Camp. 207; Rex *v.* Scalbert, 2 Leach C. C. 700; Greer *v.* Norvill, 3 Hill (S. C.), 262, 263. Upon the discharge of a jury after being charged with the prisoner, see notes to Rex *v.* Scalbert, *supra*, and to Rex *v.* Edwards, 3 Camp. 207; Rex *v.* Kinlock, 1 Wils. 157; *s. c.* Fost. Cr. L. 16; Wedderburn's Case, Fost. Cr. L. 23; Rex *v.* Delany, Jebb C. C. 106; Rex *v.* Barrett, Jebb C. C. 103.

[3] See Garner *v.* State, 5 Yerg. (Tenn.) 160; State *v.* Curtis, 5 Humph. (Tenn.) 601; Snowden *v.* State, 7 Baxter (Tenn.), 482.

[4] Clark *v.* Goode, 6 J. J. Marsh. (Ky.) 637, 638.

[5] Wharton's Case, Yelverton, 24; Vicars *v.* Langham, Hob. 235; Blewett *v.* Bainard, 1 Stra. 70; Tyndal's Case, Cro. Car. 291. However, the juror might be withdrawn by consent of the adverse party. Oates' Case, 10 How. St. Tr. 1082. A juror may be challenged for a cause happening since he was sworn. Co. Litt. 158. a.; Vicars *v.* Langham, Hob. 235; United States *v.* Watkins, 3 Cranch C. C. (U. S.) 441. Not so the panel; for as stated by Hobart, "no ill affection of the sheriff, arising since the jury sworn can make the jury suspected, that was impaneled before." Vicars *v.* Langham, Hob. 235. This is the practice in England at the present time. Reg. *v.* Sullivan, 1 Per. & Dav. 96; *s. c.* 8 Ad. & El. 831; Reg. *v.* Wardle, Car. & M. 647; Rex *v.* Despard, 2 Man. & Ry. 406, 409; Reg. *v.* Key, 3 Car. & K. 371; *s. c.* 15 Jur. 1065. The same rule prevails in some American jurisdictions. United States *v.* Watkins, 3 Cranch C. C. (U. S.) 443; Epps *v.* State, 19 Ga. 102; State *v.* Williams, 2 Hill (S. C.), 381; Ward *v.* State, 1 Humph. (Tenn.) 254; McFadden *v.* Com., 23 Pa. St. 12, 17;

authorize the court, for reasons satisfactory to itself, to hear any objection to a juror, even after he is sworn, before the jury is completed.[1] The challenge to the array and the challenge to the polls are taken separately. The challenge to the array always precedes challenges to the polls. If challenges to the polls are made without challenging the array, the right to challenge the array is waived.[2] So, the challenge for principal cause precedes the challenge to the favor.[3]

Queen *v.* Hepburn, 7 Cranch (U. S.), 290; State *v.* Anderson, 4 Nev. 265; Rash *v.* State, 61 Ala. 89; State *v.* Morea, 2 Ala. 275; State *v.* Patrick, 3 Jones L. (N. C.) 443; Nugent *v.* Trepagnier, 2 Martin (La.), 205; Com. *v.* Gee, 6 Cush. (Mass.) 174. Under this practice the rule is that challenges must be made as the jurors come to the book, before they are sworn. The moment the oath is begun it is too late; and the oath is begun by the juror taking the book, having been directed by the officer of the court to do so. Reg. *v.* Frost, 9 Car. & P. 129, 137. See also Brandreth's Case, 32 How. St. Tr. 755, 777; Morris' Case, 4 How. St. Tr. 1255; State *v.* Davis, 80 N. C. 412; Com. *v.* Marrow, 3 Brewst. 402. This differs from the Irish practice. By that practice it has been generally held that the oath is not commenced until after the clerk of the Crown has said: "Juror, look upon the prisoner: prisoner, look upon the juror." Reg. *v.* Hughes, 2 Craw. & Dix. Cir. 396. Likewise, if the juror is to *affirm*, after he has been called to his feet to take the affirmation, it is too late to challenge him. Com. *v.* Marrow, 3 Brewst. (Pa.) 402; *s. c. sub nom.* Com. *v.* Marra, 8 Phila. (Pa.) 440. In Drake *v.* State, 51 Ala. 30, the juror had been accepted, and, as he rose from his seat in the box to be sworn, the defendant challenged him peremptorily. It was held that the challenge was not taken too late. The point, however, that the swearing had begun was not raised.

[1] Stat. at Large, Minn. 1873, p. 1055, § 229; Gen. Laws Ore. 1872, Civ. Code, § 188; Comp. L. Nev. 1873, § 1958; Ark. Dig. Stat. 1874, § 1905; Miller's R. C. Ia. 1880, § 2769; Bullitt's Cr. Code Ky., p. 41, § 202; Cal. Penal Code, § 1068. See People *v.* Rodriguez, 10 Cal. 50. Or before evidence is introduced to the jury. Comp. L. Kan. 1879, § 4698; Code Ga. 1873, § 4681; R. S. Mo. 1879, § 1898. See also G. S. Mass., ch. 132, § 31; R. S. Me. 1871, ch. 82, § 77; Laws N. Y. 1881, ch. 442, § 371; Code Va. 1873, p. 1062, § 20; Rev. Stat. W. Va. 1879, ch. 109, § 24; Gen. Stat. R. I. 1872, p. 424, § 33.

[2] Cooley *v.* State, 38 Tex. 636, 638; People *v.* Roberts, 6 Cal. 214; People *v.* McKay, 18 Johns. (N. Y.) 218; Gropp *v.* People, 67 Ill. 154; St. Louis &c. R. Co. *v.* Casner, 72 Ill. 384; Mueller *v.* Rebhan, 94 Ill. 142; United States *v.* Loughery, 13 Blatch. (U. S.) 267; State *v.* Bryan, 40 Iowa, 379; State *v.* Davis, 41 Iowa, 311; State *v.* Davis, 14 Nev. 439, 448. A challenge to the polls cannot be taken upon grounds which would have supported a challenge to the array. Co. Litt. 157. b.

[3] Carnal *v.* People, 1 Park. Cr. (N. Y.) 272; Stout *v.* People, 4 Park.

§ 92. [Continued.] **Right to Hold Peremptory Challenges in Reserve.** — By the common law, a party is not compelled to make his peremptory challenges before his challenges for cause; but, after making his challenges for cause, he may hold his peremptory challenges in reserve up to the time of swearing the jury, to be used in excluding from the panel such jurors as, though challenged for cause, have been accepted, or such as for other reasons he may wish to exclude.[1] This is a very important

Cr. 71; Cancemi *v.* People, 16 N. Y. 501; People *v.* Freeman, 4 Den. (N. Y.) 9; People *v.* Honeyman, 3 Den. (N. Y.) 121; People *v.* Mather, 4 Wend. (N. Y.) 229. It is laid down in books of the common law that if a party has more than one cause of challenge, he must take them all at once. Co. Litt. 158. a.; Bac. Abr. Juries E. 11; Trials per Pais (1725), p. 149; 1 Chitty Cr. L. 545. The meaning of this rule seems to be that a party must prefer all of his challenges, which are of the same nature and triable by the same forum, *i.e.*, by the court, or by triors, at once. Mann *v.* Glover, 14 N. J. L. 195, 202; Carnal *v.* People, 1 Park. Cr. (N. Y.) 272.

[1] 4 Bl. Com. 353; 1 Chit. Cr. L. 545; Co. Litt. 158. a; Reg. *v.* Hughes, 2 Craw. & Dix Irish Cir. 396; Whelan *v.* Reg., 28 Up. Can. Q. B. 2; Hooker *v.* State, 4 Ohio, 348; State *v.* Fuller, 39 Vt. 74; Barber *v.* State, 13 Fla. 675; *s. c.* 1 Green Cr. L. Rep. 723; Cooley *v.* State, 38 Tex. 638; United States *v.* Butler, 1 Hughes (U. S.), 457. See Parkyn's Case, 13 How. St. Tr. 75; Cook's Case, 13 How. St. Tr. 313; Layer's Case, 16 How. St. Tr. 137; Barbot's Case, 18 How. St. Tr. 1233; O'Coigly's Case, 26 How. St. Tr. 1227; Jackson's Case, 25 How. St. Tr. 804; Rex *v.* Stone, 6 Term Rep. 527. In Brandreth's Case, 32 How. St. Tr. 773 (anno 1817), this principle was challenged by the attorney-general, but on grounds obviously untenable, as shown by the last preceding cases. In Massachusetts it was established by judicial decision that the right of peremptory challenge, if exercised at all, must be exercised in the first instance, before the juror is interrogated as to his bias or opinions. Com. *v.* Rogers, 7 Met. (Mass.) 500; Com. *v.* Webster, 5 Cush. (Mass.) 295 (overruling upon this point, Com. *v.* Knapp, 9 Pick. (Mass.) 496); Com. *v.* McElhaney, 111 Mass. 439. But this rule has been repealed and the common-law rule restored in that State by statute. Laws of Mass 1873, chap. 317, § 1. It was formerly held in Missouri that the trial court might compel both parties in a capital case to make, at the same time and once for all, the peremptory challenges allowed to each by law, each being ignorant of the challenges made by the other. State *v.* Hays, 23 Mo. 287. But now by statute (R. S. Mo. 1879, § 1905.), the prosecution is required to announce its challenges before the defendant can be required to make his. State *v.* Steeley, 65 Mo. 218; State *v.* Degonia, 69 Mo. 485. Calling over the names of those remaining unchallenged has been held to give the accused sufficient information as to whom the prosecution has challenged. Phillips *v.* State, 6 Tex. App. 44.

right; since the fact of having unsuccessfully challenged a venire-man for cause may have excited ill feeling in his breast against the challenging party, and it may be desirable to exclude him from the jury by a peremptory challenge. According to the American practice, and contrary to that in England, the swearing of the jury is generally deferred until a full jury has been procured. The jurors, as fast as they are accepted, are directed to take their places in the box. It often happens that much time is consumed in impaneling a jury, and that, during this time, a party may discover some reason for challenging peremptorily a juror who has been accepted. In many American jurisdictions it is held that he has no such right, but that all right of challenge is at an end as soon as the juror has taken his seat;[1] though the court may still, in the exercise of a *discretion*, for cause shown, *remove* the juror from the panel.[2] Other American authorities hold that the right of peremptory challenge should be kept open to the latest possible period, that is, until the actual swearing of the jury.[3]

[1] State *v.* Potter, 18 Conn. 166; Horbach *v.* State, 43 Tex. 242 (overruling on this point Cooley *v.* State, 38 Tex. 636; Hubotter *v.* State, 32 Tex. 479); Com. *v.* Marrow, 3 Brewst. (Pa.) 402, 412; Sparks *v.* State, 59 Ala. 82; State *v.* Cameron, 2 Chand. (Wis.) 172; Com. *v.* Rogers, 7 Metc. (Mass.) 500; State *v.* Hays, 23 Mo. 287; McMillan *v.* State, 7 Tex. App. 142; Smith *v.* Brown, 8 Kan. 609; State *v.* Anderson, 4 Nev. 265; State *v.* Roderigas, 7 Nev. 328; State *v.* Schutllin, 20 Ohio St. 233; Mitchell *v.* State, 43 Tex. 512; Wasson *v.* State, 3 Tex. App. 471; Taylor *v.* State, 3 Tex. App. 169; Baker *v.* State, 3 Tex. App. 525; Drake *v.* State, 5 Tex. App. 649.

[2] State *v.* Potter, 18 Conn. 166; Horbach *v.* State, 43 Tex. 242; Mitchell *v.* State, 43 Tex. 512; McMillan *v.* State, 7 Tex. App. 142; Baker *v.* State, 3 Tex. App. 525; Sparks *v.* State, 59 Ala. 82; Drake *v.* State, 5 Tex. App. 649. For a modified rule see Spencer *v.* DeFrance, 3 G. Greene (Ia.), 216.

[3] Hooker *v.* State, 4 Ohio, 348, 350; Beauchamp *v.* State, 6 Blackf. (Ind.) 299, 308; Munly *v.* State, 7 Blackf. (Ind.) 593; Morris *v.* State, 7 Blackf. (Ind.) 607; Wyatt *v.* Noble, 8 Blackf. (Ind.) 507; People *v.* Reynolds, 16 Cal. 128; People *v.* Ah You, 47 Cal. 121; Edelen *v.* Gough, 8 Gill, 87; Williams *v.* State, 3 Ga. 453, 459; Drake *v.* State, 51 Ala. 30, and Bell *v.* State, cited *Ibid.*, p. 31; Kleinback *v.* State, 2 Speers (S. C.), 418; Hendrick *v.* Com., 5 Leigh (Va.), 707; Jackson *v.* Pittsford, 8 Blackf. (Ind.) 194; Hunter *v.* Parsons, 22 Mich. 96; Johns *v.* People, 25 Mich. 500; O'Connor *v.* State, 9 Fla. 215; State *v.* Pritchard, 15 Nev. 74; *s. c.* 10 Reporter, 273; Jones *v.* Vanzandt, 2 McLean (U. S.), 611; People *v.* Kohle, 4 Cal. 199; Peo-

§ 93. **Retraction of Challenge or of Acceptance.** — In strict law a party cannot, after having once taken a peremptory challenge, retract it and accept the juror, so that it shall not be *counted* against him in reducing the number of peremptory challenges which he is allowed.[1] But this matter in modern practice yields to the *discretion* of the court;[2] and where the panel has been gone over without procuring a jury, the prisoner has been allowed to retract one of his challenges, in order that the challenged venire-man might be available to complete the jury.[3] A challenge to the array may be *waived* after allowance, by the challenging party, and he will be bound by such waiver, although the case for trial be a capital one.[4] But a prisoner having challenged a juror peremptorily, cannot subsequently withdraw the challenge and insist that he shall sit upon the jury, or substitute a challenge for cause, so that the peremptory challenge shall not be counted in reducing his number; although the grounds on which he seeks to challenge for cause may have come to his knowledge after the peremptory challenge had been taken.[5] When a venire-man has been challenged for favor and excluded, the challenging party cannot change his ground and say that he ought not to have been discharged; nor can he thereafter insist upon examining him on oath, to make it appear that he is really

ple *v.* Jenks, 24 Cal. 11; People *v.* McCarty, 48 Cal. 557; Lindsley *v.* People, 6 Park. Cr. (N. Y.) 223; Drake *v.* State, 51 Ala. 30. It is a necessary corollary of this rule that the court has a discretion to deny the right of peremptory challenge after the juror has taken his seat, but before the panel is sworn. Schumacher *v.* State, 5 Wis. 324. Under certain statutory systems the proper practice is for the clerk to draw twelve names from the box: for the court to permit the defendant separately to examine each juror whose name is so drawn, and exhaust his challenges for cause before challenging any one of the twelve peremptorily. People *v.* Scoggins, 37 Cal. 676; People *v.* Russell, 46 Cal. 121. See also Com. *v.* Hartzell, 40 Pa. St. 462: Lee *v.* Peter, 6 Gill & J. (Md.) 447.

[1] 2 Dyer, 198 b. pl. 51.

[2] Morrison *v.* Lovejoy, 6 Minn. 319; Santry *v.* State (Wis.), 30 N. W. Rep. 226.

[3] United States *v.* Porter, 2 Dall. (U. S.) 345. See also Garrison *v.* Portland, 2 Ore. 123.

[4] Pierson *v.* People, 79 N. Y. 424.

[5] State *v.* Price, 10 Rich. L. (S. C.) 351; State *v.* Coleman, 8 So. Car. 237; Rex *v.* Parry, 7 Car. & P. 838; Furman *v.* Applegate, 23 N. J. L. 28.

indifferent and therefore competent.[1] In general, it has been observed, permission to withdraw a challenge ought to be given cautiously; otherwise the right to *reject* may be converted into a right to *select*, which is contrary to its meaning and purpose.[2] It ought not to be permitted where it will operate as a fraud on the other party, who has exhausted his peremptory challenges.[3] On the other hand, it is held that a party may, for a proper reason, retract his acceptance of a juror, and challenge him for cause;[4] at least, it is within the discretion of the court to allow the party to challenge members of the panel after he has once passed them.[5] But if a known objection to a juror be improperly or capriciously kept back, the court may, in its discretion, refuse this right, on the ground that the right of challenge has been waived.[6]

§ **94. Order of Challenging as between the Parties.** — This, in like manner, seems to be committed to the discretion of the court, which discretion will not be reviewed,[7] unless it plainly appears that it has been abused to the prejudice of the party complaining.[8] In the absence of a contrary statute, the court may

[1] State *v.* Creasman, 10 Ired. L. (N. C.) 395.

[2] *Ante*, § 43.

[3] Com. *v.* Twitchell, 1 Brewst. (Pa.) 551.

[4] McFadden *v.* Com., 23 Pa. St. 12, 17; Smith *v.* State, 55 Ala. 1 (overruling Stalls *v.* State, 28 Ala. 25); Sparks *v.* State, 59 Ala. 82; State *v.* Adair, 66 N. C. 298; State *v.* Perkins, 66 N. C. 126; State *v.* Davis, 80 N. C. 412; Scripps *v.* Reilly, 38 Mich. 10.

[5] Fountain *v.* West, 23 Iowa, 10; Com. *v.* Piper, 120 Mass. 185; Hubotter *v.* State, 32 Tex. 479; Williams *v.* State, 3 Ga. 453, 459.

[6] McFadden *v.* Com., 22 Pa. St. 12, 17, *per* Black, C. J. See also the other authorities cited *supra*.

[7] Com. *v.* Piper, 120 Mass. 185; Tatum *v.* Preston, 53 Miss. 654; State *v.* Pike, 49 N. H. 406; Ossipe Man. Co. *v.* Canney, 54 N. H. 295; St. Anthony Falls W. P. Co. *v.* Eastman, 20 Minn. 277; Turpin *v.* State (Sup. Ct. Md., Oct. 1880), 2 Crim. L. Mag. 532.

[8] State *v.* Ivey, 41 Tex. 38; Dixon *v.* State, 2 Tex. App. 530; Ray *v.* State, 4 Tex. App. 450; State *v.* Cummings, 5 La. Ann. 330; State *v.* Florez, 5 La. Ann. 429; State *v.* Shelledy, 8 Iowa, 480; State *v.* Pierce, 8 Iowa, 231; State *v.* Boatwright, 10 Rich. L. (S. C.) 407; Schuffin *v.* State, 20 Ohio St. 233; State *v.* Dumphey, 4 Minn. 438; Driskell *v.* Parish, 10 Law Reporter, 395; Jones *v.* State, 2 Blackf. (Ind.) 475, 478; Williams *v.* State, 3 Ga. 453, 459; Beachamp *v.* State, 6 Blackf. (Ind.) 299. However, it has been considered that a departure from a well established practice might afford good cause

require the parties to take their peremptory challenges one at a time and alternately.[1] In such a case, according to some holdings, a failure of a party to challenge when his turn comes, is a *waiver* of his right of challenge at that time, in such a sense that it *counts* against him in reducing the number of peremptory challenges allowed him, as though he had actually made it.[2] But the waiver of the first challenge is not to be construed as a waiver of subsequent challenges.[3] Nor can the court fix up a rule or method of challenging which may operate to deprive the prisoner of his number of peremptory challenges without his consent. Thus, the court cannot, by arranging that the State shall challenge one and the prisoner thereafter two, make the prisoner's right of challenging *contingent* upon the State challenging in the first instance.[4]

for granting a new trial. State *v.* Florez, 5 La. Ann. 429. For illustrations of this, see State *v.* Pierce, 8 Iowa, 231; Dixon *v.* State, 2 Tex. App. 529; State *v.* Ivy, 41 Tex. 35. It has been held no abuse of discretion for the judge to compel either party, upon the full panel of twelve being presented to him, to strike off, then, once for all, every one to whom he has objection, granting him only the opportunity of objecting to new venire-men as fast as they shall be introduced to supply the places of those challenged off by himself or by his adversary. Tatum *v.* Preston, 53 Miss. 654; Hotz *v.* Hotz, 2 Ash. (Penn.) 245.

[1] Driskell *v.* Parish, 10 Law Reporter, 395.

[2] Patton *v.* Ash, 7 Serg. & R. (Pa.) 116; Com. *v.* Frazier, 2 Brewst. (Pa.) 490; Wenrick *v.* Hall, 11 Serg. & R. (Pa.) 153; Fountain *v.* West, 23 Iowa, 9. But see Schumacker *v.* State, 5 Wis. 324; Hartzell *v.* Com., 40 Pa. St. 462; Kleinback *v.* State, 2 Speers (S. C.), 418; Koch *v.* State, 32 Ohio St. 352; State *v.* Pritchard, 15 Nev. 74.

[3] Kennedy *v.* Dale, 4 Watts & S. (Pa.) 176; Fountain *v.* West, 23 Iowa, 9.

[4] Smith *v.* State, 4 G. Green (Iowa), 189. See also State *v.* Pritchard 15 Nev. 74. Under a statute requiring that the State shall first exhaust its peremptory challenges or waive the same, and the defendant afterwards (Iowa Rev. 1860, § 4780), the court cannot arrange an alternative order of challenging. State *v.* Bowers, 17 Iowa, 46. On the other hand, under a statute prescribing that "all challenges to an individual juror shall be taken first by the defendant, and then by the State, and each party shall exhaust all his challenges before the other begins" (G. S. Minn., chap. 106, § 32), it has been held erroneous to compel the defendant to exhaust all of his challenges to each and all of the persons upon the panel before the State began. The meaning of the statute was that the defendant should first exhaust all of his challenges to a single juror, who was then to be turned over to the State, if remaining upon the panel. State *v.* Smith, 20 Minn. 376.

§ 95. **Mode of Impaneling.**— At common law, for the purpose of ascertaining whether a full panel was present and of aiding the accused in making his challenges, the court, upon the request of the accused, would order the whole panel to be called over once in his hearing.[1] It is scarcely necessary to say that, under American constitutions, the prisoner is entitled to the assistance of *counsel* in making his challenges. In one American case, a *nisi prius* judge was found so ignorant as to deny this right, but his decision was reversed on appeal.[2] The right of counsel would obviously be abridged by rulings which would unnecessarily hamper them in discharging their duties toward their client. While a *nisi prius* court has held that counsel will not be permitted to argue before triors the question of the competency of a juror upon a challenge to the favor,[3] another has gone so far the other way as to hold that, where there are two counsel the hasty acceptance of a juror by one without consultation with the other, will not conclude the rights of the client, but if the acceptance be at once withdrawn, a peremptory challenge ought to be allowed.[4] At common law, jurors were separately accepted and sworn. The venire-man was presented to the accused or to his counsel, that a view of his person might be had. The officer of the court then looked first to the counsel of the prisoner, to know whether he wished to challenge him. He next turned to the counsel of the crown, to know whether the crown desired to offer a challenge; if neither made any objection, the oath was administered.[5] It seems that this rule of practice is

[1] Townly's Case, Foster C. L. 7; Layer's Case, 16 How. St. Tr. 132.

[2] State *v.* Cummings, 5 La. Ann. 330, 332.

[3] Joice *v.* Alexander, 1 Cranch C. C. (U. S.) 528.

[4] Clarke *v.* Goode, 6 J. J. Marsh. (Ky.) 637, 638.

[5] Brandreth's Case, 32 How. St. Tr. 755, 771; Layer's Case, 16 How. St. Tr. 135. This has been held to be the proper practice under statutes in *Texas* (Pasch. Dig. Tex. Stat., § 2034; Tex. Code Cr. Proc., § 556; Horbach *v.* State, 43 Tex. 242, 260, overruling Cooley *v.* State, 38 Tex. 633, 639. The case of Horbach *v.* State, *supra*, is regarded as settling the practice in Texas. Mitchell *v.* State, 43 Tex. 512; Wasson *v.* State, 3 Tex. App. 474; Taylor *v.* State, 3 Tex. App. 169, 199; Baker *v.* State, 3 Tex. App. 525; Hardin *v.* State, 4 Tex. App. 355; Drake *v.* State, 5 Tex. App. 649; Ray *v.* State, 4 Tex. App. 450; Garza *v.* State, 3 Tex. App. 286. See in this connection

one of those which yield to judicial discretion; though we find that it has been held that, although the practice has been to call a certain number of jurors at a time, for the purpose of putting them upon the parties, the court may call a greater or a less number and require the parties to pass upon them.[1]

§ 96. **Impaneling by Lot.**— Under some statutory systems, each jury is selected by lot from the whole number summoned. The names of the *venire-men* are written upon slips of paper, which, after being folded, are placed in a box. When the case is called, the twelve whose names are first drawn from the box, if present, and not challenged or excused, are sworn. This statutory form must be followed,[2] although slight and immaterial departures will be tolerated.[3] A juror who does not appear when drawn, may be refused his seat, although he appears and answers before the drawing is completed.[4] If, in compliance with the statute, his name is returned to the box, neither party can demand that he shall take his place upon the jury.[5] Unless there be a statute requiring the selection of jurors by lot, a party cannot demand this mode of impaneling.[6] For stronger reasons, if, without a statutory authorization, the clerk takes it upon himself to adopt a fortuitous mode of selection, a party cannot object that a *more* fortuitous mode of selection might have been adopted.[7]

Speiden *v.* State, 3 Tex. App. 156; West *v.* State, 7 Tex. App. 150; State *v.* Ivey, 41 Tex. 35; Griffin *v.* Stadler, 35 Tex. 695). And so in other States (Smith *v.* Brown, 8 Kan. 608; State *v.* Roderigas, 7 Nev. 328; Schufflin *v.* State, 20 Ohio St. 233; State *v.* Brown, 12 Minn. 538); though it has been disapproved in Wisconsin, on the ground that it would unnecessarily hamper the prisoner's right of peremptory challenge, by depriving him of adequate opportunity for comparison and choice. Lamb *v.* State, 36 Wis. 424. One State is found which requires jurors to be passed upon and accepted in panels of *four*, after twelve are in the box. Sterling Bridge Co. *v.* Pearl, 80 Ill. 250, 254.

[1] Walker *v.* Collier, 37 Ill. 362; Sellers *v.* State, 52 Ala. 368.

[2] Brazier *v.* State, 44 Ala. 387.

[3] People *v.* Rogers, 13 Abb. Pr. (N. S.) (N. Y.) 370.

[4] People *v.* Vermilyea, 7 Cow. (N. Y.) 369.

[5] People *v.* Larned, 7 N. Y. 445.

Territory *v.* Doty, 1 Pinney (Wis.), 396; State *v.* Green, 20 Iowa, 424.

[7] Benoway *v.* Conyne, 3 Chand. (Wis.) 214.

§ 97. Challenging the Polls of a Special Jury. — In some States, challenges may be made to the polls of a panel, arrayed for the purpose of striking a special jury, before the formality of striking begins, on the theory that the parties have a right to a panel of twenty-four impartial men from which to strike such as they will exclude.[1] This seems to be the safer and better practice; since the right of peremptory challenge does not exist in the case of a special or struck jury, the striking being substituted for this kind of challenge.[2] There seems to be no reason, in the nature of things, why the right of striking should displace the right of challenging for cause.

§ 98. Ground of Challenge must be specifically stated. — Much particularity is required in setting out the grounds of challenge.[3] A challenge to the array must be *in writing*,[4] but challenges to the polls are taken *orally*. The grounds of all challenges must be specifically stated. To say, "I challenge the array," "I challenge for principal cause," or "I challenge to the favor," is in general not sufficient;[5] though in one jurisdiction the prac-

[1] Melson *v.* Dickson, 63 Ga. 682. To test their competency, the jurors may be examined upon the *voir dire* before the striking begins. Howell *v.* Howell, 59 Ga. 145.

[2] See Rex *v.* Despard, 2 Man. & Ry. 406, 410; *s. c. sub nom.* But see Barrett *v.* Long, 8 Irish L. 331; *s. c.* 7 Irish L. 439; O'Connell *v.* Mansfield, 9 Irish L. 179; May *v.* Hoover (Ind.), 14 North East. Rep. 472; Branch *v.* Dawson (Minn.), 30 N. W. Rep. 545; Railroad Co. *v.* Stanley, 7 Oh. St. 155; State *v.* Moore, 28 Oh. St. 195; Thomp. & Mer. Jur., § 280; *ante*, § 7. Compare Schwenk *v.* Umstead, 6 Serg. & R. (Pa.) 351; McDermott *v.* Hoffman, 70 Pa. St. 31.

[3] Rex *v.* Edmunds, 4 Barn. & Ald. 471; Carmarthen *v.* Evans, 10 Mee. & W. 274; Brown *v.* Esmonde, Irish Rep. 4 Eq. 630; Reg. *v.* Hughes, 1 C. & K. 235; Pearse *v.* Rogers, 2 Fos. & F. 137.

[4] People *v.* Doe, 1 Mich. 453; Ryder *v.* People, 38 Mich. 269.

[5] Mann *v.* Glover, 14 N. J. L. 195, 203. See to this effect: People *v.* Reynolds, 16 Cal. 128; Freeman *v.* People, 4 Den. (N. Y.) 9; People *v.* Renfrow, 41 Cal. 37; People *v.* Walsh, 44 Cal. 440; *s. c.* 1 Green Cr. L. 487; State *v.* Knight, 43 Me. 11; Powers *v.* Presgroves, 38 Miss. 227; State *v.* Squaires, 2 Nev. 226; Paige *v.* O'Neal, 12 Cal. 483; Estes *v.* Richardson, 6 Nev. 128; State *v.* Chapman, 6 Nev. 320; State *v.* Raymond, 11 Nev. 98; People *v.* McGungill, 41 Cal. 429; People *v.* Hardin, 37 Cal. 258; People *v.* Dick, 37 Cal. 277; People *v.* Buckley, 49 Cal. 211; Wilson *v.* People, 94 Ill. 299; Cable *v.* State, 8 Blackf. (Ind.) 531; Conkey *v.* Northern Bank, 6 Wis. 447; People *v.* Doe, 1 Mich. 453; State *v.* Dove, 10 Ired. L. (N. C.) 469.

tice of making the last kind of challenge by simply saying, "I challenge to the favor," has grown up and has finally been held sufficient.[1] In challenges to the polls, there is authority to the effect that such general statements of the *grounds* of challenge as that the venire-man "does not stand indifferent between the parties," or "entertains and has manifested a strong bias and prejudice against the defendant,"[2] or "is a neighbor to the plaintiff,"[3] or, "I challenge the juror for implied bias,"[4] — are not sufficient. The challenge should state facts which, if true, show a disqualification.[5] In ancient times the steps upon a challenge of a venire-man advanced with the regularity of pleadings, demurrers and counter-pleadings;[6] but this strictness has been generally relaxed in American courts.

§ **99. Triors of Challenges.** — The common-law practice of appointing triors to try challenges to the favor,[7] still prevails in some American jurisdictions. In some of these jurisdictions, the determination of the facts, under a challenge for *actual bias*, as contradistinguished from *implied bias*, is assigned to triors;[8]

[1] See People *v.* Freeman, 4 Den. (N. Y.) 9; People *v.* Lohman, 2 Barb. (N. Y.) 216; *s. c.* 1 N. Y. 280; People *v.* Honeyman, 3 Den. (N. Y.) 121; People *v.* Bodine, 1 Den. (N. Y.) 281; Rogers *v.* Rogers, 14 Wend. (N. Y.) 131; People *v.* Mather, 4 Wend. (N. Y.) 229; Mechanics' &c. Bank *v.* Smith, 19 Johns. (N. Y.) 115; Carnal *v.* People, 1 Park. Cr. (N. Y.) 272.

[2] Mann *v.* Glover, 14 N. J. L. 195.

[3] Jones *v.* Butterworth, 3 N. J. L. 345.

[4] People *v.* Reynolds, 16 Cal. 128.

[5] So a challenge for consanguinity or affinity must state *how* and *to whom* the venire-man is related. Stephenson *v.* Stiles, 3 N. J. L. 43.

[6] Rex *v.* Edmunds, 4 Barn. & Ald. 471, 474; Alleway *v.* Rowden, 2 Show. 422; Rex *v.* Worcester, Skin. 101; Rich *v.* Player, 2 Show. 261; Carmarthen *v.* Evans, 10 Mee. & W. 274. See also Clark *v.* Van Vranken, 20 Barb. (N. Y.) 278, where it was said that a challenge for principal cause was in the nature of a pleading which must be answered by denial or demurrer; also People *v.* Stout, 4 Park. Cr. (N. Y.) 71, 109; Ex parte Vermilyea, 6 Cow. (N. Y.) 555.

[7] Challenges to the *array* and for *principal cause* to the *polls*, were triable by the court. *Ante*, §§ 40, 52.

[8] Comp. L. Nev. 1873, § 1968; 2 Stat. at Large, Minn. 1873, p. 1055, § 234; Gen. Laws Ore. 1872 (Civil Code), § 168. See also Sess. Laws, Utah, 1878, § 246. Where, by consent of the parties, the court is substituted for triors upon a challenge for actual bias, its decision will be final. State *v.* Mims, 26 Minn. 183.

but, under the statutory systems prevailing in most American jurisdictions, both of these forms of challenge are tried by the court.[1] Under the old practice the court in the first instance appointed two unexceptionable persons to act as triors.[2] When one juror had been procured, he, with the two triors who had passed upon his qualifications, or with any other two unexceptionable persons selected by the court, passed upon the qualifications of the next venire-man called.[3] When two jurors had been procured, they ordinarily acted as triors for the remaining ten.[4] The triors were sworn thus: "You shall well and truly try whether A. [the venire-man] stands indifferent between the parties to this issue."[5] As the court is the trior of challenges for principal cause, it is obvious, on principle, that the court must decide all questions of fact which arise on the trial of such a challenge. But there is questionable authority to the effect that in such cases disputed questions of facts are submitted to triors.[6] The relation of the court and triors is analogous to that of court and jury. The court, upon a challenge to the favor, decides what evidence is admissible for the consideration of the triors; but its sufficiency or insufficiency as establishing the chal-

[1] New York Code Crim. Proc. (Laws 1881, chap. 442), § 376; Ark. Dig. Stat. 1874, § 1910; Bullitt's Ky. Cr. Code, p. 41, § 209. See also Comp. L. Ariz. 1877, chap. 11, § 319.

[2] Two officers of the court might be appointed. Rex *v.* Kirwan, cited in Finlay's Irish Dig., p. 347.

[3] People *v.* Dewick, 2 Park. Cr. (N. Y.) 230.

[4] Mima Queen *v.* Hepburn, 2 Cranch C. C. (U. S.) 3; United States *v.* Watkins, 3 Cranch (U. S.) 443; Boon *v.* State, 1 Ga. 618; Copenhaven *v.* State, 15 Ga. 22; McGuffie *v.* State, 17 Ga. 497; McCormick *v.* Brookfield, 4 N. J. L. 69. There are cases, however, in which all the jurors, sworn up to the time of a juror being challenged to the favor, have acted as triors of the challenge. Thus, in one case, five acted as triors (Joice *v.* Alexander, 1 Cranch C. C. (U. S.) 528); and in another, eight. Reason *v.* Bridges, *Id.* 478. But this practice has been strongly condemned. McCormick *v.* Brookfield, 4 N. J. L. 69, 72.

[5] Anon., 1 Salk. 152. In People *v.* Bodine, Edm. Sel. Cas. (N. Y.) 36, 38, the following form was used: "You shall well and truly try whether A. [the venire-man] stands indifferent between the people of New York and Mary Bodine, the prisoner at the bar, and a true verdict render according to the evidence."

[6] People *v.* Dewick, 2 Parker Cr. (N. Y.) 230. See also Solander *v.* People, 2 Colo. 48, 58.

lenge, is for their determination alone.[1] The triors decide according to their "discretion and conscience,"[2] and their decision is conclusive,[3] even where a principal cause of challenge is submitted to them (the parties not objecting), which might have been decided by the court. If the triors disagree, what takes place is analogous to a *mistrial;* there must be a *new trial* of the challenges before new triors,—the court appointing for that purpose the third or fourth jurors, if so many have been impaneled, or two unexceptionable bystanders.[4]

§ **100. The Court as a Substitute for Triors.** — In most American jurisdictions the practice of appointing triors has been discontinued, and the court acts as the trior of all challenges. Moreover, where parties have the right to demand triors, if neither party makes such a demand, and the evidence is submitted to the judge, they cannot afterwards object to his competency to decide the issue.[5] In such cases, the determination by the court of the questions of fact submitted to it is equally final with that of triors; it cannot be excepted to or reviewed upon error.[6]

[1] Freeman *v.* People, 4 Denio (N. Y.), 9, 35; People *v.* Honeyman, 3 Denio (N. Y.), 121; Smith *v.* Floyd, 18 Barb. (N. Y.) 522.

[2] Co. Litt. 156*a*.

[3] People *v.* Dewick, 2 Parker Cr. (N .Y.) 130; State *v.* Benton, 2 Dev. & B. (N. C.) 196; State *v.* Ellington, 7 Ired. L. (N. C.) 61; State *v.* Dove, 10 Ired. L. (N. C.) 469. Ex parte Vermilyea, 6 Cow. (N. Y.) 559; Freeman *v.* People, 4 Den. (N. Y.) 33; Schoeffler *v.* State, 3 Wis. 828.

[4] People *v.* Dewick, 2 Park. Cr. (N. Y.) 230. See also People *v.* Bodine, Edm. Sel. Cas. 38, 39. In the view of other courts, where the triors cannot agree, the challenge is not made out, and the venire-man must be sworn as a juror. United States *v.* Watkins, 3 Cranch C. C. (U. S.) 443, 579; Com. *v.* Fitzpatrick, 3 Clark (Penn.), 520. This is in conformity with the principle that a venire-man is *presumed* to be qualified and impartial until the contrary is shown, and that the burden of proving the challenge rests upon the party making it. Reynolds *v.* United States, 98 U. S. 145, 157; Holt *v.* People, 13 Mich. 224.

[5] Ex parte Vermilyea, 6 Cow. (N. Y.) 555; People *v.* Mather, 4 Wend. (N. Y.) 229, 240; People *v.* Rathbun, 21 Wend. (N. Y.) 509; O'Brien *v.* People, 36 N. Y. 276; Stout *v.* People, 4 Parker Cr. (N. Y.) 132; People *v.* Doe, 1 Mich. 451; Wirebach *v.* First Nat. Bank, 12 Reporter, 571.

[6] Stout *v.* People, 4 Parker Cr. (N. Y.) 132; Sanchez *v.* The People, 22 N. Y. 147; People *v.* Bodine, 1 Denio (N. Y.), 281, 309; State *v.* Wincroft, 76 N. C. 38; Dew *v.* McDivitt, 17 Am. L. Reg. 623; *s. c.* 31 Ohio St. 139; Morri-

It has been held[1] and denied[2] that, where the judge acts as the trior, his rejection of testimony offered in support of the charge is immaterial, and not subject to review. Where he thus acts, it is immaterial upon what *form* of challenge venire-men are set aside, provided they are incompetent. A judgment will not be reversed because a challenge, good for the favor, was sustained in form for principal cause.[3]

§ 101. Examination of the Venire-man on the Voir Dire. — Venire-men are examined one by one, and not by squads or platoons.[4] A *challenge* assigning some specific ground of disqualification, which ground is denied by the opposite party, must *precede* any examination of the venire-man; for, until this is made there is no issue for the decision of the triors or the court.[5] As a general rule, a party has no right to examine the venire-man by way of *fishing* for some ground of challenge;[6] but this rule should be accepted with caution.[7] In some States, a motion or request of a party that the venire-man be put to answer is understood to be in itself a challenge.[8] Within reasonable limits, each party has a right to put pertinent questions to show, not only that there exist proper grounds for a challenge for cause, but to elicit facts to enable him to decide whether or not

son *v.* Lovejoy, 6 Minn. 319; People *v.* Tweed, 11 Hun (N. Y.), 195; United States *v.* McHenry, 6 Blatchf. (U. S.) 503; Union Gold M. Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. 565; Stewart *v.* State, 13 Ark. 720.

[1] Costigan *v.* Cuyler, 21 N. Y. 134.

[2] Sehorn *v.* Williams, 6 Jones, L. (N. C.) 575; People *v.* Cotta, 49 Cal. 166.

[3] Reynolds *v.* United States, 98 U. S. 145.

[4] 1 Chit. Cr. L. 547; Arch. Cr. Pl. & Pr. 162; Williams *v.* State, 60 Ga. 367, 372; Driskell *v.* Parish, 10 Law Reporter, 395.

[5] 1 Chitty C. L. 546; State *v.* Creasman, 10 Ired. L. (N. C.) 395, per Ruffin, C. J.; United States *v.* Johnson, 1 Cranch C. C. (U. S.) 371; Matilda *v.* Mason, 2 Cranch C. C. (U. S.) 343; Lord *v.* Brown, 5 Den. (N. Y.) 345; Trullinger *v.* Webb, 3 Ind. 198; Powers *v.* Presgrove, 38 Miss. 227; Reg. *v.* Stewart, 1 Cox C. C. 174; Com. *v.* Thrasher, 11 Gray (Mass.), 55; State *v.* Flower, Walker (Miss.), 319; King *v.* State, 5 How. (Miss.) 730; State *v.* Zellers, 7 N. J. L. 220; and note by the reporter, *Ibid.* 223.

[6] Reg. *v.* Dowling, 3 Cox C. C. 509; Bales *v.* State, 63 Ala. 30, 38.

[7] People *v.* Brown (Cal.), 14 Pac. Rep. 90; People *v.* Hamilton, 62 Cal. 377.

[8] Howell *v.* Howell, 59 Ga. 145; Temple *v.* Sumner, Smith (N. H.), 226, 234; People *v.* Backus, 5 Cal. 275, 277.

he will exercise his right of peremptory challenge.[1] There is much authority for the conclusion that the trial judge has a discretion, either to examine the juror without putting him upon oath, and to reject him if he finds him disqualified, although no challenge has been made,[2] or to allow either party to interrogate him without first interposing a challenge; and this seems to be the general practice of the courts.[3] The challenge may be tried by the examination of the venire-man himself on the *voir dire*, or by the testimony of witnesses, or both.[4] It is a general rule that the challenged venire-man may be sworn as a witness to state or explain any facts which do not impeach his character or his motives;[5] but the parties may *waive* the administration of the oath, and if a party permits him to be examined without oath, making no objection thereto, his consent will be implied.[6] Upon this examination, the venire-man, like any other witness in a judicial investigation, answers under the risk of an indictment for perjury;[7] and he therefore may, as other witnesses may, *correct* any error in his previous statements on a re-examination.[8] As already seen,[9] the grounds of a challenge must ordinarily be stated when the challenge is made. If the challenged

[1] Watson *v.* Whitney, 23 Cal. 375; State *v.* Godfrey, Brayt. (Vt.) 170.

[2] United States *v.* Cornell, 2 Mason (U. S), 91.

[3] State *v.* Lautenschlager, 22 Minn. 514; Carnal *v.* People, 1 Park. Cr. (N. Y.) 272, 282.

[4] In an early case in Ohio, the rule was laid down that the party challenging a venire-man "on suspicion of bias or partiality" might examine him, *or* call witnesses, but that he could not do both. State *v.* Ankrim, Tappan (Ohio), 80. But this conception was plainly erroneous, and is universally discarded.

[5] 1 Chitty Cr. L. 550; Ogden *v.* Parks, 16 Johns. (N. Y.) 180; Fenwick *v.* Parker, 3 Code Rep. 254; People *v.* Fuller, 2 Parker Cr. (N. Y.) 16. Compare Joice *v.* Alexander, 1 Cranch C. C. (U. S.) 528, a hasty *nisi prius* decision. In Connecticut, the practice has been to examine the challenged venire-man without putting him under oath, though it has been said that the court may, in its discretion, cause him to be sworn upon request, and that this will be done in cases of very grave importance. State *v.* Hoyt, 47 Conn. 518.

[6] Lord *v.* Brown, 5 Den. (N. Y.) 345, 348; Carnal *v.* People, 1 Park. Cr. (N. Y.) 272, 282; Trullinger *v.* Webb, 3 Ind. 198. But see State *v.* Flower, Walker (Miss.), 318; King *v.* State, 5 How. (Miss.) 730.

[7] State *v.* Howard, 63 Ind. 502.

[8] Hendrick *v.* Com., 12 Leigh (Va.), 708.

[9] *Ante*, § 101.

venire-man *admits* the truth of the grounds, he will not be examined on his *voir dire*, but the court will determine their sufficiency as matter of law.[1] So, whenever a good cause of challenge is interposed by one party and admitted by the other, there is nothing to try, and the venire-man must stand aside.[2] The court may conduct the examination for its own information,[3] though this cannot be done so as to deprive a party of his right to re-examination.[4] The court may exercise a sound legal discretion in respect of the pertinency of the questions put and the limits to which the examination shall be extended. The questions must be pertinent and of a nature to show that the venire-man is not sufficiently free from bias to sit as an impartial juror.[5]

§ 102. What Questions may be put to a Venire-man.— Questions tending to *degrade* the venire-man,[6] or to show him guilty of crime,[7] cannot be put. Anciently in England a venire-

[1] Morrison *v.* Lovejoy, 6 Minn. 319.

[2] State *v.* Lautenschlager, 22 Minn. 514.

[3] State *v.* Ludwig, 70 Mo. 412.

[4] Stephens *v.* People, 38 Mich. 739. An exception taken to the refusal of the court to permit a certain question to be put to a venire-man on the *voir dire*, may be waived by counsel omitting again to insist upon the exception when the court propounds a substitute. Loeffler *v.* Keokuk Packet Co., 7 Mo. App. 185.

[5] State *v.* Coleman, 8 So. Car. 237; Reg. *v.* Lacey, 3 Cox C. C. 517. See as to the mode of conducting such an examination, the judicious observations of Winkler, J., in Stager *v.* State, 9 Tex. App. 440.

[6] Anon., 1 Salk. 153; Farmers' Bank *v.* Smith, 19 Johns. (N. Y.) 115; Hudson *v.* State, 1 Blackf. (Ind.) 317; State *v.* Mann, 83 Mo. 590. Though, if the juror chooses to answer such questions, it is only a *waiver* of his *privilege* of refusal, and gives the prisoner no right to complain. Spruce *v.* Com., 2 Va. Cas. 375. It has even been held that a juror cannot be asked whether he has *subscribed money* towards carrying on the prosecution in a criminal case. Reg. *v.* Fitzpatrick, Crawf. & D. (Irish) 513. *Contra*, that he may be asked whether he belongs to an association for the prosecution of crime. State *v.* Mann, 83 Mo. 590. See *ante*, § 66.

[7] As, for instance, whether he had aided or abetted the late *rebellion* against the United States. Burt *v.* Panjaud, 99 U. S. 180. And so, a juror might refuse to take the *test oath* prescribed by § 821 of the Revised Statutes of the United States, designed to purge the panel of such jurors as had voluntarily engaged in the late rebellion. Atwood *v.* Weems, 99 U. S. 183. Compare United States *v.* Blodgett, 35 Ga. 336; United States *v.* Reynolds, 1 Utah, 319.

man could not be asked whether he had expressed a belief that the accused was guilty, would be hanged, or the like; since to prejudge a man of a heinous matter was scandalous, and such a question tended to degrade the venire-man.[1] This rule, which was more tender to the feelings of the venire-man than to the rights of the accused, has been unwisely adopted to some extent in this country;[2] but, as it was founded on a principle of the common law which has not been generally admitted with us, namely, that the expression of an opinion unaccompanied with personal ill-will is no ground of challenge,[3] it has not generally been followed in this country.[4] In civil cases venire-men may be questioned on their oath as to whether or not they have formed or expressed an opinion in reference to the case,[5] or whether they have "made up their minds" about the case.[6] *Hypothetical questions*, that is, questions as to what the juror *would* or would not decide in a supposed state of the evidence, — are not allowed.[7] The court may restrict the form of the questions, so that they shall not be

[1] Cook's Case, 13 How. St. Tr. 334; Rex *v.* Edmunds, 4 Barn. & Ald. 471, 492; Rex *v.* Kerwan, cited in Finlay's Irish Dig., p. 347; Reg. *v.* Hughes, 2 Craw. & Dix, Irish Cir. 396.

[2] State *v.* Baldwin, 1 Const. Rep. (S. C.) 289, 293; State *v.* Sims, 2 Bailey (S. C.), 29; State *v.* Spencer, 21 N. J. L. 197; State *v.* Fox, 25 N. J. L. 566.

[3] *Ante*, § 77; 2 Hawk. P. C., chap. 43, § 28.

[4] People *v.* Vermilyea, 7 Cow. (N. Y.) 108, 125; United States *v.* Fries, Whart. St. Tr. 610, 614: United States *v.* Callender, Whart. St. Tr. 688, 696; 1 Burr's Tr. 426, *et passim*. In a modern English case, the venire-man was thus questioned by counsel for the accused without opposition. Reg. *v.* Lacey, 3 Cox, C. C. 517.

[5] Spear *v.* Spencer, 1 G. Greene (Ia.), 535. See also Dew *v.* McDivitt, 31 Ohio St. 139; *s. c.* 17 Am. L. Reg. 621; Williams *v.* Godfrey, 1 Heisk. (Tenn.) 299. Compare, as to the ancient, restricted and obsolete practice, Anon., 1 Salk. 153; Pringle *v.* Huse, 1 Cow. (N. Y.) 432.

[6] Houston *v.* Terrell (Tex.), 7 S. W. Rep. 670.

[7] Woolen *v.* Wire (Ind.), 11 North East. Rep. 236; State *v.* Arnold, 12 Iowa, 479; State *v.* Davis, 14 Nev. 439; State *v.* Leicht, 17 Iowa, 28; State *v.* Ward, 14 La. Ann. 673; State *v.* Bennett, 14 La. Ann. 651; State *v.* Bell, 15 La. Ann. 114. But see Chicago &c. R. Co. *v.* Adler, 56 Ill. 344; Chicago &c. R. Co. *v.* Buttolf, 66 Ill. 347; Galena &c. R. Co. *v.* Haslam, 73 Ill. 494; Richmond *v.* Roberts, 98 Ill. 472. In these cases it was held that the representative of the railroad company had a right to ask jurors this question: "If upon hearing the testimony, they should find it evenly balanced, which way they would be inclined to decide the case?"

unnecessarily *prolix* or minute in their details.[1] Where the statute prescribes the questions which shall be put, it rests in the *discretion* of the court to allow *other questions* to be propounded or to allow other evidence to be adduced; though authority is not quite harmonious on this point.[2] But it should be remembered in this connection that, according to the prevailing view, the causes of challenge prescribed by statutes are *not exclusive* of others.[3] Where a venire-man is challenged on the ground of bias, prejudice or opinion, a very wide range of inquiry is permissible, for the purpose of ascertaining the real extent to which his mind is affected for or against either party. Circumstances may be gone into, including those which relate to a period subsequent to his coming to court; [4] but *irrelevant questions*,— as whether the venire-man believes in a future state of rewards and punishments,[5] or whether he has formed or expressed an

[1] Thus, it is sufficient, on a trial for murder, to ask the venire-man whether he has formed or expressed the opinion that the prisoner is guilty, without extending it to the different grades of homicide. State *v.* Matthews, 80 N. C. 417. See also Burr's Tr. 418; United States *v.* Callender, Whart. St. Tr. 688.

[2] Com. *v.* Gee, 6 Cush. (Mass.) 174, 177, *per* Dewey, J.; Com. *v.* Thrasher, 11 Gray (Mass.), 55, 56; Pierce *v.* State, 13 N. H. 536; Jones *v.* State, 2 Blackf. (Ind.) 475, 478. *Contra*, Williams *v.* State, 3 Ga. 453, where Lumpkin, J., delivering the opinion of the court, held it to be improper to ask any other questions of a juror than those authorized by statute, with a view to ascertaining whether he is objectionable for favor. See also King *v.* State, 21 Ga. 220; Pines *v.* State, 21 Ga. 227; Monday *v.* State, 32 Ga. 672; Bishop *v.* State, 9 Ga. 121; Dumas *v.* State, 63 Ga. 600. Compare State *v.* Wilson, 7 Iowa, 407. The statutory form of questions may be varied, in order to make their import clear to the juror. Mitchell *v.* State, 22 Ga. 211; Henry *v.* State, 33 Ga. 441; Carte *v.* State, 56 Ga. 463.

[3] Block *v.* State, 100 Ind. 357; Lester *v.* State, 2 Tex. App. 433; Williams *v.* State, 44 Tex. 34; Caldwell *v.* State, 41 Tex. 86; Etheridge *v.* State, 8 Tex. App. 133. Compare Jones *v.* State, 8 Tex. App. 648; Hanks *v.* State, 21 Tex. 526. A statute which prescribes that on giving an affirmative answer to a prescribed question, the venire-man "shall be discharged," is mandatory, and no further examination or explanation is permissible. Stagner *v.* State, 9 Tex. App. 440.

[4] See, for statements and illustrations of this doctrine People *v.* Bodine, Edm. Sel. Cas. 36, 77; *s. c.* 1 Denio (N. Y.), 281; People *v.* Honeyman, 3 Denio (N. Y.), 121, 124; Freeman *v.* People, 4 Denio (N. Y.), 9, 35; Smith *v.* Floyd, 8 Barb. (N. Y.) 522; Thompson *v.* People, 3 Park. Cr. (N. Y.) 467.

[5] State *v.* Hamilton, 27 La. Ann. 45*a*.

opinion as to the credibility of a particular witness,[1] are not allowed.

§ 103. [Continued.] **Questions touching Religious or Political Opinions, Affiliations, etc.** — Questions touching the *scruples* of the venire-man, whether religious or otherwise, if the answers would probably disclose facts affecting his impartiality as a juror, ought to be put.[2] So, on the trial of certain *foreigners*, it was held proper to ask the venire-man, suspected of belonging to the so-called *Know-Nothing* organization, whether he had taken an oath or obligation of such a character as caused a prejudice in his mind against foreigners;[3] and, on the trial of persons engaged in a riot between *foreign Roman Catholics* and *native Americans*, it was held that a venire-man could not refuse, on the ground that it would disgrace him, to answer whether he had any bias against Roman Catholics, or whether he belonged to the order of United Americans.[4] On the other hand, it has been held that, on a trial for participating in the destruction of a convent by mob violence (many of the witnesses being Roman Catholics), a venire-man could not be asked whether he entertained the opinion that a Roman Catholic was not to be believed on oath; whether the destruction of the building under certain circumstances constituted a crime;

[1] Com. *v.* Porter, 4 Gray (Mass.), 423. Where the issue to be tried, under an indictment for murder, arose on a special plea of former acquittal, it was held that the venire-man could not be asked whether he had formed or expressed an opinion as to the guilt or innocence of the accused as charged in the indictment. Josephine *v.* State, 39 Miss. 613.

[2] Jones *v.* State, 3 Blackf. (Ind.) 475, 478. See also Driskell *v.* Parish, 10 Law Reporter, 395. *Contra*, Reason *v.* Bridges, 1 Cranch C. C. (U. S.) 477, where on the trial of a petition for freedom, the court refused to allow a juror to be examined as to whether he was not a *Methodist*, and whether the Methodists had religious scruples touching the legality of slavery. But this, like many other cases in those reports, is of slight authority.

[3] People *v.* Keyes, 5 Cal. 347.

[4] People *v.* Christie, 2 Abb. Pr. (N. Y.) 256; *s. c.* 2 Park. Cr. (N. Y.) 579. But it has been held that a venire-man in a prosecution for counterfeiting, cannot be asked whether he has not taken an oath to acquit all persons of counterfeiting, and that he may properly decline to answer. Fletcher *v.* State, 6 Humph. (Tenn.) 249.

or whether such an offense ought to be punished by law, or in the same measure prescribed by law for other offenses of the same kind.[1] So, on the trial of one charged with being engaged in an illegal calling, a venire-man cannot be asked whether he would give less credit to the testimony of one proved to be engaged in such calling than to that of other persons.[2] But it has been held proper, on the trial of a white man for the murder of a negro, to ask venire-men whether they could, upon the same evidence, return the same verdict against a *white man* for killing a *negro* as for killing another white man.[3] In California, upon the trial of a *Chinaman* for a criminal offense, the following questions may be put to a venire-man: "Other things being equal, would you take the word of a Chinaman as soon as you would that of a white man?" "If the defendant, a Chinaman, should be sworn as a witness in his own behalf, would you give his testimony the same credit that you would give to the story told by a white person under the same circumstances?" [4]

§ **104. Swearing Singly or in a Body.** — Some writers cast doubt upon the question,[5] yet the common-law practice clearly was to swear each juror as soon as he was accepted.[6] By the American practice, the jurors are not generally sworn until a full jury is completed, and then they are sworn in a body.[7] But this practice is so far flexible that, unless a different rule is prescribed by statute, each juror may be sworn as he is accepted, or

[1] Com. *v.* Buzzell, 6 Pick. (Mass.) 153.

[2] United States *v.* Duff, 6 Fed. Rep. 45, 48. But see *ante*, § 73.

[3] Lester *v.* State, 2 Tex. App. 432. See also State *v.* McAfee, 64 N. C. 339. *Polygamist* not disqualified under Act of Cong. of March 22, 1882: People *v.* Hoyt, 3 Utah, 396.

[4] People *v.* Gar Soy, 57 Cal. 102; *s. c.* 23 Alb. L. J. 418.

[5] 1 Chit. Cr. L. 551; 2 Hale P. C. 293.

[6] Trials per Pais (ed. 1725), pp. 143, 150, 152; Joy on Confessions and Challenges, 220; 1 Chit. Cr. L. 54, 77; Count Conigsmark's Case, 9 How. St. Tr. 12; Cook's Case, 13 How. St. Tr. 318; Layer's Case, 16 How. St. Tr. 135, and especially the remarks of Mr. Justice Abbot in Brandreth's Case, 32 How. St. Tr. 694; State *v.* Potter, 18 Conn. 166, 176, per Williams, C. J.; Lamb *v.* State, 56 Wis. 424, 428, per Ryan, C. J.

[7] *Ante*, § 92.

the administration of the oath may be delayed until the jury is completed.[1] But, since in either case the parties must exercise their right of peremptory challenge before the jurors are sworn, it has been considered the better practice in criminal cases to have the jury full before any of them are sworn, so as to give the parties the benefit of their peremptory challenges down to the latest possible point of time.[2]

§ **105. Time of Swearing.** — In a civil case, the jury cannot be properly sworn until a plea has been filed and an *issue joined* thereon,[3] nor before the suit has been called for trial;[4] nor in a criminal case, before the accused has pleaded to the indictment.[5] And if the whole or a portion of them have been sworn before his arraignment, he may ask that they be resworn, though he *waives* the irregularity by not preferring the request.[6]

§ **106. Reswearing the Jury.** — Where, upon the trial of two persons jointly indicted, there is a *severance* after the jury and witnesses have been sworn, both the jury and the witnesses must be sworn again.[7] The better opinion,[8] though denied by one court,[9] is that, if the issue is changed by an *amendment* of the pleadings during the progress of the trial, a failure to reswear the jury will not be error, at least unless the complaining party

[1] People *v.* Reynolds, 16 Cal. 128; O'Connor *v.* State, 9 Fla. 215, 226.

[2] State *v.* Anderson, 4 Nev. 265; O'Connor *v.* State, 9 Fla. 215. Unless prescribed by statute, there is no rule of practice requiring *four* jurors to be called at a time, for the purpose of being sworn. According to that opinion, a greater or less number may be called at any one time, and the parties may be required to pass upon them. Walker *v.* Collier, 37 Ill. 362.

[3] Everhart *v.* Hickman, 4 Bibb (Ky.), 341; Clagget *v.* Force, 1 Dana (Ky.), 429; Shain *v.* Markham, 4 J. J. Marsh. (Ky.) 580; Hopkins *v.* Preston, 2 A. K. Marsh. (Ky.) 64; Miles *v.* Rose, Hemp. C. C. (U. S.) 37; Baltimore &c. R. Co. *v.* Christie, 5 W. Va. 325; Brown *v.* Warner, 2 J. J. Marsh. (Ky.) 39.

[4] Marshall *v.* Krugg, 2 A. K. Marsh. (Ky.) 36.

[5] Vezain *v.* People, 40 Ill. 397.

[6] *Ibid.*

[7] Babcock *v.* People, 15 Hun (N.Y.), 347.

[8] Williams *v.* Miller, 10 Iowa, 344 (overruling Cole *v.* Swan, 4 G. Greene, 32); Arnold *v.* Arnold, 20 Iowa, 273; Hinkle *v.* Davenport, 38 Iowa, 355.

[9] Kerschbaugher *v.* Slusser, 12 Ind. 453; Hoot *v.* Spade, 20 Ind. 326.

requests that this be done, which request is refused. But if the amendment does not *change the issues*, it is not necessary to re-swear the jury.[1]

§ **107. Swearing for the Term.** — There is some loose opinion to the effect that, where all the jurors selected and drawn are sworn at the commencement of the term, to try the several issues upon which they may sit as jurors during the term, this will be sufficient,[2] at least unless the complaining party insisted upon having the jury which was impaneled sworn in the particular case.[3] But this is clearly contrary to the course of the common law; and the better opinion is that, where a different practice is not prescribed by statute, it lacks the necessary solemnity, and each jury should be sworn to try the issues in each particular case.[4]

§ **108. Form of the Oath.** — Where the form of the oath is prescribed by statute, none other can be administered. The oath used at common law, as well as that prescribed by statute in *criminal cases*, is essentially different from that used in *civil cases*, and the better opinion therefore is that it is error in a criminal case to use that prescribed for civil cases,[5] though an objection for such an irregularity will not be available if taken

[1] Knowles *v.* Rexroth, 67 Ind. 59; Merrill *v.* St. Louis, 83 Mo. 244; *s. c.* aff'd. 12 Mo. App. 466.

[2] People *v.* Albany, 6 Wend. (N. Y.) 548.

[3] Hardenburgh *v.* Crary, 15 How. Pr. (N. Y.) 307.

[4] Barney *v.* People, 22 Ill. 160. This too much resembles the practice of the economical deacon who blessed the pork barrel instead of asking a blessing at each meal.

[5] State *v.* Rollins, 22 N. H. 528; Sutton *v.* State, 41 Tex. 513; Bray *v.* State, 41 Tex. 560. Where two oaths are prescribed by statute, one to be administered to jurors on the trial of "any civil action or proceeding," the other in criminal trials, the former oath must be used in a bastardy proceeding. "The use of the latter is confined exclusively to the trial of cases wholly and essentially criminal in their nature and character. The former is applicable, not only to the trial of civil actions, properly so called, but to all such other actions and special proceedings as, strictly speaking are neither civil nor criminal actions, and hence cannot properly be classified under either head." State *v.* Worthingham, 23 Minn. 528, 537. See also State *v.* Pate, Busb. 244.

after verdict.[1] Therefore, although the oath which was administered may not have conformed to the statutory form, yet it will be sufficient that the *record* states that the jury *were duly* sworn, and a party will not be permitted to contradict it.[2] In *civil cases*, the common-law form is: "You solemnly swear that you shall well and truly try the issues joined between A. B., plaintiff, and C. D., defendant, and a true verdict give according to the evidence."[3] Under many American State constitutions, as hereafter seen,[4] *jurors* in criminal cases are *judges of the law*, as well as of the fact. There is hence some opinion that it is necessary in a criminal case to swear the jury a true verdict to render *according to the law* and the evidence.[5] But it should be said that no authoritative common-law precedent sanctions such a form;[6] and as, in most of the American States, the jurors are bound to take the law from the court, it is apprehended that in most such jurisdictions, the common-law form need not be varied in this particular.[7]

[1] State *v.* Robinson, 36 La. Ann. 873; Seymour *v.* Parnell (Fla.), 2 South. Rep. 312; State *v.* Wilson, 36 La. Ann. 864. See also Harriman *v.* State, 2 G. Greene (Iowa), 285; Wrockledge *v.* State, 1 Clarke (Iowa), 167; Candler *v.* Hammond, 23 Ga. 493; Looper *v.* Bell, 1 Head (Tenn.), 373.

[2] Candler *v.* Hammond, 23 Ga. 493; Cornelius *v.* Boucher, 1 Ill. 12; Applegate *v.* Boyles, 10 Ind. 435; Looper *v.* Bell, 1 Head (Tenn.), 373. In any case, if a party would object to the form of the oath as actually administered, he must incorporate it into his bill of exceptions, in order that a court of error may see whether the form used was proper or not. Bartlett *v.* State, 28 Ohio St. 669, 672; Preston *v.* State, 8 Tex. App. 30; Dyson *v.* State, 26 Miss. 362; Barfield *v.* Impson, 1 Sm. & M. (Miss.) 326; Cato *v.* State, 9 Fla. 163; Weilborn *v.* Spears, 32 Miss. 139.

[3] 3 Bl. Comm. 365. It is sufficient if the jury are sworn "well and truly to try, and the truth to speak upon the issues joined." Burk *v.* Clark, 8 Fla. 9. Where a jury is sworn to try "*the* issue" in a case presenting several issues, the word "issue" will be taken collectively, all the issues being considered as one. Hatcher *v.* Fowler, 1 Bibb (Ky.), 337; Bate *v.* Lewis, 1 J. J. Marsh. (Ky.) 316; Pointer *v.* Thompson, 7 Humph. (Tenn.) 532. But see Adams *v.* State, 11 Ark. 466. The practitioner should be cautioned that this form may be modified by statute in his jurisdiction, and he should look to that.

[4] *Post*, § 2140, *et seq.*

[5] Patterson *v.* State, 7 Ark. 59; Sandford *v.* State, 11 Ark. 328; Bell *v.* State, 10 Ark. 536; Bivens *v.* State, 11 Ark. 455.

[6] See Trials per Pais (1725), pp. 192, 193.

[7] O'Connor *v.* State, 9 Fla. 215; State *v.* Jones, 5 Ala. 666.

§ 109. [Continued.] **In Particular Cases.**— On an inquiry of damages, or, to use the ancient form of expression, a *writ of inquiry*, after a judgment by default, the jurors are sworn not "to try the issues," but "to assess the plaintiff's damages," though an irregularity in this particular, will not reverse the judgment.[1] But where an issue has been joined, to swear a jury to inquire of damages, will be reversible error; since, in such a case, they are clearly not sworn to try the contested issues of fact.[2] The practice of swearing the jury, as well to try the issue of fact, as to inquire of the damages, on an issue of law previously found for the plaintiff, obtains only where the decision of the issue of law entitles the plaintiff to damages without regard to the trial of the issue of fact.[3] In suits on *penal bonds*, where breaches have been assigned, swearing the jury to inquire into the truth of the breaches, is equivalent to swearing them to try the issues.[4] And so, swearing them to try the issues joined, is equivalent to swearing them to inquire into the truth of the breaches; although strict practice would require them to be sworn to inquire into the truth of the breaches and to assess the damages as to the party in default, as well as to try the issues and assess the damages as to the defendants who have pleaded to the action.[5]

ARTICLE II. — OBJECTIONS AND THE WAIVER AND REVIEW OF THE SAME.

SECTION 113. Time of taking Objections to Irregularities.
114. Waiver of Causes of Challenge.
115. Waiver of Exceptions for Disallowance of Challenges.
116. Objections to Incompetency after Verdict.
117. Evidence in Support of such Objections.
118. Question, how viewed on Error or Appeal.
119. What the Record must show.
120. No Vested Right in a particular Juror.
121. Juror no Vested Right to serve.

[1] Colorado Springs *v.* Hewitt, 3 Colo. 275; Denny *v.* Hutcheson, 1 Bibb (Ky.), 576; Roberts *v.* Swearengen, Hard. (Ky.) 121.

[2] Williams *v.* Norris, 2 Litt. 157; Townsend *v.* Jeffries, 17 Ala. 276; Adams *v.* State, 6 Ark. 497, 505. But see Caldwell *v.* Irvine, 4 J. J. Marsh. (Ky.) 108.

[3] Swann *v.* Rary, 3 Blackf. (Ind.) 298, 300; Vaden *v.* Ellis, 18 Ark. 355.

[4] McCoy *v.* State, 22 Ark. 308.

[5] State *v.* Gibson, 21 Ark. 140.

§ 113. **Time of taking Objections to Irregularities.** — Irregularities in selecting the general jury list, in drawing the panel, and in summoning those whose names have been drawn, as already seen,[1] are properly objected to by a *challenge to the array*. Such an objection ought not to be listened to after trial begun, except for cogent reasons and upon a clear showing that it could not have been made sooner; though there is no doubt that the court may entertain it in its *discretion*.[2] As already seen,[3] in many jurisdictions the statutes governing these steps in the selection of a jury, are regarded as *directory* merely. In these and in other jurisdictions, the analogous doctrine exists that informalities of this kind will not be permitted to vitiate a verdict, although they did not sooner come to the knowledge of the complaining party, unless positive injury is shown to have accrued therefrom.[4] In like manner, a *known* or *obvious* irregularity in the pro-

[1] *Ante*, § 31, *et seq.*

[2] Dovey *v.* Hobson, 2 Marsh. 154; *s. c.* 6 Taunt. 460; State *v.* Stephens, 11 So. Car. 319; Steele *v.* Malony, 1 Minn. 347.

[3] *Ante*, §§ 33, 34.

[4] Doolittle *v.* State, 93 Ind. 272; Buford *v.* McGetchie, 60 Iowa, 298; Caldwell *v.* State, 12 Tex. App. 358; Page *v.* Danvers, 7 Metc. (Mass.) 326, 327. See also Reed *v.* State, 1 Tex. App. 1; Mikell *v.* State, 62 Ga. 368. The same rule was applied in the following cases where objection was made, after verdict, to the legality of the drawing. Ray *v.* State, 4 Tex. App. 450; Amherst *v.* Hadley, 1 Pick. (Mass.) 38; State *v.* Hascall, 6 N. H. 352; Bodge *v.* Foss, 39 N. H. 406; Pittsfield *v.* Barnstead, 40 N. H. 477; Wilcox *v.* School Dist., 26 N. H. 303; Gormley *v.* Laramore, 40 Ga. 253; Wentworth *v.* Farmington, 51 N. H. 128, 135; Hasselmeyer *v.* State, 1 Tex. App. 690; State *v.* Williams, 2 Hill (S. C.), 381; State *v.* Douglass, 63 N. C. 500; Anderson *v.* State, 5 Ark. 445; Walker *v.* Boston &c. R. Co., 3 Cush. (Mass.) 1, 19; State *v.* Beasley, 32 La. Ann. 1162; New York *v.* Mason, 4 E. D. Smith (N. Y.), 142; State *v.* Underwood, 6 Ired. L. (N. C.) 96; State *v.* Courtney, 28 La. Ann. 794; State *v.* Rigg, 10 Nev. 284; Com. *v.* Sallager, 3 Clark (Penn.), 127; People *v.* Cummings, 3 Park. C. (N. Y.) 343. And so with respect to objections affecting the validity of the summons. Bennett *v.* Matthews, 40 How. Pr. (N. Y.) 428; Vidal *v.* Thompson, 11 Mart. (La.) 23; Kennedy *v.* Com., 14 Bush (Ky.), 340; Daniel *v.* Frost, 62 Ga. 697; Stone *v.* People, 3 Ill. 326; State *v.* Boon, 80 N. C. 461; Bronson *v.* People, 32 Mich. 34; Fowler *v.* Middlesex, 6 Allen (Mass.), 92; Solander *v.* People, 2 Colo. 48; New York *v.* Mason, 4 E. D. Smith (N. Y.), 142; Dayharsh *v.* Enos, 5 N. Y. 581; Green *v.* State, 17 Fla. 669; Brunskill *v.* Giles, 9 Bing. 13; Rector *v.* Hudson, 20 Tex. 234; Jamesson *v.* Androscoggin R. Co., 52 Me. 412. A statute of Louisiana requires all objections to the manner of drawing juries, or to any defect or irregularity that can be pleaded against any

cess of impaneling must be objected to at the time when it is committed; it will be too late to make the objection for the first time on a motion for new trial [1] or in arrest of judgment.[2]

array or *venire*, to be urged on the first day of the term; otherwise such objections are considered as waived. State *v.* Thomas, 32 La. Ann. 349; State *v.* Given, 32 La. Ann. 782; State *v.* Harris, 30 La. Ann. 90. A statute of South Carolina provides that "no irregularity in any writ of *venire facias*, or in the drawings, summoning, returning or impaneling of jurors, shall be sufficient to set aside the verdict, unless the party making the objection was injured by the irregularity, or unless the objection was made before the returning of the verdict." See State *v.* Coleman, 8 So. Car. 237. Similar statutes are found in other States. See 1 Bright. Purd. (Penn.) Dig., p. 838, § 82; Code Va. 1873, p. 1062, § 21; Rev. Stat. W. Va. 1879, chap. 109, § 25; R. S. Wis. 1878, § 2881; Bush Dig. Fla., chap. 104, § 26; G. S. Mass. 1860, chap. 131, § 32; R. S. Me. 1871, chap. 82, § 78. That the name of the same juror appeared twice upon the *venire*, without any collusion or improper design, is no ground of error. McCarty *v.* State, 26 Miss. 302. Nor is it that the name of one of the jurors, who sat upon the trial of the case, was not upon the *venire* returned by the sheriff, where it appears that he had been summoned at the commencement of the term, and his name entered on the minutes and drawn from the box, like those of the other jurors. Thrall *v.* Smiley, 9 Cal. 529.

[1] Com. *v.* Stowell, 9 Metc. (Mass.) 572; Bristow's Case, 15 Gratt. (Va.) 634; Hardenburgh *v.* Crary, 15 How. Pr. (N. Y.) 307; State *v.* Slack, 1 Bailey (S. C.), 330; Clough *v.* State, 7 Neb. 320; Gardenhire *v.* State, 6 Tex. App. 147, 151; Munroe *v.* Brigham, 19 Pick. (Mass.) 368; Boyd *v.* State, 17 Ga. 194; State *v.* Ward, 2 Hawks (N. C.), 443; State *v.* Belcher, 13 So. Car. 459; Ray *v.* State, 4 Tex. App. 450; State *v.* Boon, 80 N. C. 461; *s. c.* 82 N. C. 637; Dayharsh *v.* Enos, 5 N. Y. 531; State *v.* Turner, 25 La. Ann. 573; Parsons *v.* Harper, 16 Gratt. (Va.) 64; Grant *v.* State, 3 Tex. App. 1; People *v.* Ransom, 7 Wend. (N. Y.) 417; Cole *v.* Perry, 6 Cow. (N. Y.) 584; Grant *v.* State, 3 Tex. App. 1; State *v.* Brown, 12 Minn. 538; Williams *v.* State (Ala.), 1 South Rep. 179; Brown *v.* Autrey (Ga.), 3 S. E. Rep. 669. It has been so held in a case of a talesman, summoned to complete a particular panel, being sworn for the term and allowed to sit in other cases (Howland *v.* Gifford, 1 Pick. (Mass.) 43, note). Where the judge, during the process of impaneling the jury, permits those who have been selected to go at liberty and mingle with the crowd, during a delay in the proceedings resulting from the summoning of talesmen, it is the duty of a party, having objections to such action of the court, to make them known at the time, or at least before the selection of jurors from the talesmen begins. Such objections will not avail, if held back until after the jury are sworn. James *v.* State, 53 Ala. 380; Robbins *v.* State, 49 Ala. 394. But see Grissom *v.* State, 4 Tex. App. 374. Allowing the jurors impaneled, but not sworn, to separate for the night is not an irregularity in civil cases. Miller *v.* Wilson, 24 Pa. St. 114; Spencer *v.* DeFrance, 3 G. Greene (Iowa), 216.

[2] State *v.* White, 35 La. Ann. 96.

§ 114. **Waiver of Causes of Challenge.** — A party is entitled to waive a cause of challenge which he may have against a juror, and suffer the juror to sit in the case,[1] and the other party can derive no advantage from such waiver.[2] So, if one party waive a cause which disqualifies the venire-man as against him, the other party cannot make the disqualification a ground of challenge.[3] If both the prisoner and the State's counsel waive an objection for bias, the judge cannot reject the *venire-man, sua sponte*.[4] As already seen, the right to challenge the array is *waived* by a challenge to the polls.[5] So, a right of challenge for cause, or what is in substance the same, an exception to the overruling of such a challenge, is waived by a peremptory challenge of the same juror.[6] But, if a challenge to the array has been once taken, an exception to the overruling of it is not *waived* by an effort to secure an impartial jury by challenges to the polls.[7] A *known* cause of challenge is always waived by withholding it, and raising it as an objection after verdict; since such a practice is incompatible with the good faith and fair dealing which should characterize the administration of justice.[8] Therefore, in order

[1] People *v.* Mather, 4 Wend. (N. Y.) 229, 246. Compare the old cases of Knyaston *v.* Shrewsbury, Andrews, 85; Anon., Anderson, 272; Alleway *v.* Rowden, 2 Show. 423.

[2] Thus, if the State have a cause of challenge, because the venire-man has a fixed opinion against capital or penitentiary punishment, it is a matter of choice with the prosecuting counsel whether he will challenge for this cause. Murphy *v.* State, 37 Ala. 142.

[3] Such as consanguinity or affinity. State *v.* Ketchey, 70 N. C. 621.

[4] Greer *v.* State, 14 Tex. App. 179.

[5] *Ante*, § 91; Co. Litt. 158. a.; Watkins *v.* Weaver, 10 Johns. 107; Tallman *v.* Woodworth, 2 Johns. 385. After a failure to make such a challenge at the proper time, any objection to the legality of subsequent proceedings must be addressed to the *discretion* of the court, which will not be exercised to the relief of the party complaining, in the absence of evidence showing some positive injury to have been suffered. Barton *v.* Quinn, Batty (Irish Rep.), 552.

[6] Ford *v.* Umatilla Co. (Ore.), 16 Pac. Rep. 33; Minich *v.* State, 8 Colo. 440.

[7] Clinton *v.* Englebrecht, 13 Wall. 434. An exception, formally taken to the decision of the court in disallowing challenge, is not waived by a negative answer to the inquiry of the court, at the conclusion of the impaneling, as to whether the parties have any objection to the jurors as they stand. Hathaway *v.* Helmer, 25 Barb. (N. Y.) 29.

[8] Dent *v.* Hurtford, 2 Salk. 645; Fox *v.* Hazelton, 10 Pick. (Mass.) 275, 278, opinion by Shaw, C. J.; Hallock *v.* Franklin, 2 Metc. (Mass.) 558; Lady Herbert *v.* Shaw, 11 Mod. 118; Falmouth *v.* Roberts, 9 Mee. & W. 469; Carew *v.* Howard, 1 Root, 323; Lisle

to make an objection to a juror available after verdict, the objecting party must *prove* that it was unknown to him, and that it would not have been disclosed to him by a proper inquiry before the jury was sworn.[1] For the purposes of this rule, the *knowledge* of the *attorney* is the knowledge of his *client*.[2] Hence,

v. State, 6 Mo. 426; Bell *v.* Howard, 4 Litt. 117; Craig *v.* Elliott, 4 Bibb, 272; Jordan *v.* Meredith, 1 Binn. (Pa.) 27; McCorkle *v.* Binns, 5 Binn. (Pa.) 340; Bellows *v.* Gallup, Kirby (Conn.), 166; Williams *v.* Poppleton, 3 Ore. 139; Tomer *v.* Densmore, 8 Neb. 384; Selleck *v.* Sugar Hollow Tp. Co., 13 Conn. 453; Bailey *v.* Trumbull, 31 Conn. 581; Brown *v.* State, 52 Ala. 345; People *v.* Stonecifer, 6 Cal. 405; People *v.* Sandford, 43 Cal. 29; Eakman *v.* Sheaffer, 48 Pa. St. 176; Parmele *v.* Guthery, 2 Root (Conn.), 185; Woodruff *v.* Richardson, 20 Conn. 238; Lane *v.* Scoville, 16 Kan. 402; State *v.* Shay, 30 La. An. 114; Hussey *v.* Allen, 59 Me. 269; Dolloff *v.* Stimpson, 33 Me. 546; Werner *v.* State, 44 Ark. 122; State *v.* Anderson, 4 Nev. 265; Lowe *v.* McCorkle, 8 West. L. J. 64; United States *v.* Smith, 1 Sawyer (U. S.), 277; Bronson *v.* People, 32 Mich. 34; People *v.* Scott, 56 Mich. 154; State *v.* Benton, 2 Dev. & Bat. (N. C.) 196; State *v.* Groome, 10 Ia. 308. If any objection exists to the competency of a trior, it should be made at the time of his appointment, when, if overruled, an exception may be reserved. It cannot for the first time be made upon a motion for a new trial. People *v.* Voll, 43 Cal. 166. This rule is also applicable to objections affecting the impartiality of *referees*. Ipswich *v.* Essex, 10 Pick. (Mass.) 519; Merrill *v.* Berkshire, 11 Pick. (Mass.) 269.

[1] Seal *v.* State, 13 Smed. & M. (Miss.) 286; Roseborough *v.* State, 43 Tex. 570; Brill *v.* State, 1 Tex. App. 572; Manion *v.* Flynn, 39 Conn. 330; Bradshaw *v.* Hubbard, 6 Ill. 390; Jameson *v.* Androscoggin R. Co., 52 Me. 412; Tilton *v.* Kimball, 52 Me. 500; Goodwin *v.* Cloudman, 43 Me. 577; Powell *v.* Haley, 28 Tex. 52; Falmouth *v.* Roberts, 9 Mee. & W. 469; *s. c.* 1 Dowl. (N. s.) 633; Stewart *v.* Ewbank, 3 Iowa, 191. Knowledge that a juror is a man of intemperate habits does not include knowledge of the fact that he is subject to *delirium tremens*. Hogshead *v.* State, 6 Humph. (Tenn.) 59; Dent *v.* Hertford, 2 Salk. 645. Judgment was arrested, where it appeared that a juror who had been challenged and withdrawn was brought in on a *tales*, and sat upon the trial of the cause. Hungate *v.* Hamond, Cro. Eliz. 188. But see Koenig *v.* Bauer, 1 Brewst. (Pa.) 304.

[2] Russell *v.* Quinn, 114 Mass. 103; Kent *v.* Charlestown, 2 Gray (Mass.), 281; Orrok *v.* Com. Ins. Co., 21 Pick. (Mass.) 456, 471; Parks *v.* State, 4 Ohio St. 234; Eastman *v.* Wight, 4 Ohio St. 156, 160; State *v.* Tuller, 34 Conn. 294; Falmouth *v.* Roberts, 9 Mee. & W. 469; Clough *v.* State, 7 Neb. 324; Anderson *v.* State, 14 Ga. 709; Parker *v.* State, 55 Miss. 414; Jameson *v.* Androscoggin R. Co., 52 Me. 412; Goodwin *v.* Cloudman, 43 Me. 577; State *v.* Bowden, 71 Me. 89; Powell *v.* Haley, 28 Tex. 52; Pryme *v.* Titchmarsh, 10 Mee. & W. 605; Trueblood *v.* State, 1 Tex. App. 650; Scott *v.* Moore, 41 Vt. 205. In one case, the knowledge of the attorney's clerk seems to have been imputed to the client. Falmouth *v.* Roberts, 9 Mee. & W. 469; *s. c.* 1 Dowl. (N. s 63

an *affidavit* in support of a motion for a *new trial* upon the ground of the disqualification of a juror, should unequivocally allege that the moving party and his attorneys were themselves ignorant of the matter affecting the juror's competency, so that the objection could not be seasonably made.[1] After a party has announced that he has no challenges to make, he cannot resume the right of challenge merely because the other party has exercised the right;[2] though the court may, in its *discretion*, allow him to do so. For counsel to sit in silence when the court is embarrassed in the process of impaneling a jury, declining to take action upon the suggestions of the court, and answering that they have nothing to say, and then raising the proper objection in case the verdict goes against them, — is a trifling with the court and with the administration of justice, which will not be tolerated on the trial of the gravest offenses.[3] After a juror is once *sworn*, objections to his competency which might have been taken by challenge are addressed to the *discretion* of the court.[4]

[1] Achey *v.* State, 64 Ind. 56; Rooby *v.* State, 4 Yerg. (Tenn.) 111; State *v.* Tuller, 34 Conn. 280; Clough *v.* State, 7 Neb. 324; Morrison *v.* McKinnon, 12 Fla. 552. A new trial will not be granted upon the sole affidavit of a stranger to the case, who deposes to a positive expression of opinion against the defendant by one of the jurors, previous to the trial; and further, that he did not inform the attorneys of the defendant of this fact until the trial was concluded. *Non constat*, but that the defendant and his attorneys were also aware of the juror's prejudice. Achey *v.* State, 64 Ind. 56.

[2] Ward *v.* Railway Co., 19 S. C. 521.

[3] Norfleet *v.* State, 4 Sneed (Tenn.), 340, 343. See also Com. *v.* Gross, 1 Ashmead (Pa.), 281, 286; State *v.* Coleman, 8 So. Car. 237; Com. *v.* Marrow, 3 Brewst. (Pa.) 402; Gardiner *v.* People, 6 Park. Cr. (N. Y.) 155; Malone *v.* State, 8 Ga. 408; Ham *v.* Lasher, 24 Up. Can. Q. B. 533, note; Widder *v.* Buffalo &c. R. Co., 24 Up. Can. Q. B. 534; People *v.* Doe, 1 Mich. 451; Livingston *v.* Heerman, 9 Martin (La.), 656; Stewart *v.* State, 15 Ohio St. 155. See also State *v.* Allen, 46 Conn. 531; *s. c.* 10 Reporter, 107; Reg. *v.* Coulter, 13 Up. Can. (C. P.) 299. The result would have been otherwise, if the prisoner had made no objection to proceeding with the jury as constituted. In such a case the court cannot, without the consent of the prisoner, and of its own will, *withdraw* a juror. Such action operates as a *discharge* of the jury, and an *acquittal*. O'Brian *v.* Com., 9 Bush (Ky.), 333. Compare Cochran *v.* State, 62 Ga. 731; Cox *v.* People, 19 Hun (N. Y.), 430; *s. c.* 80 N. Y. 500.

[4] Henry *v.* State, 77 Ala. 75. See also Simmons *v.* State, 73 Ga. 609.

§ 115. Waiver of Exceptions for Disallowance of Challenge. — The sound and prevailing view is that a party cannot, on error or appeal, complain of a ruling of the trial court in overruling his challenge for cause, if it appear that, when the jury had been completed, his *peremptory challenges were not exhausted;* since he might have excluded the obnoxious juror by a peremptory challenge, and therefore the error is to be deemed an error without injury.[1] For the same reason, if the court erroneously overrules a challenge for cause, and thereafter the challenging party excludes the obnoxious juror by a peremptory challenge, he cannot assign the ruling of the court for error,[2] unless it appear that, before the jury was sworn his quiver of peremptory challenges was exhausted;[3] in which case there is

[1] State *v.* Elliott, 45 Iowa, 486; State *v.* Davis, 41 Iowa, 311; Barnes *v.* Newton, 46 Iowa, 567; St. Louis &c. R. Co. *v.* Lux, 63 Ill. 523; Tuttle *v.* State, 6 Tex. App. 556; Sharp *v.* State, 6 Tex. App. 650; McKinney *v.* State, 8 Tex. App. 626; Tooney *v.* State, 8 Tex. App. 452; Krebs *v.* State, 8 Tex. App. 1; Palmer *v.* People, 4 Neb. 68; State *v.* Gill, 14 So. Car. 410; Preswood *v.* State, 3 Heisk. (Tenn.) 468. There is some slight and ill-considered authority to the effect that no obligation rests upon a party to make use of his peremptory challenges, for the purpose of excluding a juror, unsuccessfully challenged for cause, but that he has a right to accede to the decision of the court upon such a challenge, which, if erroneous, must be corrected by awarding him a new trial. People *v.* Bodine, Edm. Sel. Cas. (N. Y.) 36, 78; *s. c.* 1 Den. (N. Y.) 281; Freeman *v.* People, 4 Den. (N. Y.) 9, 31; Brown *v.* State, 57 Miss. 424; *s. c.* 10 Cent. L. J. 376; People *v.* Stewart, 7 Cal. 140; Sampson *v.* Schaffer, 3 Cal. 107.

[2] Schoeffler *v.* State, 3 Wis. 823, 836; Burt *v.* Panjaud, 99 U. S. 180; *s. c.* 18 Am. L. Reg. 660; Freeman *v.* People, 4 Denio (N. Y.), 9; Stewart *v.* State, 13 Ark. 720; Benton *v.* State, 30 Ark. 328; Friery *v.* People, 2 Abb. App. (N. Y.) Dec. 215; *s. c.* 2 Keyes (N. Y.), 424; 54 Barb. 319; Ferriday *v.* Selser, 4 How. (Miss.) 506; People *v.* Knickerbocker, 1 Park. Cr. (N. Y.) 302; Whelan *v.* Reg., 28 Up. Can. Q. B. 2, 108; State *v.* Raymond, 11 Nev. 98; State *v.* Davis, 41 Iowa, 311; Morton *v.* State, 1 Kan. 468; Wiley *v.* Keokuk, 6 Kan. 95; People *v.* Stonecifer, 6 Cal. 405; Robinson *v.* Randall, 82 Ill. 522; Wilson *v.* People, 94 Ill. 299; Carter *v.* State, 8 Tex. App. 372; Conway *v.* Clinton, 1 Utah, 215; Krebs *v.* State, 8 Tex. App. 1; Brown *v.* State, 57 Miss. 424; State *v.* Cockman, 2 Winst. (N. C.) 95; Mimms *v.* State, 16 Ohio St. 221; Erwin *v.* State, 29 Ohio St. 186; State *v.* Hamilton, 27 La. Ann. 400; Bejarano *v.* State, 6 Tex. App. 265. *Contra*, Lithgow *v.* Com., 2 Va. Cas. 297; Sprouce *v.* Com., 2 Va. Cas. 375; Dowds *v.* Com., 9 Gratt. (Va.) 727; Birdsong *v.* State, 47 Ala. 68; Iverson *v.* State, 52 Ala. 170, 174; Brown *v.* State, 70 Ind. 576.

[3] McGowan *v.* State, 9 Yerg. (Tenn.) 184; Burrell *v.* State, 18 Tex. 713;

room for the inference that the erroneous ruling of the court may have resulted in leaving upon the panel *other* obnoxious jurors whom the party might, but for the ruling, have excluded by peremptory challenge. Some courts, therefore, hold that it is enough, in such a juncture, to show that his peremptory challenges were exhausted before the jury was sworn.[1] But others take what seems to be the better view, that it must *also* appear, not only that his peremptory challenges were exhausted, but that some objectionable person took his place on the jury, who otherwise would have been excluded by a peremptory challenge.[2]

§ 116. [Continued.] **Objections to Incompetency after Verdict.** — Although there is considerable American authority, following in the wake of a leading case in Maryland, in favor of

Johnson *v.* State, 27 Tex. 764; Bowman *v.* State, 41 Tex. 417; Lester *v.* State, 2 Tex. App. 432, 443; Carroll *v.* State, 3 Humph. (Tenn.) 315; Robinson *v.* Randall, 82 Ill. 521; People *v.* Gaunt, 23 Cal. 156; People *v.* Gatewood, 20 Cal. 146; Wiley *v.* Keokuk, 6 Kan. 94; Morton *v.* State, 1 Kan. 468; People *v.* McGungill, 41 Cal. 429; Stout *v.* Hyatt, 13 Kan. 232; State *v.* McQuaige, 5 So. Car. 429; Tuttle *v.* State, 6 Tex. App. 556; Ogle *v.* State, 33 Miss. 383; Brown *v.* State, 57 Miss. 424; Mimms *v.* State, 16 Ohio St. 221; Erwin *v.* State, 29 Ohio St. 186; State *v.* Bunger, 14 La. Ann. 461; State *v.* Caulfield, 23 La. Ann. 148; State *v.* Lartigue, 29 La. Ann. 642, 646; State *v.* Hoyt, 47 Conn. 518.

[1] People *v.* Weil, 40 Cal. 268; Trenor *v.* Central Pacific R. Co., 50 Cal. 222, 226; Hubbard *v.* Rutledge, 57 Miss. 7; State *v.* Brown, 15 Kan. 400.

[2] Fleeson *v.* Savage, S. M. Co., 3 Nev. 157, 163; State *v.* Raymond, 11 Nev. 98; Rothschild *v.* State, 7 Tex. App. 519; Grissom *v.* State, 8 Tex. App. 386; Hollis *v.* State, 8 Tex. App. 620; Cock *v.* State, 8 Tex. App. 659; Tooney *v.* State, 8 Tex. App. 452; Cotton *v.* State, 32 Tex. 614; Myers *v.* State, 7 Tex. App. 641; Holt *v.* State, 9 Tex. App. 571; Loggins *v.* State, 12 Tex. App. 65; Balding *v.* State (Tex.), 4 S. W. Rep. 579; Meaux *v.* Whitehall, 8 Bradw. (Ill.) 173. In Whelan *v.* Reg., 28 Up. Can. Q. B. 2, the Canadian courts, certain judges dissenting, held that, even under the circumstances stated in the text, a prejudice to the challenging party would not be presumed. In considering this case, it is to be remembered that the prisoner was a member of the Fenian organization so obnoxious to the Canadian people; that the crime for which he was tried was the assassination of the Hon. Thomas D'Arcy McGee, a member of the Canadian Parliament; and that he had been fairly convicted upon the evidence, as he himself admitted at the close of the trial. See 28 Up. Can. (Q. B.) p. 141. It is not, therefore, surprising that the majority in both the appellate courts were inclined to find from the record that the prisoner had suffered in no respect from the error of the court in disallowing a legal cause of challenge.

the rule that the discovery that a disqualified person sat on the jury gives to the unsuccessful party the same right of new trial, as the right which he would have had to challenge the juror, if the discovery had been made before the jury were sworn, on the ground that such a person is no juror at all, — a *non-juror*, — and that the presence of a non-juror vitiates the whole panel; [1] yet the mass of American authority, grounded upon considerations of convenience and public policy, is opposed to this strict rule. It has been repeatedly held that a cause of challenge not discovered until after verdict, whether the case be civil or criminal, — as that some of the jurors were *aliens;* [2] or *not* of the jury list as *se-*

[1] Shane *v.* Clarke, 3 Har. & McH. (Md.) 101, 103. It was so held where one of the jurors was an alien. Quinn *v.* Halbert, 52 Vt. 353; Guykowski *v.* People, 2 Ill. 476 (overruled in Chase *v.* People, 40 Ill. 352, 358); was lacking in statutory qualifications. Briggs *v.* Georgia, 15 Vt. 61; State *v.* Babcock, 1 Conn. 401; Mann *v.* Fairlee, 44 Vt. 673; Eastman *v.* Wright, 4 Ohio St. 156; State *v.* Groome, 10 Iowa, 315; was connected with one of the parties by relationship within the degree constituting a cause of challenge. Hardy *v.* Sproule, 32 Me. 310; Lane *v.* Goodwin, 47 Me. 593; Brown *v.* State, 28 Ga. 439; Georgia R. Co. *v.* Hart, 60 Ga. 550; Woodbridge *v.* Raymond, Kirby (Conn.), 280; had expressed his opinion upon the issue to be tried, or upon the guilt of the defendant in a criminal case. McKinley *v.* Smith, Hard. (Ky.) 167; United States *v.* Fries, 3 Dall. (U. S.) 515; State *v.* Hopkins, 1 Bay (S. C.), 372; Tenney *v.* Evans, 13 N. H. 462; Monroe *v.* State, 5 Ga 85; Wade *v.* State, 12 Ga. 25; Ray *v.* State, 15 Ga. 223; Monerief *v.* State, 59 Ga. 470; Pierce *v.* Bush, 3 Bibb (Ky.), 347; French *v.* Smith, 4 Vt. 363; Vance *v* Haslett, 4 Bibb (Ky.), 191; Herndon *v* Bradshaw, 4 Bibb (Ky.), 45; Tweedy *v.* Brush, Kirby (Conn.), 13; Deming *v.* Hurlburt, 2 D. Chip. (Vt.) 45; or was interested in the event of the suit. Page *v.* Contoocook &c. R. Co., 21 N. H. 438. But an objection to a juror, which is not good as a principal cause of challenge, is no ground for setting aside the verdict. Chapman *v.* Welles, Kirby (Conn.), 132; Walton *v.* Augusta Canal Co., 54 Ga. 245. But see Cain *v.* Ingham, 7 Cow. (N. Y.) 478.

[2] Rex *v.* Sutton, 8 Barn. & Cress. 417; *s. c.* 15 Eng. C. L. 252; Hollingsworth *v.* Duane, 4 Dall. (U. S.) 353; State *v.* Quarrel, 2 Bay (S. C.), 150; Com. *v.* Thompson, 4 Phila. (Pa.) 215; Brown *v.* Lacrosse Gas Co., 21 Wis. 51; Presbury *v.* Com., 9 Dana (Ky.), 203; State *v.* Lopher, 35 La. Ann. 975; Turner *v.* Hahn, 1 Colo. 23; Jones *v.* People, 2 Colo. 351; Chase *v.* People, 40 Ill. 352; Bennett *v.* Matthews, 40 How. Pr. (N. Y.) 428; Ripley *v.* Coolidge, Minor (Ala.), 11; State *v.* McDonald, 8 Ore. 113; Kennedy *v.* Com., 14 Bush (Ky.), 340; Major *v.* Pulliam, 3 Dana (Ky.), 583; Mt. Desert *v.* Cranberry Isles, 46 Me. 411; Hull *v.* Albro, 2 Disney (Ohio), 147; Thompson *v.* Paige, 16 Cal. 78; Territory *v.* Baker (N. Mex.), 13 Pac. Rep. 31.

lected by the county authorities;[1] or *non-residents*, or not citizens of the county or State;[2] or not possessed of the statutory qualifications,[3] as for instance less than *twenty-one*[4] or more than sixty,[5] years of age; or *related* to the opposite party within the disqualifying degrees:[6] or *interested* in the event of the suit;[7] or shown to have *expressed disqualifying opin-*

[1] Gormley *v.* Laramore, 40 Ga. 253; Edwards *v.* State, 53 Ga. 428; Urquhart *v.* Powell, 59 Ga. 721; Osgood *v.* State, 63 Ga. 791.

[2] Roseborough *v.* State, 43 Tex. 570; O'Mealy *v.* State, 1 Tex. App. 180; Clarke *v.* Territory, 1 Wash. (Terr.) 82; State *v.* Kennedy, 8 Rob. (La.) 590; Costly *v.* State, 19 Ga. 614; Zickefoose *v.* Kuykendall, 12 W. Va. 23; Major *v.* Pulliam, 3 Dana (Ky.), 583; Mt. Desert *v.* Cranberry Isles, 46 Me. 411; Hull *v.* Albro, 2 Disney, 147; Thompson *v.* Paige, 16 Cal. 78.

[3] Ex parte Phillips, 10 Exch. 731; *s. c.* 1 Jur. (N. S.) 143; 24 L. J. Exch. 79; State *v.* Patrick, 3 Jones L. (N. C.) 443; State *v.* White, 68 N. C. 158; Tweedy *v.* Briggs, 31 Tex. 74; Thompson *v.* Com., 8 Gratt. (Va.) 637; Gilbert *v.* Rider, Kirby (Conn.), 180, 184; Orcutt *v.* Carpenter, 1 Tyler (Vt.), 250; People *v.* Jewett, 6 Wend. (N. Y.) 386; Finley *v.* Hayden, 3 A. K. Marsh. (Ky.) 330; Bratton *v.* Bryan, 1 A. K. Marsh. (Ky.) 212; Rennick *v.* Walthall, 2 A. K. Marsh. (Ky.) 23; State *v.* Fisher, 2 Nott & McC. (S. C.) 261; People *v.* Sandford, 43 Cal. 29; *s. c.* 1 Green C. L. 682; Steele *v.* Malony, 1 Minn. 347; Clark *v.* Van Vrancken, 20 Barb. (N. Y.) 278; Estep *v.* Waterous, 45 Ind. 140; Croy *v.* State, 32 Ind. 384; Pickens *v.* Hobbs, 42 Ind. 270; State *v.* McLean, 21 La. Ann. 546; Gillooley *v.* State, 58 Ind. 182; Kingen *v.* State, 46 Ind. 132; Whitehead *v.* Wells, 29 Ark. 99; Watts *v.* Ruth, 30 Ohio St. 32; State *v.* Bunger, 14 La. Ann. 461; State *v.* Parks, 21 La. Ann. 251; Kenrick *v.* Reppard, 23 Ohio St. 333; State *v.* Madoil, 12 Fla. 151; Mansfield &c. R. Co. *v.* Clark, 23 Mich. 519; Patterson *v.* State, 70 Ind. 341; Buie *v.* State, 1 Tex. App. 453; Yanez *v.* State, 6 Tex. App. 429.

[4] Trueblood *v.* State, 1 Tex. App. 650; Wassum *v.* Feeney, 121 Mass. 93; Brewer *v.* Jacobs, 22 Fed. Rep. 217; John *v.* Hodges, 60 Md. 215; *s. c.* 45 Am. Rep. 722.

[5] Williams *v.* State, 37 Miss. 407; Monroe *v.* Brigham, 19 Pick. (Mass.) 368; Davis *v.* People, 19 Ill. 74; Seacord *v.* Burling, 1 How. Pr. (N. Y.) 175; Cohron *v.* State, 20 Ga. 753.

[6] Quinebaug Bank *v.* Leavans, 20 Conn. 87; Eggleston *v.* Smiley, 17 Johns. (N. Y.) 133; Hayes *v.* Thompson, 15 Abb. Pr. (N. Y.) (N. S.) 220; McLellan *v.* Crofton, 6 Me. 307; Tidewater Canal Co. *v.* Archer, 9 Gill & J. (Md.) 479; Orme *v.* Pratt, 4 Cranch C. C. (U. S.) 124; Smith *v.* Earle, 118 Mass. 531; Baker *v.* State, 4. Tex. App: 223 Wickersham *v.* People, 2 Ill. 128.

[7] Williams *v.* Great W. R. Co., 3 Hurl. & N. 869; *s. c.* 28 L. J. (Exch.) 2; (compare Bailey *v.* Macaulay, 13 Q. B. 815); Glover *v.* Woolsey, Dudley (Ga.), 85; Josey *v.* Wilmington &c. R. Co., 12 Rich. L. 134; Boland *v.* Greenville &c. R. Co., 12 Rich. L. 368; Magness *v.* Stewart, 2 Coldw. 309; Pearson *v.* Wightman, 1 Mills Const. Rep. 336; Billis *v.* State, 2 McCord (S. C.), 12. But see Talmadge *v.* Northrop, 1 Root (Conn.), 454.

ions as to the subject matter of the trial;[1] or otherwise subject to challenge;[2] is not, *per se*, a ground of new trial, though it may be such in the *discretion* of the court.[3] In the ex-

[1] Taylor *v.* Greely, 3 Me. 204; Briggs *v.* Byrd, 12 Ired. L. (N. C.) 377; Byars *v.* Mt. Vernon, 77 Ill. 467; Kennedy *v.* Com., 14 Bush (Ky.), 340; Romaine *v.* State, 7 Ind. 63; Keener *v.* State, 18 Ga. 194; Alexander *v.* Dunn, 5 Ind. 122; Fitzpatrick *v.* Harris, 16 B. Mon. (Ky.) 561; Tidewater Canal Co. *v.* Archer, 9 Gill & J. (Md.) 479; Simpson *v.* Pittman, 13 Ohio, 365; Com. *v.* Flanagan, 7 Watts & S. (Pa.) 415; Collier *v.* State, 20 Ark. 36; Meyer *v.* State, 19 Ark. 156; Daniel *v.* Guy, 23 Ark. 50; State *v.* Howard, 17 N. H. 171, 198; State *v.* Shelledy, 8 Iowa, 477; State *v.* Strander, 11 W. Va. 745; Brill *v.* State, 1 Tex. App. 572; Clough *v.* State, 7 Neb. 324; State *v.* Funck, 17 Iowa, 365; McKinney *v.* Simpson, 51 Iowa, 662; McDonald *v.* Beall, 55 Ga. 288; Stewart *v.* Ewbank, 3 Iowa, 191; Gregory *v.* Wells, Smith (N. H.), 239, n; Porter *v.* Greenough, Smith (N. H.), 238, n; Caldwell *v.* Caldwell, Smith (N. H.), 239. Unless he imposed himself upon the jury by concealment or prevarication. Casat *v.* State, 40 Ark. 511.

[2] State *v.* Davis, 80 N. C. 412; Amherst *v.* Hadley, 1 Pick. (Mass.) 38; Wilder *v.* State, 25 Ohio St. 555; Hogan *v.* State, 36 Wis. 226; Meeks *v.* State, 57 Ga 329; Walker *v.* Green, 3 Me. 215; Howland *v.* Gifford, 1 Pick. (Mass.) 43, note; Fellows' Case, 5 Me. 383; Cook *v.* Castner, 9 Cush. (Mass.) 266; Bloodworth *v.* State, 6 Baxt. (Tenn.) 614; Shobe *v.* Bell, 1 Rand. (Va.) 39; Hardenburgh *v.* Crary, 15 How. Pr. (N. Y.) 307, 309; State *v.* Harris, 30 La. Ann. 90; United States *v.* Baker, 3 Bened. (U. S.) 68; State *v.* Powers, 10 Ore. 145; *s. c.* 45 Am. Rep. 138; Paulitsch *v.* Railroad Co., 50 N. Y. Super. (J. & S.) 241; State *v.* Thomas, 35 La. Ann. 24.

[3] Woodward *v.* Dean, 113 Mass. 297, 298. See also Kinnicutt *v.* Stockwell, 8 Cush. (Mass.) 73; Davis *v.* Allen, 11 Pick. (Mass.) 466; Eggleston *v.* Smiley, 17 Johns. (N. Y.) 133; Meyer *v.* State, 19 Ark. 156; State *v.* McDonald, 8 Ore. 113; Seymour *v.* Deyo, 5 Cow. (N. Y.) 289; State *v.* Davis, 80 N. C. 412, 414; State *v.* Boon, 80 N. C. 461; Clough *v.* State, 7 Neb. 351; Shea *v.* Lawrence, 1 Allen (Mass.), 167; State *v.* Madoil, 12 Fla. 151; State *v.* Howard, 17 N. H. 171; Cain *v.* Cain, 1 B. Mon. (Ky.) 213; Temple *v.* Sumner, Smith (N. H.), 226; State *v.* Pike, 20 N. H. 344; State *v.* Lambert, 93 N. C. 618. On a motion in arrest of judgment, or for a new trial, it is plain that a party cannot be heard to allege partiality on the part of certain jurors, which, if existing at all, was in favor of the party complaining. Carew *v.* Howard, 1 Root (Conn.), 323. In an early criminal case in Massachusetts, the court granted a new trial where it appeared after verdict that two of the trial jurors had been members of the grand jury which found the indictment. Com. *v.* Hussey, 13 Mass. 221. See also Hawkins *v.* Andrews, 39 Ga. 118. But in other cases this reason has been held to be insufficient. State *v.* Turner, 6 La. Ann. 309; Beck *v.* State, 20 Ohio St. 228; Franklin *v.* State, 2 Tex. App. 8; State *v.* McDonald, 9 W. Va. 456. It has been considered that a new trial should be awarded, where one of the jurors previous to the trial had made a trifling *wager* upon the

ercise of such a discretion, an essential inquiry will be whether the objecting party exercised reasonable *diligence* in ascertaining the qualifications of the obnoxious juror.[1] Was he questioned on the *voir dire* as to the cause of challenge now alleged? If not, there has been a lack of diligence on the part of the complaining party,[2] which amounts to a *waiver* of the cause

result. Essex *v.* McPherson, 64 Ill. 349. But see McCausland *v.* McCausland, 1 Yeates (Pa.), 372; Booby *v.* State, 4 Yerg. (Tenn.) 111. It is evident that an objection made to a juror during the course of the trial is entitled to greater consideration than if postponed until after verdict. Dilworth *v.* Com., 12 Gratt. (Va.) 689; Henry *v.* Cuvillier, 3 Mart. (La.) (N. s.) 524.

[1] Roseborough *v.* State, 43 Tex. 570; Quinebaug Bank *v.* Leavens, 20 Conn. 87; Brown *v.* Lacrosse Gas Co., 21 Wis. 51; Steele *v.* Malony, 1 Minn. 341; Mt. Desert *v.* Cranberry Isles, 46 Me. 411; Patterson *v.* State, 70 Ind. 341; Vennum *v.* Harwood, 6 Ill. 659; Swarnes *v.* Sitton, 58 Ill. 155; Walker *v.* Green, 3 Me. 215; Glover *v.* Woolsey, Dudley (Ga.), 85; Fitzpatrick *v.* Harris, 16 B. Mon. (Ky.) 561; Franklin *v.* State, 2 Tex. App. 8; McDonald *v.* Beall, 55 Ga. 288; Koenig *v.* Bauer, 1 Brewst. (Pa.) 304. In one case the court awarded a new trial, where a juror appeared to have been strongly biased against the defendant, because the facts of the case did not show "gross" negligence on the part of the defendant in not ascertaining this cause of objection to the juror before trial. Hanks *v.* State, 21 Tex. 526. In Lafayette &c. R. Co. *v.* New Albany &c. R. Co., 13 Ind. 90, the motion for a new trial was founded upon the incapacity of a juror to understand the English language. This the court granted, the juror's ignorance being unknown to the party against whom the verdict was rendered, until after the trial. "The party," said Perkins, J., "might well presume that the officer had called a juror competent in this particular." But see Yanez *v.* State, 6 Tex. App. 429; State *v.* Harris, 30 La. Ann. 90; United States *v.* Baker, 3 Bened. (U. S.) 68.

[2] Jeffries *v.* Randall, 14 Mass. 205; State *v.* Patrick, 3 Jones L. (N. C.) 443; Tweedy *v.* Briggs, 31 Tex. 74; State *v.* Quarrel, 2 Bay (S. C.), 150; Gilbert *v.* Rider, Kirby (Conn.), 180, 184; Taylor *v.* Greely, 3 Me. 204; Turner *v.* Hahn, 1 Colo. 43; Chase *v.* People, 40 Ill. 352; Estep *v.* Watrous, 45 Ind. 140; Alexander *v.* Dunn, 5 Ind. 122; Croy *v.* State, 32 Ind. 384; Kingen *v.* State, 46 Ind. 132; Gillooley *v.* State, 58 Ind. 182; State *v.* McLean, 21 La. Ann. 546; State *v.* Parks, 21 La. Ann. 251; State *v.* Kennedy, 8 Rob. (La.) 590; Simpson *v.* Pitman, 13 Ohio, 365; Watts *v.* Ruth, 30 Ohio St. 32; Beck *v.* State, 20 Ohio St. 228; Wilder *v.* State, 25 Ohio St. 555; Kenrick *v.* Reppard, 23 Ohio St. 333; Byars *v.* Mt. Vernon, 77 Ill. 467; Keener *v.* State, 18 Ga. 194; Collier *v.* State, 20 Ark. 36; Daniel *v.* Guy, 23 Ark. 50; State *v.* Shelledy, 8 Iowa, 477; Buie *v.* State, 1 Tex. App. 453; Yanez *v.* State, 6 Tex. App. 429; Clough *v.* State, 7 Neb. 324; State *v.* Funck, 17 Iowa, 365; McKinney *v.* Simpson, 51 Iowa, 662; Stewart *v.* Ewbank, 3 Iowa, 191. Whether the juror was thus examined

of challenge. Moreover, it should appear by affidavit that both the *prisoner* and his *counsel* had no knowledge of the dis-

upon the *voir dire*, is a matter to be shown by the record. The affidavit of the party moving for the new trial is not sufficient to establish this fact. Stewart *v.* Ewbank, 3 Iowa, 191; State *v.* Shelledy, 8 Iowa, 447; Shaw *v.* State, 27 Tex. 750. If the juror answers untruthfully, for the purpose of avoiding a challenge, it is generally proper for the court to grant a new trial, upon the discovery of the *deception* after verdict. Sellers *v.* People, 4 Ill. 412; Howerton *v.* State, Meigs (Tenn.), 262; Vennum *v.* Harwood, 6 Ill. 659; Essex *v.* McPherson, 64 Ill. 349; Jeffries *v.* Randall, 14 Mass. 205; Cody *v.* State, 3 How. (Miss.) 27; Troxdale *v.* State, 9 Humph. (Tenn.) 411; Sam *v.* State, 31 Miss. 480; Busick *v.* State, 19 Ohio, 198; Rice *v.* State, 16 Ind. 298; State *v.* Kennedy, 8 Rob. (La.) 590; Smith *v.* Ward, 2 Root (Conn.), 302; Lane *v.* Scoville, 16 Kan. 402; State *v.* Shelledy, 8 Iowa, 477; Lamphier *v.* State, 70 Ind. 317; Watts *v.* Ruth, 30 Ohio St. 32; Bales *v.* State, 63 Ala. 30; Cannon *v.* State, 57 Miss. 147; McGuffie *v.* State, 17 Ga. 497; Childress *v.* Ford, 10 Smed. & M. (Miss.) 25. Mr. Justice Crompton was of opinion that, even if a prisoner had been *purposely misled* as to a cause of challenge, this would not vitiate the verdict in point of law, "though it would be matter for the consideration of a court in a civil case, in exercising their discretion as to granting a new trial under all the circumstances of the case, or for the advisers of the Crown in the exercise of the prerogative of mercy." Reg. *v.* Mellor, Dears. & Bell C. C. 468, 509; *s. c.* 4 Jur. (N. S.) 214; 7 Cox C. C. 454; 27 L. J. (M. C.) 121. See also Temple *v.* Sumner, Smith (N. H.), 226; Schmidt *v.* Rose, 6 Mo. App. 587, 588; State *v.* McDonald, 9 W. Va. 456; Brennan *v.* State, 33 Tex. 266; Frank *v.* State, 39 Miss. 705. But if, at the time of the examination, one of the parties or his counsel is aware that the juror has testified falsely, and makes no objection to the juror until after verdict, this circumstance cannot be relied upon as ground for a new trial. Parker *v.* State, 55 Miss. 414. Jurors are not required to know or to surmise that something more is intended than is fairly expressed by the terms of the questions put to them. Missouri &c. R. Co. *v.* Munkers, 11 Kan. 223; Moore *v.* Cass, 10 Kan. 288; United States *v.* Smith, 1 Sawyer (U. S.), 277, 282; Swarnes *v.* Sitton, 58 Ill. 155. It seems to make no difference whether the answers of the juror are made to questions by the court, or by the party subsequently alleging their falsity. Hudspeth *v.* Herston, 64 Ind. 133; Wiggin *v.* Plummer, 31 N. H. 251. It has been held that, if it appear after verdict that a juror testified falsely upon the *voir dire*, he does not restore his competency by making an *affidavit* that he was really impartial in the case, and that he unwittingly testified to the contrary of the facts. Territory *v.* Kennedy, 3 Mont. 520; United States *v.* Upham, 2 Mont. 170; Hudspeth *v.* Herston, 64 Ind. 133. But the soundness of this view may be doubted. The Supreme Court of *Michigan* has taken the view that the conception of *waiver* embodied in the above text is applicable only in *civil cases*, and has no application in *criminal cases*, where every step against the accused is taken *in invitum*. Hill *v.*

qualifying fact when the juror was accepted.[1] In England, and in many American jurisdictions, a paramount inquiry upon such an objection is, whether it has resulted in an *unjust verdict;* if not, the objecting party has sustained no injury, and a new trial will not be granted in order that public and private time may be consumed, and the dangers of other irregularities incurred, when the same result must, on a just view of the evidence, be reached.[2]

People, 16 Mich. 351, 357; Johr *v.* People, 26 Mich. 427. See also Smith *v.* School District, 40 Mich. 143. The Supreme court of *Wisconsin*, on the other hand, has regarded this theory of waiver to be applicable in all criminal cases *not capital.* State *v.* Vogel, 22 Wis. 471; Schumacker *v.* State, 5 Wis. 324. The *Illinois* court took this view in two early cases. See Nomaque *v.* People, 1 Ill. 109; Guykowski *v.* People, 2 Ill. 476. But it was later abandoned. See People *v.* Scates, 4 Ill. 351, 353; Chase *v.* People, 40 Ill. 352. There seems to be no sound view for such a distinction in capital cases, since here the temptation to perjury is even greater than in non-capital felonies. See for example, State *v.* Hopkins, 1 Bay (S. C.), 372. In such a case, a judge has "no right to be tender and humane at the expense of the law." Crowder, J., in Reg. *v.* Mellor, Dears. & Bell C. C. 468, 517. Most courts seem to apply the principle of the text alike in all causes, civil and criminal, *non-capital* and *capital.* Ex parte Phillips, 10 Exch. 731, 732; Amherst *v.* Hadley, 1 Pick. (Mass.) 38, 40; Wassum *v.* Feeney, 121 Mass. 93; Davis *v.* People, 19 Ill. 74; Chase *v.* The People, 40 Ill. 352; Gillooley *v.* State, 58 Ind 182; Kingen *v.* State, 46 Ind. 132; Costly *v.* State, 19 Ga. 614; Davison *v.* People, 90 Ill. 221. The argument, frequently raised, that the party cannot waive what he does not know (Vyvyan *v.* Vyvyan, 30 Beav. 65, 74, per Lord Romilly, M. R.; Bristow's case, 15 Gratt. (Va.) 648), is more specious than sound; since it is met by another principle, which is, that *negligent ignorance* operates against a party the same as actual knowledge; and therefore he ought not to be permitted to destroy a verdict by urging a ground of challenge which, but for his negligence, he might have discovered and urged at the proper time. Note the language of Lord Tenterden in Rex *v.* Sutton, 8 Barn. & Cres. 417, 419. See also Whelan *v.* Reg., 28 Up. Can. Q. B. 2, 63, 177, 178; Reg. *v.* Mellor, Dears. & Bell C. C. 468, 517, per Willes, J.; *Ibid.*, p. 523, per Byles, J.

[1] Brown *v.* State, 60 Miss. 447. The mere fact, in a criminal case, that the *prisoner* had no *knowledge* of the grounds of challenge so as to interpose it at the proper time, counts for little; since, as well suggested by Catron, J., how can the court know this after verdict except by the affidavits of a convicted felon — proof always to be had when necessary? McClure *v.* State, 1 Yerg. (Tenn.) 206, 219. See also Gillespie *v.* State, 8 Yerg. (Tenn.) 507; Calhoun *v.* State, 4 Humph. (Tenn.) 477; Meyer *v.* State, 19 Ark. 156.

[2] Rex *v.* Hunt, 4 Barn. & Ald. 430, 432; Williams *v.* Great Western R. Co., 3 Hurl. & N. 869, 870; *s. c.* 28 L. J. (Exch.) 2; Trueblood *v.* State, 1 Tex. App. 650; O'Mealy *v.* State, 1 Tex. App. 180; Whitner *v.* Hamlin, 12

Unless there is plain evidence of injustice done to the party complaining, the verdict should be allowed to stand.[1]

§ 117. Evidence in Support of such Objections. — Such objections, then, are to be received with *great caution*, as tending to perjury and to the defrauding of public justice;[2] otherwise, as soon as a verdict is rendered, another trial, to wit, that of the jurors, will begin.[3] It follows that the *evidence* in support of such objections will be closely scrutinized, and if *conflicting*, the decision of the trial court, refusing a new trial, will

Fla. 21; Finley *v.* Hayden, 3 A. K. Marsh. (Ky.) 330; Bennett *v.* Matthews, 40 How. Pr. (N. Y.) 428; Zickefoose *v.* Kuykendall, 12 W. Va. 23; State *v.* Madoil, 12 Fla. 151; Hull *v.* Albro, 2 Disney (Ohio), 147; Romaine *v.* State, 7 Ind. 63; Eggleston *v.* Smiley, 17 Johns. (N. Y.) 133; Cain *v.* Ingham, 7 Cow. (N. Y.) 478; Hayes *v.* Thompson, 15 Abb. Pr. (N. Y.) (N. S.) 220; State *v.* Turner, 6 La. Ann. 309; McLellan *v.* Crofton, 6 Me. 307; Tidewater Canal Co. *v.* Archer, 9 Gill & J. (Md.) 479; Com. *v.* Flanagan, 7 Watts & S. (Pa.) 415; State *v.* Howard, 17 N. H. 171, 198; State *v.* Strauder, 11 W. Va. 745; Brill *v.* State, 1 Tex. App. 572; Orme *v.* Pratt, 4 Cranch C. C. (U. S.) 124; Magness *v.* State, 2 Coldw. (Tenn.) 309; Hardenburgh *v.* Crary, 15 How. Pr. (N. Y.) 307, 309; Bristow's Case, 15 Gratt. (Va.) 648; Com. *v.* Jones, 1 Leigh (Va.), 598; Curran's Case, 7 Gratt. (Va.) 619; Greenup *v.* Stoker, 8 Ill. 202; Seymour *v.* Deyo, 5 Cow. (N. Y.) 289; Heath *v.* Com., 1 Rob. (Va.) 735; Wickersham *v.* People, 2 Ill. 129; Presbury *v.* Com., 9 Dana (Ky.), 203.

[1] Ramadge *v.* Ryan, 9 Bing. 333; Davison *v.* People, 90 Ill. 221; State *v.* Hayden, 51 Vt. 296; Mitchum *v.* State, 11 Ga. 615; Anderson *v.* State, 14 Ga. 709; Ray *v.* State, 15 Ga. 223; Mercer *v.* State, 17 Ga. 146; Curran's Case, 7 Gratt. (Va.) 619; Ash *v.* State, 56 Ga. 583; Moughon *v.* State, 59 Ga. 308; Lovett *v.* State, 60 Ga. 257; Morrison *v.* McKinnon, 12 Fla. 552; Re Bowman, 7 Mo. App. 568; Schmidt *v.* Rose, 6 Mo. App. 587, 588; Meyer *v.* State, 19 Ark. 156; Lawrence *v.* Collier, 1 Cal. 37; People *v.* Plummer, 9 Cal. 298; State *v.* Shay, 30 La. Ann. 114; Wallace *v.* Columbia, 48 Me. 436; Stewart *v.* State, 58 Ga. 577; Simms *v.* State, 8 Tex. App. 230; Thrall *v.* Lincoln, 28 Vt. 356; Parkinson *v.* Parker, 48 Iowa, 667; Nadenbousch *v.* Sharer, 4 W. Va. 203; O'Shields *v.* State, 55 Ga. 696; Mitchell *v.* State, 22 Ga. 211; Brinkley *v.* State, 58 Ga. 296; State *v.* Dumphey, 4 Minn. 438; Stewart *v.* Ewbank, 3 Iowa, 191; State *v.* Pike, 20 N. H. 341; State *v.* Ayer, 23 N. H. 301; Dole *v.* Erskine, 37 N. H. 317; Dumas *v.* State, 63 Ga. 600. Thus, where the juror has expressed the opinion that the defendant killed the deceased, and this indisputably appears, but self-defense was set up as a justification, no injury was shown. State *v.* Wells, 28 Kan. 321.

[2] Per Tilghman, C. J., in Moore *v.* Philadelphia Bank, 5 Serg. & R. (Pa.) 41, 42.

[3] Per Rogers, J., in Com. *v.* Flanagan, 7 Watts & S. (Pa.) 415, 422.

not be disturbed on appeal.[1] If such an objection assails the impartiality of a juror, it is due to him and to justice that he be furnished with the charge, and that his affidavit be taken, denying it if he can ;[2] and although such affidavit be not taken, a new trial will not necessarily follow, if the affidavit in support of the objection conflicts with his testimony on the *voir dire*, since it will still be merely the case of oath against oath.[3]

§ **118. Question how viewed on Error or Appeal.**— Here, as in all other cases where the rulings of the trial court are questioned on error or appeal, those rulings are *presumed* to be correct until the contrary is shown :[4] it will, therefore, be presumed, until the contrary appears by the record, that the jurors who

[1] Miami Valley Furniture Co. *v.* Wesler, 47 Ind. 65; Clem *v.* State, 33 Ind. 418; Harding *v.* Whitney, 40 Ind. 379; Holloway *v.* State, 53 Ind. 554; Romaine *v.* State, 7 Ind. 63; State *v.* Bancroft, 22 Kan. 170; Epps *v.* State, 19 Ga. 102, 122; Costly *v.* State, 19 Ga. 614; The Anarchists' Case, Spies *v.* People, 122 Ill. 1; *s. c.* 12 North East. Rep. 867, 992, 993; Hughes *v.* People, 116 Ill. 331, 337; *s. c.* 6 North East. Rep. 55; State *v.* Brooks (Mo.), 5 S. W. Rep. 258, 271.

[2] Anderson *v.* State, 14 Ga. 709; Taylor *v.* Greely, 3 Me. 204; State *v.* Kingsbury, 58 Me. 238; Nash *v.* State, 2 Tex. App. 362; Davison *v.* People, 90 Ill. 221; Columbus *v.* Goetchius, 7 Ga. 139; Re Bowman, 7 Mo. App. 568; State *v.* McDonald, 9 W. Va. 456, 466; Tenney *v.* Evans, 13 N. H. 462; Woodward *v.* Leavitt, 107 Mass. 453; Ray *v.* State, 15 Ga. 223; Moncrief *v.* State, 59 Ga. 470; Brinkley *v.* State, 58 Ga. 296; State *v.* Dumphey, 4 Minn. 439; State *v.* Ayer, 23 N. H. 301. *Contra*, Vance *v.* Haslett, 4 Bibb (Ky.), 191.

[3] Nash *v.* State, 2 Tex. App. 362; State *v.* McDonald, 9 W. Va. 456; Hudgins *v.* State, 61 Ga. 182; West *v.* State (Ga.), 4 S. E. Rep. 325; Dumas *v.* State, 63 Ga. 601; Com. *v.* Hughes, 11 Phila. 430. But see Reddle *v.* State, 3 Heisk. (Tenn.) 401; Henrie *v.* State, 41 Tex. 573; Fitzgerald *v.* People, 1 Colo. 56. In the *Anarchists' Case* it is said by the Supreme Court of Illinois: "It is a dangerous practice to allow verdicts to be set aside upon *ex parte* affidavits as to what jurors are claimed to have said before they were summoned to act as jurymen. The parties making such affidavits submit to no cross-examination, and the correctness of their statement is subject to no test whatever." Spies *v.* People (Ill.), 12 North East. Rep. 867, 992, 993; *s. c.* 122 Ill. 1; reaffirmed by the Supreme Court of Kansas in State *v.* Peterson (Kan.), 16 Pac. Rep. 263.

[4] Mansell *v.* Reg., 8 El. & Bl. 54; *s. c.* Dears. & B. 375; Strong *v.* Kean, 13 Irish L. 93; De Bardelaben *v.* State, 50 Ala. 179; State *v.* Monk, 3 Ala. 415, 417; Chesapeake &c. R. Co. *v.* Patton, 9 W. Va. 648; Campbell *v.* Strong, Hemp. C. C. (U. S.) 265; Dutton *v.* Tracy, 4 Conn. 93, 94; Clark *v.* Collins, 15 N. J. L. 473; State *v.* Marshall, 36 Mo. 400; Potsdamer *v.* State, 17 Fla. 895; Com. *v.* Stephen, 4 Leigh (Va.), 679; Burfey *v.* State, 3 Tex.

tried the case, were possessed of the qualifications required by law.[1] The disallowance of a statutory or principal cause of challenge is ground of a *venire de novo*, as contradistinguished from a new trial; it is a denial of a legal right, and not the erroneous exercise of a discretion; it is therefore subject to review by writ of error, or upon a statutory appeal in the nature of a writ of error;[2] and so (under the old system) the refusal to appoint triors,[3] the rejection of competent evidence,[4] the admission of incompetent evidence,[5] or a misdirection to the triors in point of law,[6] might be corrected, on error or statutory appeal, by a bill of exceptions in the usual way. In the view of some courts, where the trial of challenges is devolved by statute upon the court, unless the statute so provides, the decision of the court upon a challenge *to the favor* cannot be reviewed;[7] but other courts take the view that an appellate court ought to review the action of the trial court on all questions touching the

App. 519; Pauska *v.* Daus, 31 Tex. 72; State *v.* Jones, 61 Mo. 232; Montgomery *v.* State, 3 Kan. 263; Green *v.* State, 17 Fla. 669, 679; Handline *v.* State, 6 Tex. App. 347.

[1] Mansell *v.* Reg., *supra;* Chesapeake &c. R. Co. *v.* Patton, 9 W. Va. 648; Shoemaker *v.* State, 12 Ohio, 43; Isham *v.* State, 1 Sneed (Tenn.), 111; Turner *v.* State, 9 Humph. (Tenn.) 119; McClure *v.* State, 1 Yerg. (Tenn.) 215, *per* Catron, J.; Keenan *v.* State, 8 Wis. 132; State *v.* Roderigas, 7 Nev. 328. The bill of exceptions must contain a statement of the facts upon which the challenge disallowed is based; otherwise it cannot be considered by an appellate court. State *v.* Shaw, 5 La. Ann. 342; State *v.* Bruington, 22 La. Ann. 9; Ripley *v.* Coolidge, Minor (Ala.), 11. This statement must be in itself sufficient to support a challenge. State *v.* Millain, 3 Nev. 409.

[2] Rex *v.* Edmunds, 4 Barn. & Ald. 471, 473; Vicars *v.* Langham, Hob. 235; Knyaston *v.* Shrewsbury, Andrews, 85, 89; Hesketh *v.* Braddock, 3 Burr. 1847; Reg. *v.* Gray, 6 Irish C. L. 259, 267; Hutton *v.* Hun, Cro. Eliz. 849; Ex parte Vermilyea, 6 Cow. (N. Y.) 555; People *v.* Vermilyea, 7 Cow. (N. Y.) 108; Mann *v.* Glover, 14 N. J. L. 205; State *v.* Shaw, 3 Ired. L. (N. C.) 532; State v. Davis, 80 N. C. 412, 414.

[3] People *v.* Rathbun, 21 Wend. (N. Y.) 509; People *v.* Bodine, 1 Den. (N. Y.) 281, 308; Baker *v.* Harris, 1 Winst. (N. C.) 277.

[4] Mechanics' Bank *v.* Smith, 19 Johns. (N. Y.) 115.

[5] Sanchez *v.* People, 22 N. Y. 147, 151.

[6] State *v.* Benton, 2 Dev. & Bat. (N. C.) 196, 222; People *v.* Bodine, 1 Denio (N. Y.), 281, 308.

[7] Solander *v.* People, 2 Colo. 48, 62; Jones *v.* People, 2 Colo. 351, Licett *v.* State, 23 Ga. 57; Galloway *v.* State, 25 Ga. 596; Eberhart *v.* State, 47 Ga. 598.

competency of jurors.[1] A statute which grants an exception where the court *disallows* a challenge, does not authorize it where the challenge is *allowed;* since the right of challenge, as already seen,[2] is the right to *reject*, and not the right to *select*, and neither party has the right to have a particular juror sit on the trial of the case.[3] As the question of the competency of a juror is a *mixed question of law and fact*,[4] and as the reviewing court has not the opportunity of observing the demeanor of the venire-man who is challenged, or of the witnesses whose testimony is weighed, it will defer to the decision of the trial court and will exercise its power of setting aside that decision with caution and hesitancy.[5] In order to have the erroneous disallowance of a challenge reviewed on error or appeal, the *record* must not only distinctly set out the grounds of the challenge,[6]

[1] Winnesheik Ins. Co. *v.* Schueller, 60 Ill. 465; Montague *v.* Com., 10 Gratt. 767; Holt *v.* People, 13 Mich. 224; Stevens *v.* People, 38 Mich. 739; State *v.* Pike, 49 N. H. 399, 407. The statute of *Kentucky* provides that all challenges are tried by the court, and that its decision in no case is subject to exceptions. Bullitt's Ky. Cr. Code, § 212; Terrell *v.* Com., 13 Bush, 246; Rutherford *v.* Com., 13 Bush (Ky.), 608; Morgan *v.* Com., 14 Bush (Ky.), 106. A late statute of *New York* contains a similar provision, but allows an exception to the determination of the challenge and a review by writ of error or *certiorari*. Laws N. Y. 1873, ch. 427; Thomas *v.* People, 67 N. Y. 218, 222, opinion by Earl, J. See also Greenfield *v.* People, 74 N. Y. 277.

[2] *Ante*, § 43.

[3] People *v.* Murphy, 45 Cal. 137, overruling People *v.* Stewart, 7 Cal. 140. See also State *v.* Larkin, 11 Nev. 314; People *v.* Brotherton, 43 Cal. 530; People *v.* Colson, 49 Cal. 679; People *v.* Atherton, 51 Cal. 495.

[4] McCarthy *v.* Railway Co. (Mo.), 4 S. W. Rep. 516. See also State *v.* Chatham Nat. Bank, 80 Mo. 626; Montgomery *v.* Railroad Co. (Mo.), 2 S. W. Rep. 409.

[5] People *v.* Stout, 4 Parker, Cr. (N. Y.) 71, 124, opinion by E. Darwin Smith, J. See also Thomas *v.* People, 67 N. Y. 218, 222, per Earl, J.; The State *v.* Tom, 8 Oregon, 177; Jordan *v.* State, 22 Ga. 545; Bradford *v.* State, 15 Ind. 347; March *v.* Portsmouth &c. R. Co., 19 N. H. 372; People *v.* Henderson, 28 Cal. 466; Campbell *v.* Com., 84 Pa. St. 187; May *v.* Elam, 27 Iowa, 365; Davenport Gas Co. *v.* Davenport, 13 Iowa, 229; Coryell *v.* Stone, 62 Ind. 307; State *v.* Saunders (Ore.), 12 Pac. Rep. 441; Reynolds *v.* United States, 98 U. S. 145. See also Trenor *v.* Central Pacific R. Co., 50 Cal. 222; Swiss *v.* Stockstill, 30 Ohio St. 418; Dew *v.* McDivitt, 31 Ohio St. 139; *s. c.* 17 Am. L. Reg. 623; State *v.* Dodson, 16 S. C. 453. *Contra*, Montague *v.* Com., 10 Gratt. (Va.) 767.

[6] Ripley *v.* Coolidge, Minor (Ala.), 11; Rash *v.* State, 61 Ala. 89; Fillion *v.* State, 5 Neb. 351; State *v.* Bullock, 63

but also the testimony which was adduced for and against it.[1]

§ 119. What the Record must show.—Here, as in other cases of appellate procedure, and especially in criminal cases, much attention must be given to the question, what errors or irregularities must be affirmatively exhibited by the record, in order to be available for reversing the judgment. A general statement of principle would be, that those steps in the procedure which are matters of vital or constitutional right to the accused in a criminal case, must affirmatively appear by the record, though not necessarily in the form of specific recitals; and that, in respect of matters of minor importance, the presumption spoken of in the last section will support the judgment. In general, it must affirmatively appear from the record, that the jury were *sworn;*[2] though, in those jurisdictions where the jury is not

N. C. 570; State *v.* Ellington, 7 Ired. L. (N. C.) 61; People *v.* Bodine, 1 Den. (N. Y.) 281, 308; Baker *v.* Harris, 1 Winst. N. C. 277; State *v.* Benton, 2 Dev. & Bat. (N. C.) 196, 217.

[1] State *v.* Tom, 8 Ore. 177; Hayden *v.* Long, 8 Ore. 244; State *v.* Rigg, 10 Nev. 284.

[2] Kitter *v.* People, 25 Ill. 42; Nels *v.* State, 2 Tex. 280; Cannon *v.* State, 5 Tex. App. 34; Kennon *v.* State, 7 Tex. App. 326; State *v.* Gates, 9 La. Ann. 94; State *v.* Douglass, 28 La. Ann. 425; State *v.* King, 28 La. Ann. 425; State *v.* Phillips, 28 La. Ann. 387; Botsford *v.* Yates, 25 Ark. 282; Lacey *v.* State, 58 Ala. 385; Baird *v.* State, 38 Tex. 599; State *v.* Calvert, 32 La. Ann. 224; State *v.* Reid, 28 La. Ann. 387. It is doubtless true that it seldom happens, as a matter of fact, that a jury is not sworn, although the record omits to state the swearing. An attempt was lately made in a Louisiana case to break in upon the well established rule that the record must show the fact of swearing. Although unsuccessful, the result was a divided court. Ludeling, C. J., one of the dissenting judges, held that, upon the principle that courts generally will not listen to objections to the qualifications of jurors unless taken at the proper time, before trial, a prisoner should be presumed to have waived such an informality if it actually occurred. But, said he: "It is morally certain that the jury is sworn in all cases. This results from the manner in which the jurors are selected and sworn in courts, and I cannot perceive how it is possible to fail to swear a jury in any case." State *v.* Reid, 28 La. Ann. 387, 388. See also Hardenburgh *v.* Crary, 15 How. Pr. 307, where a verdict rendered by a jury, one of the twelve being unsworn, was upheld. Before a new trial will be granted in such a case, it must be demonstrated to the satisfaction of the court, that the party complaining and his attorneys were ignorant of the fact, until after verdict, that the juror was unsworn. Scott *v.* Moore, 41 Vt. 205.

sworn in each case, but the entire panel is sworn at the beginning of the term once for all, this recital is regarded as no essential part of the history of the case.[1] But it is sufficient that this appear by a fair interpretation of the record, although the fact be not expressly stated.[2] According to one conception, where some of the jurors *affirm*, the record ought to show that they were conscientiously scrupulous of taking an oath;[3] but this conclusion is doubtful,[4] and by an English statute,[5] it is unnecessary.

§ **120. No Vested Right in a Particular Juror.** — As already pointed out,[6] the right to *reject* is not a right to *select*. No party can acquire a vested right to have a particular member of the panel sit upon the trial of his cause until he has been accepted and sworn.[7] It is enough that it appear that his cause has been tried by an impartial jury. It is no ground of exception that, against his objection, a juror was rejected by the court upon insufficient grounds, unless, through rejecting qualified persons, the necessity of accepting *others* not qualified has been purposely created.[8] Thus, in the process of impaneling, no party is entitled, as of right, to have the *first juror* sit who has the statu-

[1] Waddell *v.* Magee, 53 Miss. 687 (probably overruling Wolfe *v.* Martin, 1 How. (Miss.) 30; Beall *v.* Campbell, 1 How. (Miss.) 24; Irwin *v.* Jones, 1 How. (Miss.) 497); Clark *v.* Davis, 7 Tex. 556; Drake *v.* Brander, 8 Tex. 351; Pierce *v.* Tate, 27 Miss. 283; Furniss *v.* Meredith, 43 Miss. 302; Hewett *v.* Cobb, 40 Miss. 61. But see Buck *v.* Mallory, 24 Miss. 170. See also Goyne *v.* Howell, Minor (Ala.), 62; Perdue *v.* Burnett, Minor (Ala.), 138.

[2] Christ *v.* State, 21 Ala. 37. For example, see State *v.* Christian, 30 La. Ann. 367. For cases where the record was held, on an interpretation, *not* to show the fact, see Bass *v.* State, 6 Baxter (Tenn.), 579, 586; State *v.* Potter, 18 Conn. 166, 175; Rich *v.* State, 1 Tex. App. 206.

[3] State *v.* Putnam, 1 N. J. L. 260; State *v.* Sharp, cited by Kinsey, C. J., in State *v.* Rockafellow, 6 N. J. L. 332, 341. See also State *v.* Fox, 9 N. J. L. 244; State *v.* Harris, 7 N. J. L. 361.

[4] Clark *v.* Collins, 15 N. J. L. 473.

[5] 6 and 7 Vict., chap. 85, § 2.

[6] *Ante*, § 43.

[7] Mansell *v.* Reg., 8 El. & Bl. 54, 79.

[8] Tatum *v.* Young, 1 Porter (Ala.), 298; Bibb *v.* Reid, 3 Ala. 88; People *v.* Arceo, 32 Cal. 40; Grand Rapids Booming Co. *v.* Jarvis, 30 Mich. 308; Carpenter *v.* Dame, 10 Ind. 125; Heaston *v.* Cincinnati &c. R. Co., 16 Ind. 275, 279. *Contra*, Hildreth *v.* Troy, 101 N. Y. 234; *s. c.* 54 Am. Rep. 686.

tory qualifications;[1] though there are authorities to the contrary, chiefly based on exaggerated views of the rights of the accused in criminal trials.[2] But this is on principle quite untenable; since, if the prisoner has been tried by an impartial jury, it would be nonsense to grant a new trial or a *venire de novo* upon this ground, in order that he might be again tried by another impartial jury.[3] A consequence of this rule is, that when the name of a juror is drawn and called in court, the accused in a criminal case cannot demand that the juror shall be *called* at the door of the court house, or that an attachment shall issue to bring him in, or that an officer shall be dispatched for him;[4] though, if a juror absent himself after he has been sworn, the court may either compel his attendance or dismiss the jury and impanel another.[5] Finally, it is a rule of paramount importance that errors com-

[1] People *v.* Arceo, 32 Cal. 40, 44; State *v.* Pritchard, 15 Nev. 74; State *v.* Arthur, 2 Dev. (N. C.) 217; State *v.* Benton, 2 Dev. & B. (N. C.) 196, 222; Smith *v.* Clayton, 29 N. J. L. 357; Phelps *v.* Hall, 2 Tyler (Vt.), 401; John *v.* State, 16 Fla. 554; State *v.* Marshall, 8 Ala. 302; Watson *v.* State, 63 Ind. 548; Hurley *v.* State, 29 Ark. 17, 22; State *v.* Lovenstein, 9 La. Ann. 313; State *v.* Wilson, 48 N. H. 398; Foster's Case, 13 Abb. Pr. (N. s.) (N. Y.) 372, n.; Silvis *v.* Ely, 3 Watts & S. (Pa.) 420; Citizens' Bank *v.* Strauss, 26 La. Ann. 736; State *v.* Lewis, 28 La. Ann. 84; Clifton *v.* State, 53 Ga. 241; Pannell *v.* State, 29 Ga. 681; Henry *v.* State, 4 Humph. (Tenn.) 270; State *v.* Shelledy, 8 Iowa, 477; O'Brien *v.* Vulcan Iron Works, 7 Mo. App. 257.

[2] Boles *v.* State, 13 Smed. & M. (Miss.) 398; Williams *v.* State, 32 Miss. 390; Smith *v.* State, 55 Miss. 410; Finn *v.* State, 5 Ind. 400; Meyers *v.* State, 20 Ind. 511. (But see Coryell *v.* Stone, 62 Ind. 307.) Van Blaricum *v.* People, 16 Ill. 364; Greer *v.* Norvill, 3 Hill (S. C.), 262. See also remarks of Lord Tenterden, *ante*, § 250.

[3] Henry *v.* State, 4 Humph. (Tenn.) 270; Grisson *v.* State, 8 Tex. App. 386, 398; State *v.* Raymond, 11 Nev. 98; Woodard *v.* State, 9 Tex. App. 412. But, in the view of some courts, this rule does not permit the trial judge to exclude competent jurors arbitrarily and unreasonably; but an abuse of discretion in this regard may be ground of new trial.

[4] United States *v.* Byrne (U. S. Cir. Ct. S. D. N. Y., May, 1881), 7 Fed. Rep. 455; Waller *v.* State, 40 Ala. 325; Bill *v.* State, 29 Ala. 34; Stewart *v.* State, 13 Ark. 721, 737; Hall *v.* State, 51 Ala. 9; People *v.* Larned, 7 N. Y. 445; People *v.* Vermilyea, 7 Cow. (N. Y.) 369, 382; Johnson *v.* State, 47 Ala. 9; State *v.* Lovenstein, 9 La. Ann. 313; Foster's Case, 13 Abb. Pr. (N. Y.) (N. s.) 372, n.; Boles *v.* State, 24 Miss. 445; State *v.* Breaux, 32 La. Ann. 222; State *v.* Belcher, 13 So. Car. 459. But see Johnson *v.* State, 47 Ala. 9; State *v.* Ross, 30 La. Ann. 1154.

[5] Pennell *v.* Percival, 13 Pa. St. 197.

mitted in overruling challenges for cause are not grounds of reversal, unless it be shown an objectionable juror was forced upon the challenging party after he had *exhausted his peremptory challenges;*[1] if his peremptory challenges remained unexhausted, so that he might have excluded the objectionable juror by that means, he has no ground of complaint.[2]

§ **121. Juror no Vested Right to Serve.** — A single decision is found upholding the idea that a citizen has a vested right to serve as a juror when drawn;[3] but the idea is too fantastic for serious discussion.

[1] The Anarchists' Case (Spies *v.* People) (Ill.), 12 North East. Rep. 867, 989; *s. c.* 122 Ill. 1; Holt *v.* State, 9 Tex. App. 571; Laggins *v.* State, 12 Tex. App. 65. But see Wade *v.* State, 12 Tex. App. 358.

[2] United States *v.* Neverson, 1 Mackey (D. C.), 152.

[3] Greer *v.* Norvill, 3 Hill (S. C.), 262.

TITLE II.

CONTROL AND REGULATION OF THE TRIAL.

CHAPTER V.— OF THE PRESERVATION OF ORDER AND THE PUNISHMENT OF CONTEMPTS.
CHAPTER VI.— OF COMPULSORY PROCESS AGAINST WITNESSES.
CHAPTER VII.— ENFORCING THE STIPULATIONS AND ADMISSIONS OF COUNSEL.
CHAPTER VIII.— OF OTHER SUBJECTS OF JUDICIAL CONDUCT AND CONTROL.

CHAPTER V.

OF THE PRESERVATION OF ORDER AND THE PUNISHMENT OF CONTEMPTS.

SECTION
124. Extent of the Power to Punish Contempts.
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§ 124. Extent of the Power to Punish Contempts. — It is necessary to the due exercise of the functions of a judicial court that the judge should possess the power to preserve order while conducting judicial proceedings, to enforce obedience to the lawful orders and process of the court, and consequently to punish disobedience of the same. It is therefore a general principle of the common-law, subject to statutory limitations in this country: (1) that every superior court of record has the inherent power to punish contempts committed in its presence and against its authority: (2) that every such court is the exclusive judge of such contempts.[1]

[1] Wilson's Case, 7 Q. B. 984; *s. c.* 9 Jur. 393, 14 L. J. Q. B. 105, 201; Ex parte Edwards, 11 Fla. 174; State *v.* Gallaway, 5 Coldw. (Tenn.) 326; Re Andrews, 4 C. B. 226; Ex parte Hardy (Ala.), 13 Cent. L. J. 50; Re Cooper, 32 Vt. 253; People *v.* Sturtevant, 9 N. Y. 263; Ex parte Adams, 25 Miss. 883; Ex parte Sam, 51 Ala. 34; Re Millington, 24 Kan. 214; Crosby's Case, 3 Wils. 188; Wicker *v.* Dresser, 13 How. Pr. (N. Y.) 331; Whitcomb's Case, 120 Mass. 118, 120, per Gray, C. J.; Cartwright's Case, 114 Mass. 230; State *v.* Matthews, 37 N. H. 450; Mariner *v.* Dyer, 2 Me. 165, 172; Tenney's Case, 23 N. H. 162; Spalding *v.* People, 7 Hill (N. Y.), 301 (affirming *s. c.* 10 Paige (N. Y.), 284); State *v.* White, R. M. Charlt. (Ga.) 136; Lyon *v.* Lyon, 21 Conn. 18, 185, 196; Johnson *v.* Commonwealth, 1 Bibb (Ky.), 598; Morrison *v.* McDonald, 21 Me. 550; Passmore Williamson's Case, 26 Pa. St. 9, 18; Ex parte Smith, 28 Ind. 47; State *v.* Tipton, 1 Blackf. (Ind.) 166; State *v.* Doty, 32 N. J. L. 403; The Bark Laurens, 1 Abb. Adm. 508, 513; Watson *v.* Williams, 36 Miss. 331; Hollingsworth *v.* Duane, Wall. La. (U. S) 77; State *v.* Morrill, 16 Ark. 384; Lining *v.* Bentham, 2 Bay (S. C.), 1, 7; State *v.* Johnson, *Id.* 385; People *v.* Fancher, 4 Thomp. & C. (N. Y.) 467; Sanders *v.* Metcalf, 1 Tenn. Ch. 419, 428; People *v.* Wilson, 64 Ill. 195; Middlebrook *v.* State, 43 Conn. 257, 268; Shattuck *v.* State, 51 Miss. 50; La Fontaine *v.* Southern Underwriters, 83 N. C. 132; State *v.* Harper's Ferry Bridge Co., 16 W. Va. 864, 876.

The result of this doctrine is that superior courts of record are not bound to certify upon their record the facts of which a contempt consists, but that every other court or judge, where the validity of a commitment for contempt by such a court is drawn in question, is bound to presume that the facts were sufficient to warrant it.

§ 125. Power of Legislature to limit this Power of Courts. — This power being inherent in courts of justice, and necessary to enable them to preserve their dignity and enforce their process, and so to attain the ends of their creation, the power of the legislature to regulate the same, except where such power is conferred by the constitution, may well be doubted.[1] If the court is created by the constitution, it is clear, upon principle, that the legislature has no such power, unless such power is conferred upon it by the constitution; and it has been so held.[2]

§ 126. Statutory Affirmations of this Power. — Statutory affirmations of this power exist in several States. Where the power is conferred in general terms by an affirmative statute upon a superior court of record, it is regarded as being merely declaratory of the common law,[3] not as creating a power, but simply as re-affirming a pre-existing power; and it leaves the court to follow the principles of the common law in determining what constitutes a contempt.[4] Accordingly, a statute conferring this power upon superior courts of record, in general terms, is held to embrace both direct and constructive contempts, because both of these were contempts at common law.[5] Even a statute requiring a judge issuing a writ of *habeas corpus*

[1] See Arnold *v.* Com., 80 Ky. 300; *s. c.* 44 Am. Rep. 480; Ex parte Robinson, 19 Wall. (U. S.) 510; Re Wolley, 11 Bush (Ky.), 95, 111.

[2] State *v.* Morrill, 16 Ark. 384. The Kentucky court, while asserting this principle in general terms, was disposed to consider that the legislature might impose reasonable checks upon the mere arbitrary exercise of a discretion in this regard. Re Wolley, 11 Bush (Ky.), 95, 111.

[3] Middlebrook *v.* State, 43 Conn. 257, 267.

[4] People *v.* Wilson, 64 Ill. 195.

[5] Whittem *v.* State, 36 Ind. 196, 212.

to remand a prisoner, if it appear that he is detained in custody for a contempt specially and plainly charged in the commitment, by some court having authority to commit for the contempt charged, has been supposed not to work a substantial alteration of the rule of the common law on the subject.[1] A statute which merely purports to limit the power, in this regard, of judges in vacation and at chambers, does not, of course, operate to curtail the power possessed by the courts.[2]

§ 127. **Immaterial that the Offense is Indictable.** — The power of the courts in this regard, being founded in the principle of self-preservation, it does not at all go to deprive them of it, that the law has provided some other mode for punishing the offender; it is quite immaterial that the offense is indictable.[3] Courts are not obliged to trust the preservation of their dignity and authority to such weak agencies as information, indictment, and trial by jury, it may be before some other tribunal, where the success of the prosecution and the conviction of the offender may depend upon the zeal of a prosecuting witness, of the State's attorney, or upon circumstances purely accidental. Besides, the exigencies may not admit of so tardy a remedy. In cases of inferior courts, such as justices of the peace, even the remedy by indictment may not exist, unless the words are such that they would be indictable when spoken of a private person;[4]

[1] Davison's Case, 13 Abb. Pr. (N. Y.) 129, 138. But a reading of the English decisions will show that this supposition is erroneous.

[2] Re Millington, 24 Kan. 214.

[3] Rex *v.* Lord Ossulston, 2 Strange, 1107 (*s. c. sub nom.* King *v.* Pierson, Andrews, 310); Spaulding *v.* People, 7 Hill (N. Y.), 301, 302; State *v.* Williams, 3 Speers (S. C.), 26; *Contra*, State *v.* Blackwell, 10 So. Car. 35, 38.

[4] Thus, in an old case, an indictment for saying of Sir Rowland Gwyn, who was a justice of the peace, in a discourse concerning a warrant made by him, "Sir Rowland Gwyn is a fool, an ass and a coxcomb for making such a warrant, and he knows no more than a slickhill," was held naught, on demurrer, though it was a breach of good manners, and might afford ground for binding the party over for good behavior. "*Et per* Holt, C. J.: 'To say a justice is a fool, or an ass, or a coxcomb, or a blockhead, or a buffle-head, is not indictable.'" Reg. *v.* Wrightson, 2 Salk. 698. But in a rambling report in the Modern Reports, the court is said to have sustained an indictment for speaking scandalous words of Sir J. K., a justice of the peace, namely: "Sir J. K.

but they might afford ground for binding the party over to keep the peace.[1] To this ruling an exception has been admitted by some courts, in the case of proceedings to *disbar attorneys* for professional misconduct; so that, where a special proceeding was provided by statute by which the accused was allowed the advantage of certain formalities, he could not be proceeded against and disbarred by the court in the exercise of its common-law powers.[2]

§ 128. **What are Superior Courts of Record.** — What are superior courts of record, within the meaning of this rule, is an important subject of inquiry. It must be stated in the outset, that it is not at all necessary to the inherent power of the court to fine and imprison for contempt that it should be what is termed a court of *general jurisdiction*. In the largest sense, there are no such courts, because there are no courts in England or America which exercise at once all the judicial power of the State, both original and appellate, legal and equitable, civil and criminal. The two houses of Parliament, for instance, have always been regarded, whenever their authority in this regard has been called in question in the judicial courts, as very high courts. The House of Lords, indeed, is the highest court of appellate jurisdiction in Great Britain, and it possesses a certain original jurisdiction, chiefly criminal, in respect of its own members, but it is in no sense a court of general jurisdiction. Nevertheless, its power, when sitting as a legislative body, to punish contempts of its authority is of so high a nature that it cannot even be inquired into by the judicial courts. The former Court of Chancery in England had no common-law jurisdiction,

is a buffle-headed fellow and doth not understand law; he is not fit to talk law with me; I have baffled him, and he hath not done my client justice." The counsel for the crown urged that "this was a scandal upon the government; since it was as much as to say that the king hath appointed an ignorant man to be a justice of the peace, for which an indictment would lie: and of that opinion was the whole court, and gave judgment accordingly." Rex *v.* Derby, 3 Mod. 139.

[1] Richmond *v.* Dayton, 10 Johns. (N. Y.) 393.

[2] State *v.* Start, 7 Iowa, 499; Ex parte Smith, 28 Ind. 47.

and hence was not, properly speaking, a court of general jurisdiction; but its power to punish contempts of its authority was not only never questioned, but in the earliest times this was the only way in which it enforced its orders and decrees.[1] The Court of Common Pleas in England had no criminal jurisdiction, but its inherent power in this regard was never questioned. So the Court of Common Pleas of Connecticut has no criminal jurisdiction, but its power in this regard, when questioned, was distinctly affirmed.[2] The courts of the United States possess both common-law and equity powers, and their common-law jurisdiction extends to cases both civil and criminal. But in respect of parties to actions, those courts are not courts of general jurisdiction.[3] Their jurisdiction is limited by the citizenship of the parties, except in cases relating to the federal revenue and in some other cases. But their power to punish contempts of their authority is unquestioned, and, when acting within the scope of their apparent jurisdiction, their judgments in this regard cannot be questioned in other courts.[4] Passing to other courts, we find that the English common-law judges holding courts of *nisi prius*,[5] courts of Oyer and Terminer in England[6] and in New York[7] and the Municipal Court of Bangor, Maine, existing in 1833,[8]

[1] 3 Bl. Com. 287.

[2] Middlebrook *v.* State, 43 Conn. 257, 267.

[3] Ex parte Smith, 94 U. S. 485. Compare Ex parte Watkins, 3 Pet. (U. S.) 193, 207; McCormick *v.* Sullivant, 10 Wheat. (U. S.) 192; Kemp *v.* Kennedy, 5 Cranch (U. S.), 185; Skellern *v.* May, 6 Cranch (U. S.), 267; Ruckman *v.* Cowvell, 1 N. Y. 505; Thompson *v.* Lyle, 3 Watts & S. (Pa.) 166; Reed *v.* Vaughn, 10 Mo. 447; Hays *v.* Ford, 55 Ind. 52.

[4] Williamson's Case, 26 Pa. St. 9; The Bark Laurens, 1 Abb. Adm. 508, 513. It has even been held that a contemnor of one of the Circuit Courts of the United States may be arrested in another federal district, even in another State, and brought before the court whose authority he has contemned, there to be dealt with for such contempt. Fanshawe *v.* Tracy, 4 Biss. (U. S.) 490. But some of the federal judges deny this power. Compare Pooley *v.* Whethan, 15 Ch. Div. 435; *s. c.* 50 L. J. (Chan.) 236.

[5] Rex *v.* Davison, 4 Barn. & Ald. 329.

[6] Re M'Aleece, 7 Ir. C. L. 146. Compare Re Pater, 5 Best & S. 299; *s. c.* 10 Jur. (N. S.) 972; Re Fernandez, 6 Hurl. & N. 717; *s. c.* 10 C. B. (N. S.) 3; 30 L. J. (C. P.) 321.

[7] People *v.* Fancher, 4 Thomp. & C. (N. Y.) 467.

[8] Morrison *v.* Macdonald, 21 Me. 551, 556.

were all ranked as superior courts of record, within the rule which clothes such courts with this power. So, the Court of Probate in Mississippi,[1] and the Surrogates' Court in New York,[2] possess the power to compel defaulting executors, administrators and guardians to pay over money or deliver property, where payment or delivery is within their power.[3]

§ 129. Power of Inferior Courts to Punish for Contempt. — It may be stated as a general rule of the common law, that inferior courts not of record, inferior legislative bodies such as those of the British colonies and dependencies, and the legislative councils of municipal corporations,[4] have no power to fine and imprison for contempt, except in so far as such power has been expressly conferred by statute.[5] Much difference of opinion has existed as to what tribunals and officers are to be deemed inferior courts not of record, within the meaning of this rule. But it has been held that judges of courts performing *ex officio* acts out of court in vacation,[6] or at chambers,[7] have no power to fine or im-

[1] Watson *v.* Wilson, 36 Miss. 331. But not in Vermont. Re Bingham, 32 Vt. 329.

[2] Seaman *v.* Duryea, 11 N. Y. 324 (affirming *s. c.* 10 Barb. (N. Y.) 523); Matter of Watson *v.* Nelson, 69 N. Y. 536.

[3] In Missouri, there is a general statutory provision to the effect that "when a judgment requires the performance of any other act than the payment of money, a certified copy of the judgment may be served upon the party against whom it is given, and his obedience thereto required. If he neglect or refuse, he may be punished by the court, as for a contempt, by fine or imprisonment, or both, and, if necessary, by sequestration of property." Rev. Stat., § 3728. Although courts of probate in Missouri are now, in respect of the presumptions in support of their jurisdiction in collateral proceedings, regarded, in certain cases, as superior courts of record (Johnson *v.* Beasley, 65 Mo. 250), yet it is believed that it is not the understanding of the profession in that State that the above statute extends to the courts of probate.

[4] Whitcomb's Case, 120 Mass. 118.

[5] Re Kerrigan, 33 N. J. L. 344; Batchelder *v.* Moore, 42 Cal. 412, 414; Reg. *v.* Lefroy, L. R. 8 Q. B. 134; *s. c.* 4 Moak, 250; Noyes *v.* Byxbee, 45 Conn. 382; Heard *v.* Pierce, 8 Cush. (Mass.) 338.

[6] Ex parte Ireland, 34 Tex. 344.

[7] People *v.* Brennan, 44 Barb. (N. Y.) 344. The N. Y. Code Civil Proc., § 302, gives to the judge who issues the order in a proceeding supplementary to execution, the power to punish as for contempt, and such power is possessed by the county judge in that State. Rugg *v.* Spencer, 59 Barb. (N.

prison for contempt; though judges of the Circuit Court of the United States, in cases in equity, possess power so to punish in vacation, because a court of equity has no terms, but is deemed to be always open.[1] By analogy to the well-known rule that in *summary proceedings* contrary to the course of the common law, nothing is presumed in favor of the jurisdiction even of a superior court of record, it has been laid down that no power resides in judicial officers when exercising a summary jurisdiction, to punish for contempts, unless this power is expressly conferred by statute.[2] In this category have been placed justices of the peace, recorders of municipal corporations, and the like officers who exercise summary jurisdiction expressly conferred by statute for the trial of certain petty offenses.[3] But there is a difference of opinion as to the powers of justices of the peace in this regard, as we shall hereafter see. County courts possess varying jurisdiction in different States; and no general rule can be stated with regard to the power of such courts to punish for contempts. Undoubtedly, they have such power in Vermont.[4] But it would seem they do not possess it in Alabama;[5] and, unquestionably, they do not in Missouri, where the county court is merely an administrative board, possessing, except in a few provisional cases, no judicial powers. There seems to have been a difference of opinion in New York, as to whether surrogates possess this power; but it seems that, by force of statute, they possess it to a limited extent, and may use it to compel the payment of money into their hands by defaulting executors, administrators and guardians.[6]

Y.) 383, 398. But the possession of this special statutory power on the part of the *judge*, does not operate as an implied denial of it on the part of the *court*. Kearney's Case, 13 Abb. (N. Y.) Pr. 459.

[1] Vose *v.* Reed, 1 Woods (U. S.), 647, 652.

[2] Matter of Kerrigan, 33 N. J. L. 344, 348, 350; Stuart *v.* Allen, 45 Wis. 158, 160, per Orton, J.

[3] Matter of Kerrigan, *supra*.

[4] In that State it is held that justices of the peace have such power, without the aid of any statute. Re Cooper, 32 Vt. 253.

[5] State *v.* McDuffie, 52 Ala. 4.

[6] Seaman *v.* Duryea, 11 N. Y. 324 (affirming *s. c.* 10 Barb. (N. Y.) 523); Matter of Watson *v.* Nelson, 69 N. Y. 536.

§ 130. [Continued.] Power of Referees, Court Commissioners, Notaries. — It is said, in North Carolina, that a referee sitting to try the issues of a cause which has been referred to him, has the same power to enforce obedience to his rulings which the court would have if the trial were before the court; but this is by virtue of the express provisions of a statute.[1] Where the referee is not to try the issues, but merely to collect evidence, in other words, where the officer, although called a referee, discharges merely the functions of an examiner in chancery, he has no power to punish a recusant witness for contempt, but must refer the matter to the court.[2] Court commissioners in Wisconsin have no such power, except in so far as it is conferred by statute.[3] According to the usual practice in chancery, an attachment against a witness for a contempt in a proceeding before a master, requires an application to the court.[4] A like practice is prescribed by act of Congress in the case of commissioners to take depositions to be used abroad, and in case of registers in bankruptcy.[5] Neither have commissioners of Circuit Courts of the United States power to commit for contempt, and the power of Congress to clothe them with this power has been doubted.[6] So, it has been well laid down that a party seeking to justify the commitment of a witness by a notary public, must put his finger upon some statute directly authorizing it.[7] We shall see in the next section, that justices of the peace do not possess this power at common law. For stronger reasons, then, it has been denied to the *police justices* of municipal corporations.[8]

§ 131. [Continued.] Power of Justices of the Peace.— The power of justices of the peace at common law, to fine and

[1] N. C. Code Civ. Pro., § 246.

[2] La Fontaine *v.* Southern Underwriters, 83 N. C. 132, 137.

[3] Haight *v.* Lucia, 36 Wis. 355; Stewart *v.* Allen, 45 Wis. 158, 160, per Orton, J.

[4] Gray, C. J., in Whitcomb's Case, 120 Mass. 118, 120. See Rex *v.* Almon, Wilmot, 243, 269; 2 Dan. Ch. Pr. (4th Am. ed.) 1178, 1198; 78th Eq. Rule of U. S. Courts, 17 Peters, lxxiv.

[5] Rev. Stat. U. S., §§ 4071, 4073, 4999, 5002, 5005, 5006.

[6] Ex parte Doll, 7 Phila. (Pa.) 595.

[7] Ex parte Mallinkrodt, 20 Mo. 493.

[8] Matter of Kerrigan, 30 N. J. L. 344, 346–348.

imprison for contempt, is involved in much doubt. I have not met with any authoritative adjudication in England which holds that they possess such power; and as late as 1822 the power was questioned in the King's Bench, and the court avoided expressing any opinion upon it. If they ever possessed this power at all, beyond question it was limited to the punishment of contempts committed *in facie curiæ*;[1] although a court of record possessed at common law the power to punish constructive contempts, that is, contempts committed out of court.[2] But a justice of the peace may, for this kind of contempt, compel the contemnor to find sureties to keep the peace, and commit him in default thereof;[3] but if he merely imprisons him for contempt, he will be liable to him for damages for false imprisonment.[4] Dicta may possibly be found in the old English books of reports which give color to the idea that justices of the peace have power to punish direct contempts;[5] and some of the authoritative textwriters seem to have supposed that this is the law.[6] But it has been pointed out by a learned judge in New Jersey, in by far the ablest discussion of this branch of the subject which has appeared in any American book of reports, that these assumptions are entirely destitute of the force of authority, and may be explained, for the most part, by the indefinite use of the word "commit," not discriminating between its use in the sense of committing in default of sureties of the peace or of bail, to answer before a criminal tribunal on an indictment, and the power to commit by way of punishment.[7] He pointed out that originally the powers of a justice of the peace were ministerial only,[8] consisting chiefly in preserving the peace, receiving complaints, issuing warrants for the arrest of accused persons, examining witnesses of the informant, and binding over or bailing or commit-

[1] Reg. *v.* Lefroy, L. R. 8 Q. B. 134; Richmond *v.* Dayton, 10 Johns. (N. Y.) 393; Fitler *v.* Probasco, 2 Browne (Pa.), 137.

[2] *Post*, § 135.

[3] Richmond *v.* Dayton, 10 Johns. (N. Y.) 393.

[4] Fitler *v.* Probasco, *supra*.

[5] Rex. *v.* Langley, 2 Salk. 697; *s. c.* 2 Ld. Raym. 1029.

[6] 2 Hawk. P. C., book 2, ch. 16, § 3; 2 Hale P. C. 122.

[7] Matter of Kerrigan, 33 N. J. L. 344, 349.

[8] See, as to this, Schraeder *v.* Ehlers, 31 N. J. L. 146.

ting the accused.[1] Several American courts, however, have conceded to justices of the peace the power to punish contempts of their authority, committed in their immediate presence while in the discharge of their judicial functions, independently of any express grant of such power by statute.[2] This might be held in New England consistently with sound principles, upon an exceptional view there taken of the character of courts held by justices of the peace, that such courts are courts of record;[3] or at least, in certain cases, judges of record.[4] In New York this power is conferred by statute upon justices of the peace in certain defined cases, and prohibited in all others;[5] so that, in that State, a justice of the peace has no power to adjudge a person guilty of contempt, and to punish him therefor, except in the cases prescribed.[6] In Illinois, the power is now limited by statute to the imposition of a fine of $5, and to imprisonment until the same is paid;[7] but there can be no imprisonment in the first instance.[8]

§ 132. Power of all Courts to Protect their Proceedings from Interruption.— It must not be supposed from the foregoing that the common law has been so jealous of liberty as to deprive inferior judicatories and deliberative bodies of the power to preserve their deliberations from interruption and disorder, and from making or ordering the arrest of disturbers, for this purpose. Accordingly, under any view taken of the power of a justice of the peace to fine and imprison for contempt, he un-

[1] See 3 Bl. Com. 354, note.

[2] Richmond *v.* Dayton, 10 Johns. (N. Y.) 393; Lining *v.* Bentham, 2 Bay (S. C.), 1, 8 (anno 1796); State *v.* Johnson, 2 Bay (S. C.), 385; Hill *v.* Crandall, 52 Ill. 70, 73; Re Cooper, 32 Vt. 253, 257; State *v.* Towle, 42 N. H. 540.

[3] Holcomb *v.* Cornish, 8 Conn. 375, 380. That this is not the view in New York, see Brown *v.* Genung, 1 Wend. (N. Y.) 115.

[4] Thayer *v.* Commonwealth, 12 Metc. (Mass.) 9. Compare Smith *v.* Morrison, 22 Pick. (Mass.) 430.

[5] Rev. Stat. N. Y. 748, § 44; *Id.* (4th ed.) 931, § 51.

[6] Rutherford *v.* Holmes, 66 N. Y. 368; (affirming *s. c.* 5 Hun (N. Y.), 31); Mallory *v.* Benjamin, 9 How. Pr. (N. Y.) 419; People *v.* Webster, 14 How. Pr. (N. Y.) 242; *s. c.* 3 Park. Cr. (N. Y.) 503.

[7] Ill. Act. July 1st, 1872, § 123.

[8] Newton *v.* Locklin, 77 Ill. 103, 106.

doubtedly possesses the power, during the trial of a cause before him, to order the removal of a disorderly by-stander from his court room. Such a power lies at the very foundation of the administration of justice, and his order, in the exercise of it, will justify a sheriff or constable in an action of false imprisonment; and, not being an order of record, may be proved by parol.[1] So, one of the houses of the legislative assembly of a British colony, while possessing no power to imprison for contempt by way of punishment, nevertheless possesses the inherent power to arrest and remove a disorderly member. This power is necessary for self-preservation. It is warranted by the legal maxim *quando lex aliquid concedit, concedere videtur et illud, sine quo res ipsa esse non potest.*[2] In like manner, a grand jury, while possessing no inherent power to punish contempts of its authority, is held to possess, by necessary implication, the power to order a contumacious witness or a disturber of its deliberations into the custody of its officer, for the purpose of being brought before the court, there to be dealt with as to the court shall seem proper.[3]

§ 133. Of Direct Contempts or Contempts in Facie Curiæ. — Having thus stated by way of premise the general scope of the power which judicial courts possess of punishing contempts and protecting their proceedings from disorderly interruption, we shall now proceed to speak of those contempts which most usually arise in the conduct of trials. And first of direct contempts, or contempts in the face of the court itself. What will amount to such a contempt will, of course depend largely upon the personal temperament and the views of decorum of the judge who presides. The following acts have been held to constitute such contempt: Tearing up papers of the opposite counsel;[4] for a person conducting his own defense on a trial under an indictment for a blasphemous libel to say to the

[1] State *v.* Copp, 15 N. H 212.

[2] Doyle *v.* Falconer, L. R., 1 P. C. 328, 340.

[3] Heard *v.* Pierce, 8 Cush. (Mass.) 338.

[4] Thwing *v.* Dennie, Quincy (Mass.), 338.

judge: "My Lord, if you have your dungeon ready I will give you the key." [1] To say on such a trial, "The deist is infamous because he cannot believe that some traditions handed down among the Jews and Christians are a divine revelation, and not only superior to the several and respective revelations possessed by the Turks, the Brahmins, the Hindoos, and many others, but the only genuine and authentic revelation in existence. Now, it so happens that a deist considers all as a collection of ancient tracts, to contain sentiments, stories and references totally derogatory to the honor of a God, destructive to pure principles of morality, and opposed to the best interests of society;" [2] for the defendant on such a trial to say, "All bishops are generally sceptics;" [3] to call another person a liar in the presence of the court and in the hearing of its officers; [4] to protest against the judgment of the court in an insulting manner, though with language not necessarily insulting; [5] for a party against whom the judge had decided a cause to say to him when about to take his seat on the bench, "I do not speak to any one who acted so corruptly and cowardly as to attack my character when I was absent and so entirely defenseless;" [6] to perform militia evolutions, with music and firing near the court-house while the court is in session; [7] for a Jew to refuse to be sworn on Saturday; [8] for one not a Quaker to refuse to be sworn on the grounds of conscientious scruples, the liberty of affirming being at the time confined to Quakers.[9]

[1] For this contempt the defendant was fined £200. Rex *v.* Davisson, 4 Barn. & Ald. 329.

[2] For these expressions the learned judge fined the defendant £40. *Ibid.*

[3] This so horrified the learned judge that he imposed an additional £40. It is not supposed that any American court will follow this infamous precedent. The trial of a person for a blasphemous libel, consisting in the expression of candid opinions upon matters of religious belief, could not take place anywhere in the United States (admitting that anywhere the laws are in such a barbarous state as to admit of such a prosecution), with the slightest prospect of success.

[4] United States *v.* Emerson, 4 Cranch C. C. (U. S.) 188.

[5] Wilson's Case, 7 Q. B. 984.

[6] Com. *v.* Dandridge, 2 Va. Cas. 408.

[7] State *v.* Coulter, Wright (Ohio), 421; State *v.* Goff, *Id.* 78.

[8] Stansbury *v.* Marks, 2 Dall. (Pa.) 213.

[9] U. S. *v.* Coolidge, 2 Dall. (U. S.) 364.

§ 134. [Continued.] **Matters which have been held not Contempts in Facie Curiæ.**—On the contrary, the following cases have been held not to amount to contempts in the face of the court itself, so as to subject the person or persons guilty of them to immediate fine or committment: To make an affray at a tavern near the court house, where the judge was stopping, of which the roiters were advised, during a night of the term, the court being then in recess;[1] to serve a party or witness attending court, with a summons, in violation of privilege;[2] for the clerk of a court to send up an imperfect record to an appellate court — this not being a contempt of the appellate court, though possibly a contempt of the court below;[3] to read an affidavit charging the judge with prejudice, on a motion for a change of venue;[4] for counsel to use hasty expressions under excitement, where no disrespect was intended;[5] for a justice to offer a protest to the county court, against their proceedings in making certain appropriations, and to complain of their acting illegally and oppressively;[6] for an attorney to post up, with his name signed thereto, at the office of A. B., the judge, a paper reading: "A. B. is a damned base and corrupt man" — the court not being in session, and it not appearing that the language had reference to any official act of the judge.[7]

§ 135. [Continued.] **What Acts are Punishable as Constructive Contempts.** — Many acts intimately connected with the conduct of trials, though not regarded as direct contempts, are punishable as constructive contempts. Within this category falls every species of interference with the process or authority of the court, direct or indirect, committed out of the presence of the court itself, such as removing the subject of the controversy beyond the jurisdiction of the court;[8] taking papers from

[1] Com. *v.* Stuart, 2 Va. Cas. 329.

[2] Blight *v.* Fisher, Pet. C. C. 41.

[3] Moore *v.* Clerk, 6 Litt. (Ky.) 104.

[4] Ex parte Curtis, 3 Minn. 274.

[5] St. Clair *v.* Piatt, Wright (Ohio), 532.

[6] Stokeley *v.* Com., 1 Va. Cas. 330.

[7] Neel *v.* State, 9 Ark. 259.

[8] So held concerning the removal of a slave pending the trial of a suit for his freedom. Richard *v.* Van Meter, 3 Cranch C. C. (U. S.) 214; Thornton *v.* Davis, 4 *Id.* 500.

the files of the court and refusing to return them; [1] for a juror to separate himself from his associates and mingle with the community at large, or to hold communications with persons other than officers of the court; [2] holding improper communications with jurors; [3] writing an insulting letter to a grand juror; [4] spiriting away witnesses; [5] procuring an insolvent person to justify as bail; [6] becoming surety in a bail bond under a fictitious name; [7] interfering with property *in custodia legis*, as property in the possession of a receiver,[8] or an assignee in bankruptcy; [9] or property held under mesne process,[10] such as a writ of replevin;[11] but not under final process, such as a writ of *fieri facias*.[12]

§ **136. Contempts by Attorneys of the Court.** — There is no doubt of the power at common law of those superior courts of record which are commonly termed courts of *general jurisdiction*, to disbar, suspend, or otherwise punish attorneys of their bar for contempts.[13] This is nothing more than a branch of that in-

[1] Baker *v.* Wilford, Kirby (Conn.), 235.

[2] State *v.* Helvenston, R. M. Charlt. (Ga.) 48. See also Milo *v.* Gardiner, 41 Me. 549; Perkins *v.* Ermil, 2 Kan. 325; Burrill *v.* Phillips, 1 Gall. (U. S.) 360; Alexander *v.* Dunn, 5 Ind. 122, 125; Graves *v.* Monet, 7 Smedes & M. (Miss.) 45; Oram *v.* Bishop, 7 Halst. (N. J.) L. 153.

[3] State *v.* Doty, 32 N. J. L. 403.

[4] Berg's Case, 16 Abb. Pr. (N. Y.) 266. The contemnor was excused under the circumstances and in view of his official position.

[5] Haskett *v.* State, 51 Ind. 176, 180. The contemnor was likewise excused under the circumstances in this case.

[6] Hall *v.* Platimer, 49 How. Pr. (N. Y.) 500; *s. c.* 5 Daly (N. Y.), 534.

[7] Re Fawcett, 9 Phila. (Pa.) 217.

[8] Secor *v.* Toledo &c. R. R. Co., 7 Biss. (U. S.) 513; King *v.* Ohio &c. R. R. Co., *Id.* 529; Gates *v.* People, 6 Bradw. (Ill.) 383, 386, per Pillsbury, P. J. Compare Albany City Bank *v.* Schermerhorn, 9 Paige (N. Y.), 372; Bowery Savings Bank *v.* Richards, 3 Hun (N. Y.), 336; *s. c.* 6 Thomp. & C. (N. Y.) 59; Parker *v.* Browning, 8 Paige (N. Y.), 388, 390; Sea Ins. Co. *v.* Stebbins, 8 Paige (N. Y.), 565.

[9] Gates *v.* People, 6 Bradw. (Ill.) 383.

[10] People *v.* Church, 2 Wend. (N. Y.) 262.

[11] Knott *v.* People, 83 Ill. 583; People *v.* Neill, 74 Ill. 68. Compare Horr *v.* People, 95 Ill. 169, 172.

[12] Gates *v.* People, 6 Bradw. (Ill.) 383, 388.

[13] State *v.* Holding, 1 McCord (S. C.), 379, where many precedents are cited; Ex parte Biggs, 64 N. C. 202; Matter of Moree, *Id.* 398; Re Wolley, 11 Bush (Ky.), 95; Watson *v.* Citizens' Bank, 5 S. C. 159; Stevens *v.* Hill, 10 Mees. & W. 30; Butler *v.* People, 2 Col. T. 295; Winkleman *v.* People, 50 Ill. 449; Re Ingersoll, 9 Phil. (Pa.) 216.

herent power which, as already seen, superior courts of record possess, of preserving their dignity and enforcing obedience to their process by summary proceedings for contempt.[1] Thus, there seems never to have been any question that, where an attorney receives money for his client, upon an employment as an attorney, whether any suit or legal proceedings may have been instituted by him for his client or not, an attachment will lie to compel its payment.[2] This power has been exercised in a case where, after a temporary restraining order had been made in a suit in equity to wind up a banking corporation, certain attorneys advised the officers and stockholders to file a petition in bankruptcy for the corporation, with the view of removing its property beyond the jurisdiction of the State court;[3] where an attorney imposed upon the court by suing out an attachment for a witness before a subpœna had been issued;[4] or presented straw bail to the court;[5] or charged the judge with prejudice, in a motion for a new trial;[6] or where an attorney presented to the court scandalous matter reflecting on an opinion of the court, in a petition for a rehearing;[7] or attempted to suborn a witness;[8] or used sneering, insulting and disrespectful language in a written communication to the judge respecting his ruling upon a matter still pending;[9] or procured money for his client by practicing fraud upon the court;[10] or, being the editor of a newspaper, published therein a libel upon the judges of the court;[11] or brought

[1] See Ex parte Robinson, 19 Wall. (U. S.) 505.

[2] Wilmerdings *v.* Fowler, 14 Abb. Pr. (N. Y.) (N. S.) 249 (N. Y. Ct. of App.); People *v.* Wilson, 5 Johns. (N. Y.) 368; Ex parte Staats, 4 Cow. (N. Y.) 76; Matter of Dakin, 4 Hill (N. Y.), 42; Matter of Steinert, 24 Hun (N. Y.), 246.

[3] Watson *v.* Citizens' Savings Bank, 5 S. C. 159.

[4] Butler *v.* People, 2 Col. T. 295. See also Brown *v.* Kellar, 40 Ill. 81.

[5] Re Ingersoll, 9 Phil. (Pa.) 216.

[6] Harrison *v.* State, 35 Ark. 458. *Contra*, where the motion is for a change of venue. Ex parte Curtis, 3 Minn. 274. As to the limit of the privilege of an attorney in criticising the rulings of the court, see Matter of Pryor, 18 Kan. 72; Re Wolley, 11 Bush (Ky.), 95.

[7] Re Wolley, 11 Bush (Ky.), 95. The punishment here was a fine.

[8] State *v.* Holding, 1 McCord (S. C.), 379.

[9] Matter of Pryor, 18 Kan. 72.

[10] Wilmerdings *v.* Fowler, 14 Abb. Pr. (N. Y.) (N. S.) 249.

[11] Ex parte Biggs, 64 N. C. 202.

an action in the name of another without his privity or consent;[1] or commenced a suit against a lunatic or habitual drunkard without permission, after notice of the inquisition declaring his incompetency;[2] or brought a fictitious case for the purpose of obtaining the opinion of the court on the matters presented by it;[3] or appeared for a defendant and confessed judgment without authority.[4] On the contrary, it has been held not a contempt for an attorney to advise his client, who was indicted for assault and battery, and bound by a recognizance to answer the charge, that if he could not procure a continuance on affidavit, he could escape and forfeit his recognizance, which would work a continuance, for a trifling expense.[5]

§ 137. [Continued.] **Punishment — Disbarment, Suspension.** — The subject of disciplinary action against attorneys is, to a considerable extent, regulated by statute, and it has been generally held that, where it has been made the subject of statutory regulation, a court cannot proceed to disbar or suspend an attorney by the ordinary process of contempt, under its common-law powers, but that the proceedings must be in conformity with the statute;[6] that unquestionably, unless the statute contains a positive negation of this power the court may proceed summarily, in virtue of its common-law powers, to fine and imprison an attorney, just as it may so proceed against any other contemnor.[7] A fine so levied upon an attorney may be either enforced by execution, or by a *capias pro fine;*[8] or the attorney may be suspended from practice until he purge his contempt by paying the fine which has been assessed against him.[9] Such an order of suspension imposed by a court in virtue of its common-law powers, affects only the *status* of the attorney in that particular court; it will not prevent his being enrolled as a counselor in another,

[1] Butterworth *v.* Stagg, 2 Johns. (N. Y.) Case, 291.

[2] L'Amoureaux *v.* Crosby, 2 Paige (N. Y.), 422.

[3] Smith *v.* Brown, 3 Tex. 360.

[4] Denton *v.* Noyes, 6 Johns. (N. Y.) 296.

[5] Ingle *v.* State, 8 Blackf. (Ind.) 574.

[6] State *v.* Start, 7 Iowa 499; Ex parte Smith, 28 Ind. 47.

[7] Ex parte Smith, *supra.*

[8] Re Wolley, 11 Bush (Ky.), 95.

[9] Butler *v.* People, 2 Col. T. 295, 297.

even a higher court, of the same sovereign;[1] and it will cease with the abolition of the court by which he is thus disbarred.[2]

§ 138. Procedure in Cases of Contempt in Facie Curiæ. — In cases of contempt, as in other cases, the one object of process is to bring the accused person into court;[3] and the only object of an affidavit in such a case is to inform the court that a contempt has been committed.[4] When, therefore, the contempt is committed in the face of the court itself, no affidavit,[5] order to show cause,[6] attachment,[7] or interrogatories,[8] are necessary; but the court takes judicial notice of the contempt,[9] and proceeds immediately, without formality, to pass sentence upon the offender.[10] The court may, however, in its discretion, require the contemnor to *answer interrogatories;*[11] and, while the offending party may

[1] Ex parte Tillinghast, 4 Pet. (U. S.) 108, where an attorney who had been stricken from the roll of attorneys of the United States District Court for the Northern District of New York was, nevertheless, enrolled in the Supreme Court of the United States, Chief Justice Marshall saying: "The court finds that he comes within the rules established by this court. The circumstances of his having been stricken off the roll of counsel of the District Court of the United States for the Northern District of New York, by the order of the judge of the court, for contempt, is one which the court do not mean to say was not done for sufficient cause, or that it is not one of a serious character; but this court does not consider itself authorized to punish him for a contempt which may have been committed in that court." As to disbarment of attorneys in United States courts, see Ex parte Garland, 4 Wall. (U. S.) 378; Ex parte Robinson, 19 *Id.* 505.

[2] Re Hirst, 9 Phil. (Pa.) 216, 218.

[3] Com. *v.* Dandridge, 2 Va. Cas. 408.

[4] Matter of Smethurst, 2 Sandf. (N. Y.) 724.

[5] Matter of Smethurst, *supra*; People *v.* Kelly, *supra*.

[6] Matter of Smethurst, *supra*.

[7] United States *v.* Green, 3 Mason (U. S.), 482; Commonwealth *v.* Dandridge, 2 Va. Cas. 408; State *v.* Mathews, 37 N. H. 450, 453.

[8] Matter of Percy, 2 Daly (N. Y.), 530. Compare Pitt *v.* Davidson, 37 Barb. (N. Y.) 97; People *v.* Nevins, 1 Hill (N. Y.), 154; Commonwealth *v.* Dandridge, 2 Va. Cas. 408.

[9] People *v.* Kelly, 24 N. Y. 75.

[10] 4 Bl. Com. 286; 1 Tidd Pr. 479; 2 Bac. Abr. (Bouv. ed.) 633; Easton *v.* State, 39 Ala. 552; Commonwealth *v.* Dandridge, 2 Va. Cas. 408; State *v.* Mathews, 37 N. H. 450, 453; State *v.* Copp, 15 N. H. 212; Middlebrook *v.* State, 43 Conn. 257; People *v.* Kelley, 24 N. Y. 75; Ex parte Wright, 65 Ind. 504. Compare Holcomb *v.* Cornish, 8 Conn. 375.

[11] U. S. *v.* Green, 3 Mason (U. S.), 482.

be ordered into custody although no warrant or written order is made out,[1] yet some record of the offense and the order for its punishment should be immediatety made,[2] and in this record the matter of the contempt should be stated.[3] When, therefore, a witness refused to answer certain questions before a grand jury, and his refusal was reported to the court in the presence of the witness, who did not deny, but justified the same, and reiterated his refusal, it was held that this was a contempt in the immediate face and presence of the court, and that no affidavit or further evidence of it was necessary to a commitment.[4]

§ 139. [Continued.] **Procedure in Cases of Indirect or Constructive Contempts.** — The subject of procedure in cases of indirect or constructive contempts, that is, contempts committed out of the immediate presence of the court while conducting its proceedings and not so near thereto as to interrupt such proceedings, is an extensive one, and would of itself form a long chapter. It is not so intimately connected with the conduct of a trial as to require treatment here. It has been carefully treated by the present writer in an article in the *Criminal Law Magazine*,[5] and also by Mr. Rapalje in his work on contempts.

§ 140. **Remedies of the Person Committed for Contempt.** — The rule of the common law, above stated,[6] that every superior court of record is the exclusive judge of contempts committed against its dignity and authority, has necessarily its counterpart in another rule of the common law, which is, that the judgment of every superior court of record (and this principle includes the legislative bodies of sovereign States), in a proceeding for contempt is final, and not subject to review by any superior authority

[1] State *v.* Mathews, 37 N. H. 450, 453.

[2] *Ibid.*

[3] Ex parte Wright, 65 Ind. 504.

[4] People *v.* Kelley, 24 N. Y. 75.

[5] 5 Crim. L. Mag. 483, 521.

[6] *Ante*, § 125.

by writ of error,[1] appeal,[2] *certiorari*,[3] or otherwise; nor subject to be relieved against in any manner, unless such judgment is absolutely void for want of jurisdiction, in which case relief is usually had by *habeas corpus*, as hereafter stated. In some American jurisdictions, however, under the operation of constitutional or statutory provisions, and perhaps in one or two cases, of judicial decisions, contrary to the general course of authority, writs of error,[4] lie in such cases; and in cases where the proceeding is in the nature of *execution* of judgments, orders or decrees in civil cases, such as orders upon trustees or executors to pay over money,

[1] Rex *v.* Dean and Chapter, 1 Str. 536; *s. c.* 8 Mod. 27, per Fortescue, J.; Groenwelt *v.* Burwell, 1 Salk. 144; *s. c.* 1 Ld. Raym. 454, per Lord Hale, C. J.; Tyler *v.* Hammersley, 44 Conn. 393, 409; State *v.* Tipton, 1 Blackf. (Ind.) 166; Lockwood *v.* State, 1 Ind. 161; Watson *v.* Williams, 36 Miss. 331; State *v.* Galloway, 5 Coldw. (Tenn.) 326, 331; Shattuck *v.* State, 51 Miss. 50; Phillips *v.* Welch, 11 Nev. 187; Ex parte Kearney, 7 Wheat. (U. S.) 38; New Orleans *v.* Steamship Co., 20 Wall. (U. S.) 387; Hayes *v.* Fischer, 102 U. S. 121; Butler *v.* People, 2 Col. T. 295; Ex parte Bradley, 7 Wall. (U. S.) 376; Ex parte Robinson, 19 Wall. (U. S.) 505; Hagan *v.* Alston, 9 Ala. 627; Ex parte Martin, 5 Yerg. (Tenn.) 456; Re Cooper, 32 Vt. 253; Ex parte Summers, 5 Ired. (N. C.) 149; Cossart *v.* State, 14 Ark. 538; Bunch *v.* State, *Id.* 544. Compare Neel *v.* State, 9 Ark. 259.

[2] Ex parte Summers, 5 Ired. (N. C.) 149; State *v.* Woodfin, *Id.* 199; State *v.* Tipton, 1 Blackf. (Ind.) 166; Lockwood *v.* State, 1 Ind. 161; Watson *v.* Williams, 36 Miss. 381; State *v.* Galloway, 5 Coldw. (Tenn.) 326, 331; Shattuck *v.* State, 51 Miss. 50; Phillips *v.* Welch, 11 Nev. 187; Ex parte Kearney, 7 Wheat. (U. S.) 38; New Orleans *v.* Steamship Co., 20 Wall. (U. S.) 387; Hayes *v.* Fischer, 102 U. S. 121; First Congregational Church *v.* Muscatine, 2 Iowa, 69; Ex parte Martin, 5 Yerg. (Tenn.) 456; Floyd *v.* State, 7 Tex. 215; Casey *v.* State, 25 Tex. 380, 385; Crow *v.* State, 14 Tex. 12, 14; State *v.* Giles, 10 Wis. 101; Kernodle *v.* Cason, 25 Ind. 362; Larrabee *v.* Selby, 52 Cal. 506, 508; State *v.* Mott, 4 Jones L. (N. C.) 449; State *v.* Thurmond, 37 Tex. 340; Vilas *v.* Burton, 27 Vt. 56; McMicken *v.* Perin, 20 How. (U. S.) 133; Easton *v.* State, 39 Ala. 551; Wyatt *v.* Magee, 3 Ala. 94, 97; Cossart *v.* State, 14 Ark. 538; Bunch *v.* State, *Id.* 544; State *v.* Towle, 42 N. H. 540, 546; Clark *v.* People, Breese (Ill.), 266.

[3] State *v.* Tipton, 1 Blackf. (Ind.) 166; Lockwood *v.* State, 1 Ind. 161. The writ of *certiorari* is used to bring up contempt proceedings in several States; but the inquiry extends no further than the jurisdiction of the court below.

[4] Matter of Pryor, 18 Kan. 72; Haines *v.* People, 97 Ill. 161; Baltimore &c. R. Co. *v.* Wheeling, 13 Gratt (Va.), 40, 57; Stuart *v.* People, Breese (Ill.), 395; Stokeley *v.* Commonwealth, 1 Va. Cas. 330; Ingle *v.* State, 8 Blackf. (Ind.) 574 (in case of an attorney fined for contempt).

the rule is varied in some jurisdictions by local statutes, perhaps by judicial decisions,[1] so that an appeal lies.[2] In some jurisdictions the *certiorari* is also used by the highest appellate court, in virtue of a superintending jurisdiction, to bring up such judgments for re-examination.[3] In most of these jurisdictions the writ of *certiorari* is limited to the office which it performed at common law, that is, it reaches only proceedings which are absolutely void for want of jurisdiction,[4] and in such cases the judgment of the superintending court in general is that the conviction be *quashed*. In others, it has substantially the scope of a writ of error;[5] and in still others it performs the office of an appeal and secures a re-examination of the merits.[6]

§ 141. Remedy by Habeas Corpus in Case of a Want of Jurisdiction.— An order committing a person for such a contempt is in the nature of a *judgment*. The person so committed is

[1] See the subject considered more at large in an article by the present writer. 5 Crim. L. Mag. 648, *et seq.*

[2] Romeyn *v.* Caplis, 17 Mich. 449; McCredie *v.* Senior, 4 Paige (N. Y.), 378; Spaulding *v.* People, 10 *Id.* 284; *s. c.* on appeal, 7 Hill (N. Y.), 302, and 4 How. Pr. (N. Y.) 21; People *v.* Sturtevant, 9 N. Y. 263; Ballston Spa Bank *v.* Marine Bank, 18 Wis. 490; Shannon *v.* State, 18 Wis. 604; People *v.* Healey, 48 Barb. (N. Y.) 564; Forbes *v.* Willard, 37 How. Pr. (N. Y.) 193; Ludlow *v.* Knox, 7 Abb. Pr. (N. Y.) (N. S.) 411 (N. Y. Court of Appeals, 1869); Brinkley *v.* Brinkley, 47 N. Y. 40; Haines *v.* Haines, 35 Mich. 138; Matter of Daves, 81 N. C. 72; Re Pierce, 44 Wis. 411, 422; Watrous *v.* Kearney, 79 N. Y. 496; Witter *v.* Lyon, 34 Wis. 564; Hundhausen *v.* Ins. Co., 5 Heisk. (Tenn.) 702.

[3] *Pennsylvania:* Hummel's Case, 9 Watts, 416; Com. *v.* Newton, 1 Grant Cas. 458. *Louisiana:* State *v.* The Judges, 32 La. Ann. 549; State *v.* The Judges, 32 La. Ann. 1256. *Arkansas:* Harrison *v.* State, 35 Ark. 458. *Iowa:* Code of 1873, § 3499; State *v.* Myers, 44 Iowa, 580; Dunham *v.* State, 6 Iowa, 245. *California:* People *v.* Turner, 1 Cal. 152, 156; Ex parte Field, *Id.* 187. *New York:* People *v.* Donohue, 59 How. Pr. (N. Y.) 417; People *v.* Kelly, 24 N. Y. 74. *North Carolina:* Ex parte Biggs, 64 N. C. 202.

[4] *Louisiana:* State *v.* Judges, 32 La. Ann. 1256. *California:* People *v.* Dwinelle, 29 Cal. 632. *Nevada:* Maxwell *v.* Rives, 11 Nev. 213. *Utah:* Young *v.* Cannon, 2 Utah, 560, 593.

[5] *North Carolina:* Ex parte Biggs, 64 N. C. 202. *Pennsylvania:* Com. *v.* Newton, 1 Grant Cas. 453. *New York:* People *v.* Kelly, 24 N. Y. 74. *Arkansas:* Harrison *v.* State, 35 Ark. 458, 461.

[6] *Iowa:* Code of 1873, § 3222; State *v.* Myers, 44 Iowa, 580, 584.

committed in execution,[1] and if the court have jurisdiction so to commit him, and if the contempt be plainly charged in the warrant of commitment, he will no more be relieved on *habeas corpus* than he would be if he were committed in execution of a judgment founded upon a verdict in an ordinary criminal prosecution.[2] It will appear from the general current of the decisions which declare this rule, that the inquiry upon *habeas corpus* is ordinarily limited to the question whether the court which made the order of commitment had jurisdiction in the premises.[3] If

[1] De Grey C. J., in Crosby's Case, 3 Wils. 188.

[2] *British:* Paty *v.* The Queen, 2 Ld. Raym. 1105; Stockdale *v.* Hansard, 9 Ad. & E. 1; *s. c.* 4 Jur. 70; *sub nom.* Reg. *v.* Gossett, 3 Per. & D. 349; *sub nom.* Reg. *v.* Evans, 8 Dowl. P. C. 451; *sub nom.* Re Sheriff of Middlesex, 11 Ad. & E. 273; Re Wilson, 7 Q. B. 984; *s. c.* 9 Jur. 393; 14 L. J. Q. B. 105; Re Cobbett, 17 Q. B. 187; Re Andrews, 14 C. B. 226; Bethel's Case, 1 Salk. 533. *United States:* Ex parte Kearney, 7 Wheat. (U. S.) 345. *Alabama:* Gates *v.* McDaniel, 4 Stew. & P. (Ala.) 69; Ex parte Stickney, 40 Ala. 167. *California:* Matter of Cohen, 5 Cal. 494; Ex parte Perkins, 18 Cal. 60; [*Contra*, Ex parte Rowe, 7 Cal. 181; *s. c.* 7 Cal. 177, per Burnett, J.]; People, ex rel. County Judge, 27 Cal. 151; Ex parte McCullough, 35 Cal. 97; Ex parte Smith, 53 Cal. 204; Ex parte Cohn, 55 Cal. 193. *Iowa:* Robb *v.* McDonald, 22 Iowa, 330. *Louisiana:* State, ex rel., *v.* Fagin, 28 La. Ann. 887. *Massachusetts:* Burnham *v.* Morrissey, 14 Gray (Mass.), 226, 240. *Michigan:* Matter of Bissell, 40 Mich. 63. *Mississippi:* Ex parte Adams, 25 Miss. 883; Shattuck *v.* State, 51 Miss. 50; Ex parte Wimberly, 57 Miss. 437. *Missouri:* Ex parte Goodin, 67 Mo. 637. *Nevada:* Ex parte Winston, 7 Nev. 71; Phillips *v.* Welch, 12 Nev. 171. *New Hampshire:* State *v.* Towle, 42 N. H. 540. *New York:* People, ex rel., *v.* Jacobs, 66 N. Y. 8; Kearney's Case, 13 Abb. Pr. (N. Y.) 459; Davison's Case, 13 Abb. Pr. (N. Y.) 129; Kahn's Case, 11 Abb. Pr. (N. Y.) 147; *s. c.* 19 How. Pr. (N. Y.) 475; People *v.* Cassel, 5 Hill (N. Y.), 164; People, ex rel., *v.* Sheriff, 7 Abb. Pr. (N. Y.) 96; Matter of Percy, 2 Daly (N. Y.), 530; Pitt *v.* Davidson, 37 Barb. (N. Y.) 97; People *v.* Fancher, 2 Hun (N. Y.), 226; Ex parte Devlin, 5 Abb. Pr. (N. Y.) 287; Matter of Smethurst, 2 Sandf. (N. Y.) 724; Myers *v.* James, 3 Abb. Pr. (N. Y.) 301; Matter of Hackeney, 21 How. Pr. (N. Y.) 54; *s. c.* in Ct. of App., 24 N. Y. 74. *Pennsylvania:* Williamson's Case, 26 Pa. St. 9; *s. c.* 27 Pa. St. 18; Lessee of Penn *v.* Messenger, 1 Yeates (Pa.), 2; Ex parte Nugent, 4 Clark (Pa. L. J.), 106. *South Carolina:* Re Stokes, 5 So. Car. 71; Gilliam *v.* McJunkin, 2 So. Car. 442; James *v.* Smith, 2 So. Car. 183. *Tennessee:* State *v.* Galloway, 5 Coldw. (Tenn.) 326. *Texas:* Holman *v.* Mayer, 34 Tex. 668; Jordan *v.* State, 14 Tex. 436. *Vermont:* Vilas *v.* Burton, 27 Vt. 61. *Wisconsin:* Re Perry, 30 Wis. 268.

[3] See Ex parte Adams, 25 Miss. 883.

jurisdiction appear, the rule expressed in a former section,[1] that every superior court of record and every legislative body of a sovereign State is the exclusive judge of contempts committed in its presence or against its process or authority, forbids all interference on the part of other tribunals by means of the writ of *habeas corpus*, or otherwise, except in plain cases of excess of jurisdiction.[2] Great difficulty attends the application of this rule, and this difficulty is not sufficiently discussed and explained in the judgment of the courts.

§ 142. [Continued.] **Power of one Court to judge of the Jurisdiction of another Court.** — The question concerns the power of one court to judge of the jurisdiction of another court. This power will be freely exercised where the court which issues the *habeas corpus* is a court having appellate or superintending jurisdiction over the court which made the commitment; and this consideration will explain the fact that many such courts, while professing to limit their inquiry to the jurisdiction of the inferior court, push such inquiry much further than one court would go in inquiring concerning the jurisdiction of a co-ordinate court. Where the commitment is made by a court superior in rank or dignity to, or having appellate or superintending jurisisdiction over, the court which issues the *habeas corpus*, it would be highly indecent for the inferior court to assume the right to judge of the jurisdiction of the superior court; and yet the doctrine of many of the courts, broadly stated and applied, would lead to this result. Thus, it is said in Missouri that the Supreme Court has no more power in the use of the writ of *habeas corpus* than any other court — even the county court, which has power to issue the writ — has.[3]

§ 143. [Continued.] **Power to Rejudge the Question of Jurisdiction, but not the Judgment.** — Concerning this power

[1] *Ante*, § 125; 5 Crim. L. Mag. 151.

[2] Ex parte Hardy, 13 Cent. L. J. 50 (Supreme Court of Ala. 1881); Re Cooper, 32 Vt. 253; People *v.* Sturtevant, 9 N. Y. 263; Ex parte Adams, *supra*; Ex parte Sam, 51 Ala. 34.

[3] See Ex parte Jilz, 64 Mo. 205, 216, per Henry, J.

of one court to judge of the jurisdiction of another court, if we take the English and American decisions together we shall be able to extract from them no uniform rule. The English courts of judicature, in proceedings by *habeas corpus*, and in actions for malicious prosecutions, have generally agreed, in respect of commitments made by authority of the houses of Parliament, that the judicial courts have no power to judge of the jurisdiction of Parliament; or, to use the expression in which the judicial courts couch this rule, they have no conusance of the *lex parliamenti*, and no power to judge of the *privileges* of either house of Parliament.[1] It may also be said with confidence that the English courts, in dealing by *habeas corpus* with commitments for contempts by other courts of co-ordinate dignity, have generally refused to judge of the jurisdiction of such other courts. To this extent they have pushed the doctrine that each superior court of record is the exclusive judge of its own contempts. This limitation upon the use of the writ of *habeas corpus* has been expressed by some of the most authoritative American courts.[2] In a case which was greatly agitated in the State of New York, where a judge of the Supreme Court of that State, in vacation, on *habeas corpus*, had discharged a prisoner committed by the chancellor on a conviction for a contempt, and such person was again arrested and committed for the same cause, the second commitment was held legal. It was held that a person who had been regularly committed by the chancellor for a contempt, and who afterwards had been improperly set at large, might be recommitted by an order of the court reciting the original writ of attachment.[3] The sound rule

[1] 5 Crim. L. Mag. 152, 153.

[2] See Ex parte Kearney, 7 Wheat. (U. S.) 345; Williamson's Case, 27 Pa. St. 18.

[3] Yates *v.* Lansing, 9 Johns. (N. Y.) 395 (overruling Yates *v.* People, 6 Johns. (N. Y.) 337; re-affirming Ex parte Yates, 4 Johns. (N. Y.) 317). In the case of Ex parte Jilz, 64 Mo. 205, the Supreme Court of Missouri, overlooking the fact that Yates *v.* People, 6 Johns. (N. Y.) 337, had been overruled, following the supposed authority of that case, laid down the doctrine that where a person, although held in execution under the judgment of a court having jurisdiction of the subject-matter of the crime for which he had been tried, is discharged on *habeas corpus* by another court or judicial

was thus expressed in a case in the former Supreme Court of New York: "If there has been error the remedy is by *certiorari* or writ of error. When the return states the imprisonment to be by virtue of legal process, the officer may inquire whether, in truth, there be any process, and whether it appears upon its face to be valid, and he may also inquire whether any cause has arisen since the execution for putting an end to the imprisonment — as a pardon, reversal of the judgment, payment of the fine, and the like. But he cannot rejudge the judgment of the committing court or magistrate.[1]

§ 144. [Continued.] Statutory Expressions in Various States. — In conformity with this rule, it is in several States provided by statute that a prisoner shall not be discharged on *habeas corpus* where he is held in custody for any contempts specially or plainly charged in the commitment, by some court or body politic having authority to commit for a contempt so charged.[2] In some of the States the statutory expression is

officer having power to issue the writ, such discharge conclusively entitles the prisoner to his liberty, and he cannot thereafter be recommitted upon the same judgment, nor can the propriety of the discharge on *habeas corpus* be reviewed by another judicial tribunal. This absurd and anarchical decision, which vested even in the county courts of Missouri the power of opening the penitentiary of the State and discharging therefrom men who were held in execution of judgments which had been affirmed by the Supreme Court of the State, called forth an act of the legislature, providing that whenever, on *habeas corpus*, it should appear that the prisoner was held in execution under a sentence for a crime, which sentence was erroneous as to time or place of imprisonment, the court hearing the *habeas corpus* should correct the sentence. 1 Rev. Stat. of Mo., § 1996. This act of the legislature was as nonsensical as the decision which produced it. It gives to courts of any grade above justices of the peace the power on *habeas corpus* to revise and correct the judgments or sentences of courts of co-ordinate or even superior jurisdiction.

[1] People *v.* Cassels, 5 Hill (N. Y.), 164, 167.

[2] Comp. L. Kan. 1879, § 4211; Rev. Stat. Ind. 1881, § 1119; Comp. L. Mich. 1871, § 7014; 2 Minn. Stat. at L. 1873 p. 931, § 36; Rev. Stat. Mo. 1879, §§ 2648, 2650; Comp. L. Nev. 1873, § 367; N. Y. Code of Crim. Proc., § 2032 ("Criminal Contempt"); Batt. Rev. (N. C.) 1873, p. 463, § 24; Gen. Laws Ore. 1872, § 611; Rev. Stat. Wis. 1878, § 3427. This does not include an order of commitment as for contempt upon proceedings to enforce the remedy of a party. Comp. L. Kan. 1879, § 4211; Rev. Stat. Ind. 1881, § 1119.

somewhat different, thus: That the legality or justice of any order, judgment, decree or process of any court legally constituted, or the justice or propriety of any commitment for contempt made by a court, officer or body according to law, and charged in such commitment, will not be inquired into.[1] In Massachusetts and Maine it is also provided that the Supreme Judicial Court shall have no authority to issue a writ of *habeas corpus* for the purpose of taking bail of any person committed for causes mentioned in the constitution by the governor and council, Senate or House of Representatives.[2] In Minnesota, "persons committed or detained by virtue of the final judgment or decree of any competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such judgment or decree," are not entitled to prosecute writs of *habeas corpus;* but "no order of commitment for any alleged contempt, or upon proceedings as for contempt to enforce the rights or remedies of any party, shall be deemed a judgment or decree within the meaning of this section; nor shall any attachment, order or process issued upon such order be deemed an execution within the meaning of this section."[3] In Vermont, by statute, the writ of *habeas corpus* is made to extend to commitments for contempt.[4] If it appear on the hearing upon such writ that such disobedience or contempt was committed through ignorance, mistake or misapprehension, or by acting in good faith under the advice of counsel, and that relief may be granted without impairing the rights of the parties concerned, or the due administration of the law, the Supreme Court may discharge such person from such imprisonment or confinement upon such terms as it thinks fit.[5] Where a party in a proceeding before a justice of the peace assailed the justice's decision with sneers, sarcasm and irony, and was fined for contempt in the sum of $10, and committed to jail for the non-pay-

[1] Code of Ala. 1876, § 4691; Fla. Dig., 1881, p. 564, § 8; Comp. L. Mich. 1871, § 7015; Gen. L. Ore. 1872, § 613; N. Y. Code Civ. Proc., § 2034.

[2] Pub. Stat. Mass. 1882, p. 1069, § 28; Rev. Stat. Me. 1871, p. 748, § 33.

[3] 2 Minn. Stat. at L. 1873, p. 929, § 22. Compare N. Y. Code Civ. Proc, § 2032.

[4] Rev. Laws of Vt. 1880, § 1371.

[5] *Id.*, § 1372.

ment of the fine, the Supreme Court refused to relieve him on *habeas corpus* under this statute.[1]

§ 145. [Continued.] **Extension of the Use of this Writ by Appellate Courts.** — The general habit of appellate courts of scrutinizing closely the records of inferior courts to discover errors or irregularities, has led them insensibly to pass beyond the bounds which have been set by sound principle to the use of the writ of *habeas corpus*, and, instead of limiting their inquiry to the mere question of general jurisdiction, they have extended it so as to inquire whether the sentence pronounced was legal. They have indeed said again and again that they would not discharge a prisoner for what is termed irregularity of procedure. They need not have said this, because this is the correct rule upon which courts proceed upon writ of error. But they have said that there is a distinction between irregularity and illegality, and that if the sentence was illegal — that is, such a sentence as the court *in the particular case* had no power to pronounce — they would discharge the prisoner on *habeas corpus*.[2] In other words, they have passed beyond the idea of the former school of jurists as to the limits which are set by sound principle to the inquiry into the jurisdiction of other courts. It was enough for the old judges to see that a court had what was termed *general jurisdiction* of the subject matter of the proceeding which resulted in the commitment, as well as jurisdiction of the person of the prisoner;[3] but the modern idea is that it must not only appear that the court making the commitment had general jurisdiction of the subject matter — that is, general power to commit for contempt, and also jurisdiction over the person of the prisoner — but it must also appear that the court had power to render the particular judgment or to order the particular commitment.[4] Accordingly, they will inquire whether the contempt charged in

[1] Re Cooper, 32 Vt. 258.

[2] The writer refers to an article in the *Criminal Law Magazine* for a discussion of these distinctions. 4 Crim. L. Mag. 805

[3] Ex parte Watkins, 3 Pet. (U. S.) 193, 203.

[4] See this subject discussed in 5 Crim. L. Mag. 162.

the commitment was a contempt in point of law; holding, in the expressive language of Denio, J., that "where the act is necessarily justifiable, it would be preposterous to hold it a cause of imprisonment."[1] It is very plain that this view results substantially in converting the writ of *habeas corpus*, when used by appellate or superintending courts, into a writ of error.

§ **146. [Continued.] — Pernicious Consequences of such Extensions.** — It will not escape the attention of the judicious reader that this extension of the original doctrine must bear pernicious fruits, because the appellate courts which make this use of the writ of *habeas corpus* do not profess to use the writ as a means of exercising appellate jurisdiction.[2] They do not profess to exercise a larger jurisdiction in the use of the writ than any other court or judicial officer, even the lowest, which is clothed by law with power to issue it, might exercise; and it will result from this that if, in a given case, the Court of Appeals of New York can say that an act charged in a commitment as a contempt of court is rightful and innocent, and that the commitment is accordingly preposterous, any justice of the Supreme Court of New York, revising a commitment of any other court for contempt, can say the same thing; that a county court in Missouri, composed of men unlearned in the law, can say it; and that the writ of *habeas corpus*, instead of being a writ of *liberty*, becomes a writ of *anarchy*.

§ **147. Injunction, Prohibition, Mandamus.** — It is scarcely necessary to suggest that the execution of a judgment imposed for a contempt will not be enjoined in equity;[3] for, although courts of equity constantly, by orders *in personam*, exercise the jurisdiction of restraining the execution of judgments at law, yet they do this on the ground that, but for the existence of such a jurisdiction parties would frequently find themselves remediless; and this jurisdiction has never, except in one or two rare cases,[4]

[1] People *v.* Kelley, 24 N. Y. 74, 77.

[2] The Supreme Court of the United States is an exception to this statement. 18 Fed. Rep. 69.

[3] Sanders *v.* Metcalf, 1 Tenn. Ch. 419, 428, per Cooper, C.

[4] Mayor &c. of York *v.* Pilkington, 2 Atk. 302; Turner *v.* Turner, 15 Jur. 218.

been exercised to restrain criminal proceedings.[1] The same may be said of the writ of prohibition. This writ, as is well known, is a superintending writ, used by the former Court of King's Bench, and now by the Queen's Bench Division of the High Court of Justice in England, and by certain courts in the United States, upon whom the jurisdiction to use it is specially conferred by constitutional ordinance or by statute, to restrain inferior courts from doing injurious acts in excess of their jurisdiction. Like the writ of *mandamus* it is never issued in a case where the party has any other plain remedy. As the writ of *habeas corpus* in the cases we are considering affords a plain remedy, the writ of prohibition will not ordinarily issue to restrain a court from proceeding against a party for a contempt.[2] So of the writ of *mandamus*. While this writ has been sometimes awarded to compel inferior tribunals to reinstate attorneys who have been expelled from the bar without notice or an opportunity of being heard,[3] yet it has been well laid down that it is not an appropriate remedy for one who has been fined or imprisoned for contempt; and opinion is divided upon the question whether it will lie to compel a court to proceed against a party for contempt.[4]

§ **148. Action for False Imprisonment.**—A remedy which has been frequently resorted to in cases of unlawful imprisonment for contempt is an action for false imprisonment, either

[1] See an article on this subject, by the present writer in the *American Law Review* for July–Aug. 1884. 18 Am. L. Rev. 599.

[2] See Ex parte Stickney, 40 Ala. 160, 169.

[3] Ex parte Bradly, 7 Wall. (U. S.) 364.

[4] People *v.* Turner, 1 Cal. 153, 155. In North Carolina, it has been held that *mandamus* is not the proper proceeding to restore an attorney who has been disbarred by the superior court for contempt; that the proper proceeding is by *certiorari* in the nature of a writ of error. Ex parte Biggs, 64 N. C. 202. As to the writ of *certiorari* in the nature of a writ of error, under the North Carolina practice, see Brooks *v.* Morgan, 5 Ired. (N. C.) 481; Raleigh *v.* Kane, 2 Jones L. (N. C.) 288. That *mandamus* will lie, see Ortman *v.* Dixon, 9 Cal. 33; Kimball *v.* Morris, 2 Metc. (Mass.) 573. *Contra*, State ex rel. *v.* Horner, 16 Mo. App. 191. Compare Ex parte Chamberlain, 4 Cow. (N. Y.) 49.

against the ministerial officer executing the process of commitment, or the judicial officer who awarded the process, or both. The grounds which are necessary to support such an action are pretty well understood. An officer can justify under legal process, unless upon its face it is void for want of jurisdiction.[1] Such an action will not lie against the judge of a superior court of record, although he may have acted without jurisdiction and from express malice, if it appear that the act was done *colore officii*. He is under an absolute privilege in respect of his judicial acts. The rule which clothes him with this immunity is one of public policy, which has always been held to be necessary to preserve the independence of the judiciary.[2] The same immunity does not extend to courts of inferior jurisdiction, such as justices of the peace and the like. They are liable in such cases whenever they act in excess of their jurisdiction; and in their cases the single inquiry is whether the commitment was within or without the jurisdiction of the judicial officer against whom the action is brought.[3]

§ **149. Executive Pardon.** — If these remedies fail, the party fined or imprisoned has still a right to resort to the executive for pardon. There is little doubt that an order inflicting punishment for a criminal contempt comes within the scope of the pardoning power of the executive.[4] It has even been held that where the imprisonment is imposed to compel the payment of a fine assessed for the violation of an injunction, and after a length of time it appears that payment of the fine has become impos-

[1] Anderson *v.* Dunn, 6 Wheat. (U. S.) 204.

[2] Bradley *v.* Fisher, 13 Wall. (U. S.) 335; Fray *v.* Blackburn, 3 Best & S. 576. See Morrison *v.* Macdonald, 21 Me. 550; Pratt *v.* Gardner, 2 Cush. (Mass.) 68; Cooley on Torts, 409.

[3] Piper *v.* Pearson, 2 Gray (Mass.), 120; Newton *v.* Locklin, 77 Ill. 103; Fitler *v.* Probasco, 2 Browne (Pa.), 137. Compare Beaurain *v.* Scott, 3 Camp. 388; Ackerly *v.* Parkinson, 3 Maule & S. 425, 428; Borden *v.* Fitch, 5 Johns. (N. Y.) 121; Biglow *v.* Stearnes, 19 Johns. (N. Y.) 39; Allen *v.* Gray, 11 Conn. 95; Clark *v.* May, 2 Gray (Mass.), 440; Bushell *v.* Starling, 3 Keb. 322.

[4] Ex parte Hickey, 4 Sm. & M. (Miss.) 751; State *v.* Sauvinet, 24 La. Ann. 119; 4 Opp. Atty.-Gen. 458; 3 *Id.* 662.

sible, the president has power to pardon the contemnor and release him from imprisonment.[1]

§ 150. Application to the Judge who has Imposed the Punishment. — Where the contempt is merely a criminal contempt, and no civil right is involved in the punishment of the accused, if all these remedies fail, there still remains one which, though not agreeable to the pride of the contemnor, is seldom ineffective, and that is a submission and an application for forgiveness to the judge of the court whose process has been disobeyed or whose authority or dignity has been offended. Nothing can be more distasteful to a right-minded judge or hurtful to his feelings, than the necessity of being compelled to impose a punishment upon a party for an offense which, though an offense against the State and against the administration of justice, is, nevertheless, in a greater or less degree, a personal affront to himself. Experience shows that in such cases judges are generally eager to grant pardon upon the apology and submission of the offender, and that they very often accompany the remission of the fine or the discharge of the order of imprisonment with complimentary allusions to the person committed.[2]

[1] Re Mullee, 7 Blatchf. (U. S.) 24.

[2] State *v.* Hunt, 4 Strobh. (S. C.) L. 322, 340; Ex parte Biggs, 64 N. C. 202; De Witt *v.* Dennis, 30 How. Pr. (N. Y.) 131; People *v.* Murphy, 1 Daly (N. Y.), 462.

CHAPTER VI.

OF COMPULSORY PROCESS AGAINST WITNESSES.

SECTION

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185. Protection of Witness against Arrest and Service of Process.
186. Privilege of Member of Congress.
187. Refusing to be Sworn on the Ground of Conscientious Scruples.

§ 155. Scope of this Chapter. — It is not designed to discuss in this chapter the subject of the *privilege* of witnesses except so far as it arises incidentally;[1] but chiefly to give a sketch

[1] See *post*, Ch. XII.

of the mode of compelling the *attendance* of witnesses and the *production* of books and papers.

§ 156. **Power of Court to compel Attendance of Witnesses.** "Every court," says Dr. Greenleaf, "having power definitely to hear and determine any suit, has, by the common law, inherent power to call for all proofs of the facts in controversy, and, to that end, to summon and compel the attendance of witnesses before it." [1]

§ 157. **Of Subpœnas.** — The first process for bringing a witness into court is a subpœna. This is a judicial writ, directed to the witness, commanding him to appear at the court on a day named, there to give evidence and the truth to say in a cause therein pending, wherein A. B. is plaintiff and C. D. is defendant (or otherwise describing the parties), and not depart thence without leave of the court, under a certain penalty therein named.

§ 158. **Particularity in this Writ.** — As this writ is the foundation of any future compulsory process against the witness, particularity is required in its terms. A subpœna issuing in a criminal case out of a court of the United States must command the witness to attend from day to day, and not to depart without leave of the court; otherwise it will not support a proceeding against the witness for contempt, in case he attends on the day named and afterward departs without leave.[2] Where subpœnas for witnesses against whom a contempt is charged, are issued *in blank* as to the names of the parties to the case, such subpœnas are not valid process on which to predicate a rule for contempt, in hiring a person to intimidate such witnesses.[3]

§ 159. **Right to this Process.** — The granting of this process is matter of right, where it appears that the attendance of the

[1] 1 Greenl. Ev., § 309. It was ruled in New York that a *surrogate* had no power to issue an attachment to bring in a witness to testify. Perry *v.* Mitchell, 5 Denio (N. Y.), 537.

[2] Re Spencer, 4 McArthur (D.C.), 433.

[3] Dobbs *v.* State, 55 Ga. 272.

witness cannot otherwise be procured, and the granting or refusing of it is not within the discretion of the judge or clerk.[1] In criminal cases, by the terms of American constitutions, the accused is entitled to have *compulsory process* for obtaining witnesses in his favor.[2] The accused may, therefore, demand that his witnesses shall be compelled to enter into a *recognizance* for their appearance at the trial,[3] and the court may compel a witness in such a case to enter into a recognizance to appear at a future day; but, according to one view, cannot require him to find *surities* for his appearance.[4] It is usual, upon preliminary examinations in criminal cases, where the accused is held to bail or committed, to require the witnesses thus to enter into a recognizance, and, according to early conceptions, to commit them upon their refusal to do so.[5] But one American court has declared that it is unjust, oppressive and against common right to commit a witness to jail in default of sureties, without some proof of his intent not to appear at the trial. But where such intention appears, the commitment is not prohibited by the fourteenth amendment to the constitution of the United States, nor by the constitution of the State.[6] In another State, by statute, the witness in a criminal case, if unable to procure sureties, may be discharged from commitment and his deposition taken;[7] and the power to require undertakings from such witnesses is limited in the same jurisdiction to those who have been examined before a

[1] Edmonson *v.* State, 43 Tex. 230.

[2] Const. U. S., 6th Amendment; Ind. Const. 1851, art. 1, § 13; Const. Cal. 1879, art. 1, § 13; Const. Colo., § 16; Conn. Const. 1818, art. 1, § 9; Const. Ill. 1870, art. II, § 9; Kans. Const. Bill of Rights, § 10; Md. Const. Bill of Rights, art. 21; Mich. Const., art. 6, § 28; N. Y. Const. 1847, art. I, § 6; Ohio Const. art. VIII, § 11; Tex. Const., art. 1, § 10. See Buchman *v.* State, 59 Ind. 1; Bills *v.* State, *Id.* 15; Ex parte Marmaduke, 91 Mo. 228.

[3] State *v.* Zellers, 7 N. J. L. 220.

[4] The refusal of a witness, summoned as such upon an indictment for a felony, to enter into a recognizance to appear as a witness and give evidence upon the trial of such indictment, cannot be regarded as a contempt, where there is no statute authorizing the court to require such security. Bickley *v.* Com., 2 J. J. Marsh. (Ky.) 572, 574.

[5] 1 Greenl. Ev., § 313; Benuett *v.* Watson, 3 Maul. & S. 1; Evans *v.* Rees, 12 Ad. & El. 55.

[6] State *v.* Grace, 18 Minn. 398.

[7] People *v.* Lee, 49 Cal. 37

committing magistrate.[1] Moreover, the constitution of that State provides that witnesses shall not be "unreasonably detained;" under which it is held that if a witness is detained for ninety days, after several continuances not satisfactorily explained, he is entitled to be discharged on *habeas corpus*.[2]

§ **160. Of Letters Rogatory.** — The etymology of the word *subpœna* implies that it is issued from a tribunal having the power to *command* and to enforce obedience to its command by the imposition of a *penalty*. It, therefore, cannot properly issue to a person who, under the law, is *privileged* from arrest in case of his refusal to obey it. In such a case, it is indecent to issue such a writ, but it is sometimes the practice to issue, instead of it, what is called a *letter rogatory*. It seems that where the attendance of a member of a *legislative body*, then in session, is desired before a court of judicature, the proper practice is to issue a letter rogatory to the speaker of the body, requesting the attendance of the member named as a witness, and not to issue a *subpœna* in the first instance.[3] Letters rogatory are also issued

[1] Ex parte Shaw, 61 Cal. 58.

[2] Ex parte Dressler, 67 Cal. 257.

[3] In a case in 1800, in the Circuit Court of the United States for the District of Pennsylvania, before Mr. Justice Chase, of the Supreme Court of the United States, and Mr. District Judge Peters, the defendant, being indicted for a libel on the President, applied to the court for a letter to be addressed by them to several members of Congress (Congress being in session), requesting their attendance as witnesses on his behalf. In support of the application, a variety of similar cases arising under the government of Pennsylvania were referred to. Mr. Justice Chase, who appears to have been a person of hasty, arbitrary and unjudicial temperament, is reported to have said: "The constitution gives to every man charged with an offense the benefit of compulsory process to secure the attendance of his witnesses. I do not know of any privilege to exempt members of Congress from the service or obligations of a *subpœna*. In such cases I will not sign any letter of the kind proposed. If, upon service of a *subpœna*, the members of Congress do not attend, a different question may arise; and it will then be time enough to decide whether an attachment ought or ought not to issue. It is not a necessary consequence of non-attendance after the service of a *subpœna* that an attachment shall issue. A satisfactory reason may appear to the court to justify or excuse it." Mr. District Judge Peters, on the contrary, is reported to have said: "I know the practice in Pennsylvania to be as it has been stated; for I have received such letters from the Supreme

to foreign judicatories, whose assistance is desired in obtaining the depositions of witnesses residing abroad.[1]

§ 161. Of Attachments for Witnesses. — Where a witness has been duly subpœnaed and fails to attend, the usual course is for the court, on the application of the party whose witness he is, to issue an attachment for him, under which he is arrested by the court's officer and brought before the court and there compelled to give his evidence, with or without the imposition of punishment, according to the excuse which he may have to offer.[2] In ordinary cases the purpose of the attachment is satisfied when the presence of the witness is secured; but where contumacious neglect or disobedience of the court's process appears, a pecuniary fine, generally small, is also imposed; and where the contumacy is aggravated, as in the case of the witness concealing himself or keeping out of the way of the court's officer to avoid giving his testimony in the particular case, a substantial punishment by fine or imprisonment, within the limits allowed by law may be inflicted.

§ 162. Whether Attachment a Matter of Discretion. — According to certain conceptions the *refusing* of an attachment for an absent witness is a matter of *discretion*, which will not be reviewed on error or appeal, in the absence of an appearance of

Court while I was speaker of the House of Representatives requesting that members might be permitted to attend as witnesses. In the present case I should have no objection to acquiesce in the defendant's application, with the concurrence of the presiding judge." But, in accordance with the opinion of the presiding judge, the motion was refused. United States *v.* Cooper, 4 Dall. (U. S.) 341.

[1] 1 Greenl. Ev., § 320, where the practice is described and a form given; also 1 Rol. Abr. 530, pl. 15. A statutory commission, if sufficient, is preferred to letters rogatory. Froude *v.* Froude, 3 Thomp. & C. (N. Y.) 79.

[2] See Burnham *v.* Morrissey, 14 Gray (Mass.), 226; Ex parte Humphrey, 2 Blatchf. (U. S.) 228; Ex parte Judson, 3 Blatchf. (U. S.) 89; United States *v.* Moore, Wall. C. C. (U. S.) 23; Ex parte Beebees, 2 Wall. Jr. (U. S.) 127; Re Roelker, 1 Sprague (U. S.), 276; West *v.* State, 1 Wis. 209; Bleecker *v.* Carroll, 2 Abb. Pr. (N. Y.) 82; State *v.* Trumbull, 4 N. J. L. 139; Stephens *v.* People, 19 N. Y. 537, 549.

abuse.[1] But another and better view is that, if the witness has been regularly served with subpœna, the party requiring his attendance may claim an attachment as a matter of right.[2]

§ 163. [Continued.] Personal Service of Subpœna necessary. — In order to entitle a party to an attachment against a defaulting witness, it is necessary for him to show that the subpœna was duly served,[3] — it being a general rule that before a person can be brought into contempt for disobeying an order of court, he must be personally served with the order,[4] unless he was present in court when the order was made, or knowing that the order was about to be made, left the court in order to avoid being present when it was made and in order to prevent its service upon him.[5] If, however, the return of the sheriff shows that the witness wilfully refused to permit the sheriff to serve the subpœna upon him, this will be sufficient ground for the attachment.[6] It is said that, in order to punish a witness for contempt in not attending in obedience to a subpœna, two things are necessary: 1. That the process of subpœna, be strictly and legally served. 2. That the disobedience is of such a nature as to indicate a design to contemn the process and authority of the court. Upon the first point, where it did not appear from the return of the subpœna, *where* it was delivered to the witness, it was held that it was not a sufficient basis

[1] West *v.* State, 1 Wis. 209; State *v.* Archer, 48 Iowa, 310. Thus, where an attachment against an absent female witness was refused on account of her condition, and the accused failed to apply for a continuance, it was held that relief could not be granted on appeal. State *v.* Benjamin, 7 La. Ann. 47.

[2] Green *v.* State, 17 Fla. 669.

[3] State *v.* Trumbull, 4 N. J. L. 139; United States *v.* Caldwell, 2 Dall. (U. S.) 334. It has been held, in the case of an order for the examination of a party under a statute (N. Y. Code Civ. Proc., § 873) service of order upon the *attorney* of the party is not sufficient to authorize an attachment in case it is disobeyed. Loop *v.* Gould, 17 Hun (N. Y.), 535; Tebo *v.* Baker, 16 Hun (N. Y.), 182; *s. c.* 19 Alb. L. J. (N. Y.) 398.

[4] McCaulay *v.* Palmer, 40 Hun (N. Y.), 38; Sanford *v.* Sanford, *Id.* 540; Bate Ref. Co. *v.* Gilett, 24 Fed. Rep. 697; Johnson *v.* San Francisco Superior Court, 63 Cal. 578.

[5] Hearn *v.* Tennant, 14 Ves. 136.

[6] Wilson *v.* State, 57 Ind. 71. Moreover, all the papers on which the attachment is awarded ought to be *filed* in court. United States *v.* Caldwell, 2 Dall. (U. S.) 334.

to punish the witness for the contempt, since it might have been delivered to him at a place where he was not bound to yield it obedience. It might have been out of the jurisdiction of the court or out of the limits of the State. Upon the second head, it was said: "It is the *contempt* which is punishable in this summary way. In the present instance there is not the slightest appearance of any intention to disregard the process or authority of the court. The defendant had yielded obedience, and when he left the place it seems to have been under a well-founded impression that his presence would not at the time be required. Besides, he was in another State and attending to necessary business of deep importance to himself. The court therefore see no grounds for an attachment." [1]

§ **164. What will excuse non-attendance.** — The serious *illness* of the witness,[2] or of his wife,[3] will generally be a sufficient excuse for his failure to attend. So, where there is a statute requiring the party desiring the attendance of the witness to tender to him his legal *fees*, he cannot be punished for refusing to obey the subpœna, if the same are not tendered, or the tender waived.[4] For the witness is not bound to testify until his fees are tendered;[5] and if he attends for one party and testifies and then departs, without notice that he will be required to remain for cross-examination, the cross-examining party must tender his fees in order to secure his return for that purpose.[6] By an

[1] State *v.* Trumbull, 4 N. J. L. 139.

[2] Cutler *v.* State, 42 Ind. 244. Where it appeared that the witnesses thus brought in had been so much indisposed as to be incapable of attending, they were discharged, and the *costs* of the attachment directed to abide the event of the suit. Butcher *v.* Coats, 1 Dall. (U. S.) 340.

[3] Foster *v.* McDonald, 12 Heisk. (Tenn.) 619.

[4] Re Thomas, 1 Dill. (U. S.) 420; 1 Greenl. Ev., § 319; Garden *v.* Creswell, 2 Mees. & W. 319.

[5] Atwood *v.* Scott, 99 Mass. 177; Bliss *v.* Brainard, 42 N. H. 255. *Contra*, in the federal courts, at least so far as *mileage money* is concerned: Norris *v.* Hasler, 23 Fed. Rep. 581.

[6] Richards *v.* Goddard, L. R. 17 Eq. 238. Where a party is summoned as a witness, under a statute, by the opposite party, it has been held that he is entitled to witness fees. Penny *v.* Brink, 75 N. C. 68.

early English statute,[1] the witness was entitled to his "reasonable charges," "according to his countenance or calling;" but in the United States, the fees and mileage of witnesses are, it is believed, universally fixed by statute:[2] but there is so little uniformity in the practice touching this subject that it cannot properly be discussed here.[3] Nor will the court compel the attendance of an *interpreter*, or of an *expert*, who has neglected to obey a subpœna, unless in case of necessity.[4] If the witness against whom an attachment is issued, arrives in court before it has been served and makes a reasonable excuse, the court will countermand the attachment on payment of the costs of it.[5] Moreover, an attachment will not be granted where it appears that the testimony of the witness could not be *material* to the issues.[6] So, where a *public officer* is served with a subpœna *duces tecum*, requiring him to bring certain *public documents* which may be proved by *copies*, an attachment will not be granted because of his refusal to obey;[7] otherwise if he refuses to furnish copies.[8] Where the witness had reasonable grounds to suppose that he would not be wanted at the trial,[9] or was excused by the attorney of the party who summoned him,[10] attachments were refused. An attachment will not be issued where it would be *oppressive*, or *dangerous* to the *health* of the witness, or where any strong reason relating to the business or family of the witness exists, against his compulsory absence from home; but the court will either postpone the cause or have his deposition taken.[11]

§ 165. When Attachment Issues in First Instance. — It is not usual to grant an attachment against a witness in the first

[1] Stat. 5 Eliz., chap. 9.

[2] See Holbrook *v.* Cooley, 25 Minn. 275.

[3] See 1 Greenl. Ev., § 310, and citations.

[4] Re Roelker, 1 Sprague (U. S.), 276; *post*, § 171.

[5] United States *v.* Scholfield, 1 Cranch C. C. (U. S.) 130.

[6] Dicas *v.* Lawson, 1 Cromp. M. & R. 934; Morgan *v.* Morgan 16 Abb. Pr. (N. S.) (N. Y.) 291. Compare Courtney *v.* Baker, 3 Denio (N. Y.), 27, 30, 31, and cases cited.

[7] Corbett *v.* Gibson, 16 Blatch. (U. S.) 334.

[8] Delaney *v.* Regulators, 1 Yeates (Pa.), 403.

[9] Reg. *v.* Slowman, 1 Dowl. 618.

[10] Farrah *v.* Keat, 6 Dowl. 470.

[11] Ex parte Beebees, 2 Wall. Jr. (U. S.) 127.

instance, unless some willful disobedience to the authority of the court is made to appear. The usual practice is to grant only a rule to show cause.[1] But where a witness is regularly served with subpœna and money tendered him for his expenses, which he does not object to for its insufficiency, but positively refuses to attend, it is a palpable case of contempt, and the court will award an attachment in the first instance. "The sum of money tendered may or may not have been adequate; but as the witness did not object to it at the time, it is to be considered sufficient."[2]

§ **166. Service and Return of Attachment.** — The attachment must be *served* by the proper executive order of the court, — in the courts of the United States, by the *marshal* of the United States, although the witness reside in a distant county of the State; it being process regularly issued for the administration of justice.[3] It has been held, under statutes, that it is unnecessary that an attachment for a defaulting witness should be issued and executed *at the same term*. It may be issued at the close of the term, returnable to the succeeding term, and may be executed by the *sheriff in vacation*, who may discharge him upon his giving *bail* in the amount required by statute; and, after such an attachment, the cause may be *continued*.[4]

§ **167. Hearing the Excuse — Purging the Contempt.** — When the witness is brought in by the officer, in execution of the attachment, the court will, of course, hear his *excuse*, if any he have to offer, and if it is a valid one, will discharge him from the arrest and hear his testimony. "He is called upon to *purge himself* of the alleged contempt, which, if he does to the satisfaction of the court, he is dismissed without more; but if he fail to purge himself, the court adjudges him guilty of *contempt*, and imposes the costs of the attachment, and such additional *fine* as, in their discretion, the case seems to demand;

[1] Jackson *v.* Mann, 2 Caines (N. Y.), Rep. 92; Morris *v.* Creel, 1 Va. Cas. 333.

[2] Andrews *v.* Andrews, 2 Johns Cas. (N. Y.) 109; *s. c.* Coleman's Cases (N. Y.), 119.

[3] U. S. *v.* Montgomery, 2 Dall. (U. S.) 335.

[4] State *v.* Archer, 43 Iowa, 310.

and, in default of payment, he may be *committed* to jail to compel execution of the sentence."[1]

§ **168. Punishment of the Recusant Witness.** — As a general rule, the refusal of a witness to attend, to submit himself to an examination, or to answer particular questions before a subordinate officer of a court of record, appointed, or having authority to take the deposition of the witness, or to conduct his examination, is a contempt of the court, and not of the officer.[2] In like manner, the refusal of a witness to submit to an examination, or to answer particular questions[3] before a *grand jury*, is a contempt of the court by which the grand jury is impaneled.[4] The *grand jury* is merely an appendage of the court, of which the judge is the head or controlling power.[5] It is only through the subpœna of the court that witnesses can be brought before them, who do not choose to attend voluntarily; and they must invoke the powers of the court, when necessary, to compel the

[1] Com. *v.* Newton, 1 Grant's Cas. (Pa.) 453, 456. This case discusses at length the power of the courts to punish contempts under the Pennsylvania statute of June 16th, 1836 (Purd. Dig. 158).

[2] La Fontaine *v.* Southern Underwriters, 83 N. C. 132, 137; Stuart *v.* Allen, 45 Wis. 158, 161, per Orton, J.; Whitcomb's Case, 120 Mass. 118, 121, per Gray, C. J.; Rex *v.* Almon, Wilmot, 243, 269; 2 Dan. Ch. Pr. (4th Am. ed.) 1178, 1198; 78th Eq. Rule of U. S. Courts, 17 Pet. lxxiv.; Rev. Stat. U. S., §§ 4071, 4072, 4073, 4999, 5002, 5005, 5006; Ex parte Doll, 7 Phil. (Pa.) 595; Matter of Allen, 13 Blatchf. (U. S.) 271. Compare Shepherd *v.* Dean, 13 How. Pr. (N. Y.) 174; Wicker *v.* Dresser, 13 How. Pr. (N. Y.) 331; Com. *v.* Newton, 1 Grant (Pa.) Cas. 453.

[3] United States *v.* Caton, 1 Cranch C. C. (U. S.) 150. Where the writ issues from a federal court, refusal to obey it is an offense against the United States. Re Ellerbe, 4 McCrary (U. S.), 449.

[4] People *v.* Kelly, 24 N. Y. 74; Heard *v.* Pierce, 8 Cush. (Mass.) 338; People *v.* Fancher, 4 Thomp. & C. (N. Y.) 467, 470; Commonwealth *v.* Bannon, 97 Mass. 214; Rex *v.* Lord Preston, 1 Salk. 278; Ex parte Maulsby, 13 Md. 625; Lockwood *v.* State, 1 Ind. 161; Ward *v.* State, 2 Mo. 120. *Contra*, in Alabama, where the proceeding must be by indictment. State *v.* Blocker, 14 Ala. 450.

[5] United States *v.* Hill, 1 Brock. (U. S.) 156; Denning *v.* State, 22 Ark. 131, 132; Cherry *v.* State, 6 Fla. 679, 685; People *v.* Naughton, 7 Abb. Pr. (N. Y.) (N. S.) 421, 423; Heard *v.* Pierce, 8 Cush. (Mass.) 338, 339; Commonwealth *v.* Bannon, 97 Mass. 214, 219; Lewis *v.* Wake County, 74 N. C. 194, 198; Commonwealth *v.* Crans, 3 Pa. L. J. 449, 450; *s. c.* 2 Clarke (Pa. L. J.), 180.

attendance of witnesses, and to protect themselves from insult or interference.[1] Under the limitations imposed upon the process of contempt by statute in Pennsylvania, a sentence *disbarring an attorney* for default as a witness is merely void. "This legislation," said Woodward, J., "would be a vain array of words, if a gentleman of the bar who happened to be in technical *contempt* as a tardy witness, might, instead of being fined, be stripped of his profession. As well might the occupation of another witness be taken away from him for disobedience to a *subpœna*, and his family beggared. Before such things can be done, the acts of assembly *restricting* punishments for contempt must be repealed and forgotten."[2]

§ 169. Power to Award Compensation to Party injured by Recusancy of Witness. — The power of courts to award indemnity to an injured party, in a summary proceeding as for a *contempt*, is said, in Wisconsin, to rest entirely upon the statute.[3] This may be true, but it is beyond question that it was the practice of the court of chancery in England, independently of statute, to fine contemnors in the amount which the opposite party and been damaged by their contempt.[4] Following this view, however, the Wisconsin court, having held in a previous case that the "loss or injury" for which the court may award compensation to the injured party in a proceeding for contempt, under the statutes of that State,[5] is a pecuniary loss or injury, for which the party injured might recover damages by an action,[6] — with this ruling as the basis of its reasoning, proceed upon the consideration that, while the statute of that State[7] gives or recognizes a right of action by the aggrieved party against one duly *subpœnaed* and under obligation to attend

[1] Commonwealth *v.* Crans, 3 Pa. L. J. 453; *s. c.* 2 Clarke (Pa. L. J.), 184; Ex parte Van Hook, 3 N. Y. City Hall Rec. 64; Ex parte Spooner, 5 *Id.* 109; Bergh's Case, 16 Abb. Pr. (N. Y.) (N. s.) 266. Compare Storey *v.* People, 79 Ill. 45; Grand Jury *v.* Public Press, 4 Brewst. (Pa.) 313.

[2] Com. *v.* Newton, 1 Grant's Cas. (Pa.) 453, 457.

[3] State *v.* Lonsdale, 48 Wis. 348, 366.

[4] 3 Bla. Com. 344.

[5] R. S. 1878, §§ 3490, 3491; R. S. 1858, ch. 149, §§ 21, 23.

[6] Re Pierce, 44 Wis. 411.

[7] R. S. Wis. 1878, § 4063.

as a witness, who fails to attend without reasonable excuse, to recover damages caused by such failure; yet no right of action exists against a witness for the mere refusal to answer proper questions, at least without allegation and proof of some special loss or injury. The conclusion of the court, therefore, is that, in a proceeding against a witness for contempt in refusing to answer proper questions propounded to him, it is not competent for the court to impose a fine upon him for an *indemnification* of the party by whom he was subpœnaed.[1] Speaking for the court, Lyon, J., says: "Neither the statute nor any adjudged case that has come to our notice recognizes such right of action against a witness for refusing to answer proper questions. It may be, however, that in special cases such an action can be maintained on common-law principles. But it seems to us it can only be maintained (if at all) for some special damage resulting from the unlawful refusal of the witness to testify. For example, such refusal might compel a party to take a *continuance* one term. The continuance *costs* would probably be the *measure of damages*. If such an action can be maintained in any case, we think the recovery will be limited to the actual, direct tangible damages; and that the mere refusal to testify, unaccompanied by such damages, is not a ground of action. And we think also that no recovery can be had in such an action, based upon the possibility or probability that, had the witness testified fully, the judgment would have been more favorable to the aggrieved party than it was. Such damages are altogether too uncertain and conjectural to furnish a ground of action."[2]

§ 170. Relief by Habeas Corpus.— If the commitment of the witness is illegal, he is entitled to be discharged by *habeas corpus*.[3] At the same time, the sentence of commitment will not — at least at common law — be reviewed on error or appeal.[4] But, on well settled principles touching the office of the

[1] State *v.* Lonsdale, 48 Wis. 348, 367.

[2] *Ibid.* 367.

[3] Ex parte Maulsby, 13 Md. 625, 641, app.; People *v.* Kelly, 24 N. Y. 74.

[4] Lockwood *v.* State, 1 Ind. 161. Otherwise under statutes. *Ante*, § 140.

writ of *habeas corpus*, he cannot be discharged because of any mere *error* or *irregularity* in the *commitment*, or in the steps which have led up to it; he can only be discharged for what is termed *illegality* — that is, because the sentence was one which could not be legally imposed.[1] Upon this subject — the difference between *irregularity* and *illegality* in respect of the remedy by *habeas corpus*, — there is much contrariety of judicial opinion. It would appear, on the whole, that courts of co-ordinate jurisdiction will not assume the right, on *habeas corpus*, to judge of each other's jurisdiction and of the legality of each other's commitments for contempt; while it cannot escape attention that appellate or superintending courts are more and more in the habit of doing so.[2] It is apprehended that the generally prevailing view is that a person committed contempt for refusing to produce certain papers in his possession before a grand jury, in compliance with an order of the court in the nature of *subpœna duces tecum* is in law committed *in execution* of a criminal judgment, and cannot be enlarged by another tribunal or judge on *habeas corpus*, upon any view of *errors* in the judgment of commitment, as that the witness was *privileged* by his position of attorney from producing the documents called for; they being the documents of his client, or for any other error which may have led to the judgment of committal, or for any excess in the fine or imprisonment imposed.[3] On the other hand, there is authority in support of the view that if the refusal of the witness to answer the question is altogether *innocent* and *justifiable*, or only an assertion of a *constitutional right*, such as the right of not giving evidence against himself, a commitment for contempt is illegal in such a sense that the error may be reached by *certiorari*, if not examinable upon the return to a *habeas corpus*.[5] Where an event occurs which renders it impossible for the witness, or other contemnor, to perform the thing required of him, for refusing to perform which he is imprisoned, he will be entitled to be relieved from imprisonment by *habeas corpus;* other-

[1] *Ante*, § 140 *et seq.*
[2] *Ante*, § 145.
[3] Ex parte Maulsby, 13 Md. App. 625.
[5] People *v.* Kelly, 24 N. Y. 74.

wise he might be doomed to perpetual imprisonment.[1] Thus, where a witness is imprisoned for refusing to answer questions in a pending cause, he will be released on *habeas corpus* upon the *abatement of such suit*.[2]

§ 171. Compelling the Testimony of Experts. — This subject is also in much confusion. Statutes exist fixing the fees of experts at larger sums than those of ordinary witnesses. Judicial opinion is much at variance on the question whether an expert may be compelled to testify without the payment of the statutory fees, or even as to whether a witness can be compelled to give his *opinion* at all. According to one view, the witness meets the requirements of a subpœna if he appears in court when required to testify and gives *impromptu* answers to such questions as are then put to him. He cannot be required, by virtue of the subpœna, to examine the case, to use his skill and knowledge, to form an opinion, or to attend, hear and consider the testimony given, so as to be qualified to give an opinion on a question of science arising upon such testimony, — from which the conclusion follows that a professional witness called as an expert may properly be paid for his time, services and expenses, and that the amount which is paid to him cannot, in the absence of anything showing bad faith on his part and on the part of the party calling him, affect the regularity of the trial, though it may affect his credit with the jury. It was also reasoned that it is not improper for the State's attorney, in a criminal case, to procure the attendance of skilled witnesses for a special compensation, and that the fact that an expert attended and testified at his instance, under an agreement for compensation, which was unknown to the defendant until after the witness' testimony had closed, did not affect the regularity of the verdict.[3] Opinion has so far varied that in one jurisdiction it has been held that an expert may refuse to give his opinion on matters of science or skill until the statutory fees are

[1] Ex parte Rowe, 7 Cal. 175.

[2] *Ibid.*

[3] People *v.* Montgomery, 13 Abb. Pr. (N. S.) (N. Y.) 207.

paid;[1] and another court has gone so far as to hold that he may refuse to give his opinion at all;[2] while still another court has held that such a refusal is a contempt.[3] It has been reasoned in an English case that there is a distinction between a witness to the facts and a witness selected by a party to give his opinion as an expert; that the former is bound, as a matter of public duty, to testify to facts within his knowledge, while the latter is under no such obligation to testify as to his opinion on matters of skill or science; and accordingly that the party who selects him must pay for his time before he will be compelled to testify.[4] If a professional man is called as an ordinary witness to testify to facts within his knowledge, he will not be entitled to the extra compensation allowed by a statute in the case of experts;[5] and it has been held that physicians called to give their opinions on facts observed by them while treating a person professionally, are not within the meaning of a statute empowering the court in its discretion to give extra compensation to expert witnesses.[6]

§ **172. When the Witness is privileged to depart.** — By the usual terms of a subpœna, the witness is required to attend *de die in diem*, and not to depart without leave of the court. But it is usual, and hence not blameable, for him to depart as soon as his examination has been completed and he is notified by the party calling him that his attendance will not be further required, unless he receives contrary notice from the opposite party or from the court. It has even been held that the party calling the witness may allow him to depart after cross-examination, and that the opposite party cannot demand that he be detained to testify regarding new matter, or that he be required to produce documents to be used by the latter in support of his case; and this for the reason that if he desires him for this purpose, he should subpœna him as his own witness.[7] In another case, the

[1] Buchman *v.* State, 59 Ind. 1; Dills *v.* State, *Id.* 15.

[2] Ex parte Roelker, 1 Sprague (U. S.), 627.

[3] Ex parte Dement, 53 Ala. 389.

[4] Webb *v.* Page, 1 Car. & K. 23.

[5] Snyder *v.* Iowa City, 40 Ia. 646.

[6] Le Mere *v.* McHale, 30 Minn. 410.

[7] Wells *v.* Wells, 33 N. J. Eq. 4.

court refused to allow the defendant to prove his case by cross-examination of the plaintiff's witness, thus enforcing what we shall hereafter find to be the general rule in several American jurisdictions;[1] whereupon the defendant said that he would call the witness as his own at the proper time, and the plaintiff replied that he had no objection to the witness remaining. Next day, when the defendant desired to call the witness, he could not be found. It appearing that the defendant had not subpœnaed him, or tendered him the statutory fee for the second day, it was held that he could not have an attachment for him.[2] But there is another conception, which is that, when a witness has been subpœnaed and called to testify, he is presumed to be present until the conclusion of the trial, and that if he has left the court after the close of his examination, and is thereafter wanted by the opposite party, the court may, in its discretion, suspend the trial until he can be brought in.[3] On a similar view, it has been held that, after the announcement of the counsel on each side in a criminal case that the testimony is closed, it is within the *discretion* of the presiding judge to issue attachments to compel the attendance of an absent witness.[4]

§ 173. Habeas Corpus ad Testificandum. — Where the witness is in custody or in the military or naval service, it has been usual to compel his attendance by a writ of *habeas corpus ad testificandum*, directed to his prison-keeper if in confinement,[5] or to his superior officer if in the military or naval service. This writ is a very ancient one, and appears to have been granted at the discretion of the courts of common law. It is said to have been employed to bring witnesses before the court when in custody awaiting trial, and also when undergoing sentence.[6] The writ

[1] *Post*, chap. XVII.

[2] Beaulieu *v.* Parsons, 2 Minn. 37.

[3] Neil *v.* Thorn, 88 N. Y. 270.

[4] Stephens *v.* People, 19 N. Y. 549.

[5] Chapman *v.* Welles, Kirby (Conn.), 133, 137.

[6] Ex parte Marmaduke, 91 Mo. 228, 250, per Sherwood, J. See Adam's Case, 3 Keb. 51; Rex *v.* Burbage, 3 Burr. 1440; Rex *v.* Layer, Fort. 396; Geery *v.* Hopkins, 2 Ld. Raym. 851; Friend's Case, 13 How. St. Tr. 1; 2 Tidd Prac. (9th ed.) 809; Shank's Case, 15 Abb. Pr. (N. S.) (N. Y.) 38; Re Mason, 8 Mich. 7

has issued in civil cases from the federal courts, and seemingly without regard to the question whether the witness was in Federal or in State custody.[1] Its use is recognized by several American statutes.[2] The Missouri statute empowers the judge of any court of record to issue the writ to bring up persons detained for any cause, "except a sentence for felony." It was held, where the writ was demanded on behalf of a prisoner on trial for felony, that this exception did not infringe his constitutional right to have process to compel the attendance of witnesses in his behalf, and that obedience to the writ, when directed to the warden of the penitentiary of the State to bring up a prisoner there confined under sentence for a felony, could not be enforced by a criminal court.[3]

§ **174. Proceeding to Obtain this Writ.**— According to an early English case, in order to lay the proper foundation for the writ of *habeas corpus ad testificandum*, it is necessary to show by affidavit that the persons whom it is desired to bring up as witnesses have been served with subpœnas, and that they are not willing to attend. "Without such an affidavit," said Lord Mansfield, "the writ ought not to go. They can never be brought up as prisoners against their consent."[4] According to Dr. Green-

[1] Ex parte Barnes, 1 Sprague (U. S.), 133; Ex parte Cabrera, 1 Wash. C. C. (U. S.) 232; Ex parte des Rochers, 1 McAll. (U. S.) 68; Ex parte Dorr, 3 How. (U. S.) 104; Ex parte Bollman, 4 Cranch (U. S.), 75; Elkison *v.* Deliesseline, 2 Wheel. Crim. Cas. 56; United States *v* Moore, 3 Cranch (U. S.), 159.

[2] Crim. Code Ind., §§ 245, 246; 2 Rev. Laws Ohio 1880, § 7290; Stat. Me. 1883, p. 805, § 37; Stat. Mass. 1882, p. 1070, § 29; Rev. Stat. Mo. 1879, § 4031.

[3] Ex parte Marmaduke, 91 Mo. 228 (Sherwood, J., dissenting).

[4] Rex *v.* Roddam, Cowp. 672. The King's Bench, in 1804 granted a *habeas corpus ad testificandum* to bring up a prisoner who was confined in jail for the non-payment of a fine imposed on him as a part of a judgment of the court upon an indictment for assault, in order that he might give evidence before an election committee of the House of Commons, on an affidavit of service of a rule to show cause upon the under sheriff, the solicitor of the treasury, the prisoner, and the person at whose instance he was in execution, and, no cause having been shown. Matter of Price, 4 East, 587. See also Rex *v.* Burbage, 3 Burr. 1440; Thelusson *v.* Coppinger, 3 Esp. 283; Noble *v.* Smith, 5 Johns. 357. It was at one time a doubtful point whether a *habeas cor-*

leaf, "the application in civil cases, is made upon affidavit, stating the nature of the suit, and the materiality of the testimony, as the party is advised and verily believes, together with the fact and general circumstances of restraint, which call for the issuing of the writ; and, if he is not actually a prisoner, it should state his willingness to attend. In criminal cases, no affidavit is deemed necessary on the part of the prosecuting attorney. The writ is left with the sheriff, if the witness is in custody; but if he is in the military or naval service, it is left with the officer in immediate command, to be served, obeyed and returned like any other writ of *habeas corpus*.[1] This writ will not be issued in any case to bring out of the penitentiary a witness who, by reason of his conviction for a felony is *incompetent* to testify.[2] Nor will it be issued in such a case where the competency of the witness is *substantially* in doubt;[3] nor will its execution be enforced when *improvidently* granted.[4]

pus ad testificandum could be granted in the Common Pleas, to bring up a prisoner charged in execution in the Fleet, in order that he might testify in a pending cause. The doubt turned upon whether the writ of *habeas corpus* would be a good defense to an action for an escape against the warden of the Fleet. Burdus *v.* Shorter, Barnes' Notes, 222. The court refused the writ in Francia *v.* De Mattos, *Id.* 223. The court declared it to be a very doubtful point and did not grant the writ; but the deposition of the prisoner taken in chancery was read by consent.

[1] 1 Greenl. Ev., § 312. See Evans *v.* Rees, 12 Ad. & El. 55; Hammond *v.* Stewart, 1 Strange, 510.

[2] Ex parte Marmaduke, 91 Mo. 228, 236.

[3] United States *v.* Barefield, 23 Fed. Rep. 136.

[4] Accordingly, where, in a trial of an issue in a divorce case, the respondent, the father, had been served with a *habeas corpus ad testificandum*, directing him to produce the two daughters of the parties who were at school in Boston, and he made return that the children had been sent to the school more than six months before, and that the libellant, the mother, had visited them there and had free access to them,—it was held that, as the libellant knew of the whereabouts of the children and could have taken their depositions under a commission, she had been guilty of laches in not doing so, and could not obtain a continuance of the cause because of their absence; that the writ of *habeas corpus ad testificandum* had been improvidently issued, and could not, therefore, be enforced; that the witnesses, not having been sent away by the father to avoid service of the *subpœna*, and being at the time of the application, and for several months before, in another State, could not be brought in under this writ without their consent. Koecker *v.* Koecker, 7 Phila. 364, before Paxson, J.

§ **175. Subpœna Duces Tecum.** — The ordinary process for compelling the production of books and papers which are necessary to be used in evidence upon a trial or other judicial examination, is a *subpœna duces tecum*. This is usually the ordinary subpœna with an additional clause to the following effect: "And also, that you diligently and carefully search for, examine, and inquire after, and bring with you and produce at the time, and place aforesaid, a bill of exchange, dated," etc. [here describing with precision the papers and documents to be produced], "together with all copies, drafts and vouchers, relating to said documents, and all other documents, letters, and papers, writings whatsoever, that can or may afford any information or evidence in said cause; then and there to testify and show all and singularly those things which you (or either of you) know or the said documents, letters or instruments in writing do import, of and concerning the said cause now depending. And this you (or any of you) shall in no wise omit," etc.[1] It has been held that unless the subpœna contain the words "to testify," it will not support further compulsory process against the witness; since the power of the court to compel the witness to attend at all, is based upon the assumption that his *testimony* is material to a case in court.[2] *Particularity* is required in describing the documents which the witness is required to produce. Thus, a subpœna to produce all the dispatches received at a certain telegraph office between the 6th and 20th days of the month, is too general.[3] So, it has been held that a subpœna requiring a solicitor to produce all his books, papers, etc., relating to all dealings between him and a party to the suit during a term of thirty-three years, is too vague.[4] But "the papers are required to be stated or specified only with that degree of certainty which is practicable, considering all the circumstances of the case, so that the witness may know what is wanted of him, and may have the papers at the trial so that they can be used, if the court shall then determine them to be com-

[1] Amey *v.* Long, 9 East, 473; 3 Chit. Gen., Prac. 830, note; 1 Greenl. Ev., § 309.

[2] Murray *v.* Elston, 23 N. J. Eq. 212.

[3] United States *v.* Hunter, 15 Fed. Rep. 712.

[4] Lee *v.* Angas, L. R. 2 Eq. 59.

petent and relevant evidence." [1] There is, of course, some limit to the *thing* which the witness can be compelled under such a writ to produce. It has been held in a patent case that he could not be thus compelled to bring before the court the *patterns of a stove*.[2] It was held in an early case in Pennsylvania that a *subpœna duces tecum* would not lie to compel a party, residing at a great distance from court, to produce in court certain *newspapers* containing advertisements of the sale of unseated lands for taxes; the court reasoning that if the party applying for the process desired the benefit of the newspapers, it behooved him to produce them or get them the best way he could.[3] Moreover, if books or papers are brought into court under a *subpœna duces tecum*, a party who *withdraws* them from the court and restores them to their original custody, is guilty of a *contempt* of court and may be punished for so doing.[4] A witness will not be punished for *contempt* for failing to produce books and papers in a case pending before a *referee*, where it appears from his affidavit that he has not had *reasonable time* within which to procure and produce them.[5] On the other hand, it has been held that a public officer, — the surveyor-general of the State, — is guilty of *contempt* if he refuses to furnish *copies of official records* in obedience to a *subpœna duces tecum*, though applied to for this purpose *after office hours*.[6]

§ 176. [Continued.] May be used for obtaining a Discovery. — The use of the *subpœna duces tecum* is regulated to such an extent by local statutes that it would be unsafe to attempt any extended exposition of the practice under it in this country, without a very minute examination. One idea concerning it seems to be that it is not to be used as a means of obtaining a discovery of evidence in the possession of the opposite

[1] United States *v.* Babcock, 3 Dill. (U. S.) 566, 568, per Dillon, J.

[2] Re Shepherd, 18 Blatchf. (U. S.) 225.

[3] Shippen's Lesee *v.* Wells, 2 Yeates (Pa.), 260.

[4] Com. *v.* Braynard, Thach. Cr. Cas. 146, 155.

[5] Heerdt *v.* Wetmore, 2 Rob. (N. Y.) 697.

[6] Delaney *v.* Regulators, 1 Yeates (Pa.), 403.

party.[1] But this cannot be stated with much confidence, especially in view of recent statutes rendering *parties* competent as witnesses; for we find that it has been ruled that a *subpœna duces tecum* must in all cases be issued for the purpose of obtaining profert of books and papers; and that, upon taking conditionally the testimony of a witness, whether a party to the action or not, he may be required, by such a subpœna, to produce any books or papers specified in the writ, and, for disobedience, is guilty of contempt and also liable in damages to any party aggrieved thereby.[2] It is held that it may issue to compel the president and secretary of a *corporation* to produce books and papers of the corporation in a suit in equity to which the corporation is *not* a party.[3]

[1] Smith *v.* McDonald, 50 How. Pr. (N. Y.) 519; Campbell *v.* Johnson, 3 Del. Ch. 94.

[2] Central Nat. Bank *v.* Arthur, 2 Sweeny (N. Y.), 194; Trotter *v.* Latson, 7 How. Pr. (N. Y.) 261. Mott *v.* Consumers Ice Co., 52 How. Pr. (N. Y.) 244; Murray *v.* Elston, 23 N. J. Eq. 212. As to the proper proceeding where the witness appears but neglects to produce the books or papers, see O'Toole's Estate, 1 Tuck. (N. Y.) (Surr.) 39. Where, in an action for ejectment against a grantee, his *warrantor*, though not nominally a party, employed counsel to defend the case, and placed in his hands a deed to be used in the litigation, it was held that the paper was legally in the custody of the warrantor and must be produced under such a subpœna. Steed *v.* Cruise, 70 Ga. 168. It is no answer to such a writ that the books and papers are *private property* of the witness, nor is it necessary that the subpœna should declare them material to the investigation. Re Dunn, 9 Mo. App. 255.

[3] Wertheim *v.* Continental &c. Co., 21 Blatchf. (U. S.) 246. *Contra*, Boorman *v.* Atlantic &c. R. Co., 17 Hun (N. Y.), 555; Central Nat. Bank *v.* White, 37 N. Y. Super. 297. In the view of other courts, the statute affords ample means of compelling a corporation to produce its books under a *subpœna duces tecum* in like manner as in the case of a natural person. N. Y. Code Civ. Proc., § 868; Central &c. R. Co. *v.* Twenty-third Street R. Co., 53 How. Pr. 45. On the contrary, it has been laid down in New York that, even in case of an action in which a corporation is a party, the production of its books cannot be enforced by *subpœna duces tecum*, served on its officers; it can only be effected by way of *discovery* under the provisions of the statutes. (2 Rev. Stats. New York, 199; Wait's New York Code of Procedure, 1871, § 388 Throop's Code, 1877, § 803; La Farge *v.* La Farge Ins. Co., 14 How. Pr. (N. Y.) 26; Opdyke *v.* Marble, 44 Barb. (N. Y.) 64); and the exercise of this power is left to the discretion of the court. As to the books of a corporation, not a party to the action, no such power of enforcing an examination or production of them on a trial between

§ 177. [Continued.] **Witness when privileged against the Writ.** — The command of a *subpœna duces tecum* is sometimes met by the claim of *absolute privilege;* and where the claim is well founded, the person to whom the subpœna is directed will be justified in disobeying it, and if he is thereafter committed for the supposed contempt, he will be entitled to be discharged by *habeas corpus.* Thus, it has been held that an attachment will not be awarded against an *attorney* for refusing to obey a subpœna *duces tecum*, to appear before a grand jury with vouchers which have been intrusted to him by his client in confidence, which vouchers contain evidence of a forgery committed by his client.[1] In such circumstances, it is the duty of the attorney, immediately on receiving the subpœna, to deliver up the papers to his client.[2] This subject is merely suggested here, and is discussed hereafter.[3]

§ 178. **Actions against Witnesses for Non-attendance.** — Statutes exist imposing *penalties* upon witnesses for non-attendance, to be recovered by the parties on whose behalf they have been subpœnaed. It has been held that, in order to recover the penalty denounced by such a statute, it must be shown that the witness was a *material* witness, and that *damages* resulted from his non-attendance.[4] Under some systems, the party summoning the witness also may have an *action for damages* against the

other parties is afforded; nor can its agents or officers, in their individual capacity, be compelled to discover or produce the books of a corporation over which they have not an absolute control and right of disposition at their own will and discretion. Morgan *v.* Morgan, 16 Abb. Pr. (N. S.) 291, 295. See Opdyke *v.* Marble, *supra.* Accordingly, a motion for an attachment against the chief officers of a *foundling hospital*, to compel them to produce upon the hearing, before a referee, of an action for *divorce*, the books of the hospital, for the purpose of disclosing the supposed fact that the defendant had left an infant with such hospital, the result of an illicit sexual intercourse with a third person, was denied. Morgan *v.* Morgan, *supra.* Whether these decisions are law in that State at the present time, the writer does not undertake to say.

[1] Rex *v.* Dixon, 3 Burr. 1687.

[2] *Ibid.*

[3] *Post*, Ch. XII.

[4] Carrington *v.* Hutson, 28 Hun (N. Y.), 371. See also Courtney *v.* Baker, 3 Denio (N. Y.), 27. This is required by the Texas statute. McGehee *v.* State, 4 Tex. App. 94.

witness;[1] but here it must likewise appear that his testimony was *material* and necessary to prove the case of the party requiring his attendance.[2] But in order to sustain such an action, it is necessary to prove that the *fees* of the witnesss for *travel* and *attendance* were duly paid or tendered according to the requirements of the statute; it is not sufficient to prove a *waiver* on the part of the witness of his right to such fees.[3] Under some systems the penalty does not go to the injured party, but is in the nature of a *fine* imposed on the witness by way of punishment.[4] Under the Tennessee statute, the penalty can only be recovered in the name, and to the use of the *State*.[5] In order to recover such a penalty there must have been a substantial compliance with the statute in the matter of summoning the witness.[6] Such a statute has been regarded as *penal* and to be *strictly pursued*, for which reason a judgment *nisi* for any sum, — even a *less* sum, — than therein prescribed, has been held a nullity.[7] Under some systems, defaulting witnesses are liable to *summary proceedings* for punishment.[8]

§ 179. Striking out the Answer of a Defendant who fails to appear. — Under some statutes, if the defendant, duly sum-

[1] McCall *v.* Butterworth, 8 Ia. 329; Hurd *v.* Swan, 4 Denio (N. Y.), 75.

[2] It is an answer, as well to a common-law action against a witness, as to a proceeding to punish him for contempt for neglecting to attend in obedience to a *subpœna* served upon him, that he knows nothing material to the issue; or, if it were a *subpœna duces tecum*, that he has not any document such as he is called upon to produce, material and necessary as evidence tending to prove the case of the party requiring his attendance. Morgan *v.* Morgan, 16 Abb. Pr. (N. S.) (N. Y.) 291. Compare Courtney *v.* Baker, 3 Denio (N. Y.), 27, 30, 31, and cases cited.

[3] McKeon *v.* Lane, 1 Hall (N. Y.), 319.

[4] Maclin *v.* Wilson, 21 Ala. 670.

[5] Nelson *v.* Ewell, 2 Swan (Tenn.), 271. As to forfeitures against witnesses who have been put under recognizance, see State *v.* Herndon, 1 Murph. (N. C.) 269. See, as to statute forfeitures against witnesses, State *v.* Thomas, 11 Lea (Tenn.), 113; Duke *v.* Given, 4 Yerg. (Tenn.) 478; State *v.* Butler, 8 Yerg. (Tenn.) 83; State *v.* Dill, 2 Sneed (Tenn.), 414; Kincaid *v.* Rogers, 3 Sneed (Tenn.), 1; Mattocks *v.* Wheaton, 10 Vt. 493; Kinzey *v.* King, 6 Ired. (N. C.) 76.

[6] Durden *v.* State, 32 Ala. 579. See also Mattocks *v.* Wheaton, 10 Vt. 493.

[7] State *v.* Dill, 2 Sneed (Tenn.), 414.

[8] Robbins *v.* Gorham, 25 N. Y. 588.

moned as a witness, fails to appear and testify, the court may strike out his answer and give judgment for the plaintiff.[1]

§ 180. Interfering with Witnesses. — Tampering with witnesses, attempting to bribe them, or to dissuade them from attending and testifying, is not only a contempt of court, but a misdemeanor at common law and punishable by indictment.[2]

§ 181. Refusing to Appear before Commissioners, Examiners, Notaries. — The process for compelling the attendance of witnesses and their answers to questions, before examiners, notaries, commissioners or other officers, is too wide a question for general discussion in a work of this kind. Nothing can be done beyond suggesting certain lines of inquiry. In the first place, it should be observed that the subject is very much controlled by local statutes. For instance, we find that it has been laid down in Pennsylvania that a failure on the part of the witness to appear before an *examiner* in obedience to a subpœna is not a *contempt* of the court in which the proceeding is pending, in which his testimony was to be used, but a contempt of the process of the law, for which the examiner is entrusted by the law with power to punish him.[3] On the other hand, it is held in Wisconsin, as a rule under the statute of that State,[4] as well as at common law, that the circuit court of any county may punish as for a criminal contempt a person who, subpœnaed to testify in an action pending in such court, before a *court commissioner* in another county, disobeys the summons or refuse to be sworn or to answer.[5] It has been laid down that the same rules must be applied in determining the propriety of compelling a witness to answer a particular question, on his examination *de bene esse* before a *commissioner* of the Circuit Court of the United States, under section thirty of the Judiciary Act of 1789, which govern the court in the examination of a witness on a trial before a

[1] Snyder *v.* Raab, 40 Mo. 166; Hewlett *v.* Brown, 1 Bosw. (N. Y.) 655.

[2] Com. *v.* Reynolds, 14 Gray (Mass.), 87.

[3] Com. *v.* Newton, 1 Grant's Cas. (Pa.) 453.

[4] R. S. Wis., § 3477.

[5] State *v.* Lonsdale, 48 Wis. 348, 365.

court; and accordingly, that an attachment will not be granted against a witness for *contempt* in refusing to answer questions before such a commissioner on the taking of a deposition *de bene esse*, unless the materiality of the evidence sought to be elicited is shown. In so holding Mr. District Judge Betts said: "I see no reason why any more stringent obligation should be imposed upon a witness in these outside examinations than is enforced in court. Before the court will adjudge a witness to be in contempt, or commit him therefor, it will require more than proof of the fact that he declines to respond to a question. It will inquire whether the question is relevant and material to the case on hearing,[1] and also whether the witness is exempt from answering it. No contumacy can be imputed to him until these points are determined."[2]

§ 182. Refusing to attend or testify before Municipal Boards, Committees, etc. — A statute of Wisconsin,[3] empowers courts of record to punish for *contempt* witnesses who refuse to attend and give evidence before municipal boards, committees, etc.[4] A similar statute formerly existed in New York City,[5] under which it has been held that an *attachment* will not be granted against a witness subpœnaed to attend and testify before a committee of the New York Common Council, unless it satisfactorily appears to the judge to whom the application is made: (1) That the witness refused to obey a subpœna issued by the clerk; or (2) that, on appearing, he refused to be sworn as a witness; or (3) that, after being sworn, he refused to answer some question which, in the opinion of the judge, was a question proper to be put. Therefore, where the witness attended pursuant to the subpœna and submitted to be sworn, and then stated that he declined generally to answer any questions, and none were put to him by the committee, an attachment was refused.[6]

[1] Citing Greenl. Ev., § 319.

[2] Re Judson, 3 Blatchf. (U. S.) 148.

[3] R. S. Wis. § 4066.

[4] See State *v.* Lonsdale, 48 Wis. 348, 363; and compare Stuart *v.* Allen, 45 Wis. 158.

[5] N. Y. Act of Feb. 8th, 1855; Laws N. Y. 1855, p. 24, chap. 20 (local to the *city* of New York); *repealed* by the N. Y. Laws of 1860, chap. 39; 1 R. S. N. Y. 1882, p. 921.

[6] Biggs *v.* Matsell, 2 Abb. Pr. (N. Y.) 156.

§ 183. Refusing to give Deposition to be used in Foreign Court. — Construing a statute, the Supreme Court of Wisconsin say: "The law which compels the citizens of this State to give testimony in such cases is founded in *comity*, and such testimony is, so to speak, extra-judicial as to our courts. A witness who unlawfully refuses to testify in a foreign cause, although he violates a penal law and is liable to be punished therefor, commits no *contempt* of any court of this State." [1]

§ 184. Power to Compel answer before Grand Jury. — As already suggested,[2] courts of criminal jurisdiction, which have power to impanel grand juries, have inherent power to compel witnesses summoned to appear before such grand juries, to answer proper questions propounded to them by such bodies.[3] A grand jury falls within the designation of "persons appointed under the authority of the court, to take depositions or testimony," within the meaning of a statute empowering courts to compel the attendance of witnesses in such cases.[4] Where a witness is committed for contempt in refusing to produce certain papers before a grand jury, in obedience to an order of the court in the nature of a *subpœna duces tecum*, the commitment reciting that he shall remain in custody till "purged of contempt by appearing before the grand jury and furnishing to them the paper or papers required by them," — he is entitled to his discharge upon *habeas corpus*, from such commitment, upon the *discharge of the grand jury;* for this circumstance renders obedience to the *subpœna duces tecum* impossible; and if he were not entitled to his discharge upon the happening of this event, he would be doomed to perpetual imprisonment.[5]

[1] State *v.* Lonsdale, 48 Wis. 348, 365.

[2] *Ante*, § 168.

[3] People *v.* Fancher, 4 Thomp. & C. (N. Y.) 467, 470; People *v.* Kelly, 24 N. Y. 74; Heard *v.* Pierce, 8 Cush. (Mass.) 338. So by statute in Missouri: Ward *v.* State, 2 Mo. 120.

[4] Ward *v.* State, *supra*. For a witness summoned to attend before a grand jury to *conceal himself*, in order to prevent the service of the process, has been held, under a statute, not a contempt such as could be punished in a summary manner. Com. *v.* Deskins, 4 Leigh (Va.), 685. But this would seem to be a contempt of court upon common-law principles.

[5] Ex parte Maulsby, 13 Md. 625, 641, App.

§ 185. Protection of Witnesses against Arrest and Service of Process. — Moreover, it is to be observed that the court has power, at common law, to protect witnesses and parties from arrest on civil process during their attendance, and for a reasonable time in going and returning, — *eundo, morando, et redeundo;* [1] and this whether they attend under the compulsion of a subpœna or voluntarily, or whether or not they have obtained a writ of protection.[2] According to early conceptions, the privilege extended only to exemption from arrest, but not to the mere service of a summons, — a distinction not of much importance at a time when civil actions were ordinarily commenced by the issuing of a *capias;* [3] but later views incline to extend it to immunity from the service of all process.[4]

§ 186. Privilege of Member of Congress. — The constitution of the United States declares that "the senators and repre-

[1] 1 Greenl. Ev., § 316; Palmer *v.* Rowan (Neb.), 32 N. W. Rep. 210 (where numerous authorities are collected by Maxwell, C. J.); Thompson's Case, 122 Mass. 428. See also Larned *v.* Griffin, 12 Fed. Rep. 590; Ex parte Levy, 28 Fed. Rep. 651; Atchison *v.* Morris, 11 Fed. Rep. 582; Plimpton *v.* Winslow, 9 Fed. Rep. 365; Bridges *v.* Sheldon, 7 Fed. Rep. 19; Brooks *v.* Farwell, 4 Fed. Rep. 166; Parker *v.* Hotchkiss, 1 Wall. Jr. 269.

[2] Walpole *v.* Alexander, 3 Doug. 45; Meekins *v.* Smith, 1 H. B. L. 636; Arding *v.* Flower, 8 Term R. 534; Spence *v.* Stuart, 3 East, 89; Ex parte Byne, 1 Ves. & B. 316; Persse *v.* Persse, 5 H. L. Cas. 671; McNeil's Case, 6 Mass. 245; Wood *v.* Neale, 5 Gray (Mass.), 538; May *v.* Shumway, 16 Gray (Mass.), 86; Gray, J., in Thompson's Case, *supra.*

[3] Blight *v.* Fisher, Pet. C. C. 41; Hunter *v.* Cleveland, 1 Brev. 167; Taft *v.* Hoppin, Anth. N. P. 255; Booraem *v.* Wheeler, 12 Vt. 311.

[4] Mitchell *v.* Huron Circuit Judge, 53 Mich. 541; *s. c. sub nom.* Mitchell *v.* Wixon, 19 N. W. Rep. 176; Compton *v.* Wilder, 40 Ohio St. 130. See, as to the nature and extent of the immunity and the reasons which support it. Morris *v.* Beach, 2 Johns. (N. Y.) 294; Sanford *v.* Chase, 3 Cow. (N. Y.) 381; Hopkins *v.* Coburn, 1 Wend. (N. Y.) 292; Seaver *v.* Robinson, 3 Duer (N. Y.), 622; Merrill *v.* George, 23 How. Pr. (N. Y.) 331; Matthews *v.* Tufts, 87 N. Y. 568, 570; Huddeson *v.* Prizer, 9 Phila. (Pa.) 65; Dungan *v.* Miller, 37 N. J. Law, 182; Vincent *v.* Watson, 1 Rich. 194; Saddler *v.* Ray, 5 Rich. L. (S. C.) 523; Martin *v.* Ramsey, 7 Humph. (Tenn.) 260; Dickenson's Case, 3 Har. (Del.) 517; Hanegar *v.* Spangler, 29 Ga. 217; May *v.* Shumway, 16 Gray (Mass.), 86; Thompson's Case, 122 Mass. 428; Ballinger *v.* Elliott, 72 N. C. 596; Parker *v.* Hotchkiss, 1 Wall. Jr. (U. S.) 269; Juneau Bank *v.* McSpedon, 5 Biss. 64; Arding *v.* Flower, 8 Term R. 534; Newton *v.* Askew, 6 Hare, 310; Persse *v.* Persse, 5 H. L. Cas. 671. See also In re Cannon, 47 Mich. 481, 11 N. W. Rep. 280.

sentatives shall, in all cases except treason, felony and breach of the peace, be privileged from arrest during their attendance at the sessions of their respective houses, and in going to or returning from the same."[1] It has been said: "There is no ambiguity in these expressions; they convey precise and definite ideas. The privilege secured to the members of both houses is freedom *from arrest*. It cannot be asserted that the service of a subpœna is an arrest. It is a mere notice to the party to appear and give testimony. But it is certain that, unless a court can constitutionally enforce the attendance of a witness under a subpœna, it will be of little avail to issue that process to a reluctant witness. And this necessarily leads to the inquiry whether an *attachment* can issue against a senator or representative in Congress, neglecting or refusing to attend in consequence of a subpœna properly served? On the most mature reflection, I am of opinion that the court may either grant or refuse such compulsory process, according to existing circumstances. That the service of an attachment for a *contempt* includes an arrest there can be little doubt; and it cannot be said that such contempt is either treason, felony or breach of the peace. But the privilege is confined to the periods of the members' attendance at the sessions of their respective houses, going to or returning from the same. If a member should neglect his duty by not attending the session of Congress, or should desert it without leave, he is no more entitled to the privilege in such circumstances from arrest than a mere private citizen. The court, however, will not presume a dereliction of duty unless it is established by satisfactory proof; they will construe the privilege liberally, and by no means weigh the absence of the member in scales too nice. Should it appear to them that he is on his return to Congress, they will at once refuse the attachment."[2]

§ 187. Refusing to be sworn on the Ground of Conscientious Scruples. — A *Jew* refusing to be sworn on Saturday, was

[1] Const. U. S., art. 1, § 6.

[2] Respublica *v.* Duane, 4 Yeates (Pa.), 347, 348, per Yeates, J. Compare U. S. *v.* Cooper, 4 Dall. (U. S.) 341.

fined ten pounds for contempt, but, the defendant afterwards waiving the benefit of his testimony, he was discharged from the fine.[1] One who, *not* being a *Quaker*, was called as a witness and refused to be *sworn*, on the ground of conscientious scruples, but offered to *affirm*, was committed for contempt, — the liberty to affirm being strictly confined to Quakers by the laws and practice of Massachusetts then existing.[2]

[1] Stansbury *v.* Marks, 2 Dall. (Pa.) 313.

[2] U. S. *v.* Coolidge, 2 Gall. (U. S.) 364, before Mr. Justice Story.

CHAPTER VII.

ENFORCING THE STIPULATIONS AND ADMISSIONS OF COUNSEL.

SECTION

190. Extent of Authority of Attorney in Management of Cause.
191. [Continued.] What he may do.
192. [Continued.] What he may not do.
193. Binding Nature of his Stipulations.
194. Setting aside and relieving against such Stipulations.
195. [Illustration.] Agreement that several Causes shall abide the Event of One.
196. [Further Illustrations.] That the opposite Party may take Judgment.
197. [Further Illustrations.] Admissions in the Pleadings.
198. Admissions and Agreements of State's Attorney.
199. Stipulation cannot confer Jurisdiction.
200. Verbal Stipulations, how far Binding.
201. Solemnity and Formality required in Admissions of Counsel.
202. Interpretation of Various Stipulations and Agreements.

§ 190. Extent of Authority of Attorney in Management of Cause. — While a general retainer to collect a debt or to conduct a cause does not, except under extraordinary circumstances, enable the attorney to bind his client by a *compromise* entered into with the opposite party,[1] yet he has general power to make

[1] Jones *v.* Inness, 32 Kan. 177; Kelly *v.* Wright, 65 Wis. 236; Roberts *v.* Nelson, 22 Mo. App. 28; Walden *v.* Boulten, 55 Mo. 405; Spears *v.* Ledergerber, 56 Mo. 465; Ambrose *v.* McDonald, 53 Cal. 28; Preston *v.* Hill, 50 Cal. 43; Township *v.* Keller, 100 Pa. St. 105; *s. c.* 43 Am. Rep. 42; Huston *v.* Mitchell, 14 Serg. & R. (Pa.) 307; Stackhouse *v.* O'Hara, 14 Pa. St. 88; Stokely *v.* Robinson, 34 Pa. St. 315; Mackey *v.* Adair, 99 Pa. St. 143; Hamrich *v.* Combs, 14 Neb. 381; Robinson *v.* Murphy, 69 Ala. 543; Herriman *v.* Shoman, 24 Kan. 387; *s. c.* 36 Am. Rep. 261; Levy *v.* Brown, 56 Miss. 83; Picket *v.* Merchants' Nat. Bank, 32 Ark. 346; Mandeville *v.* Reynolds, 68 N. Y. 528; Wadhams *v.* Gay, 73 Ill. 415; People *v.* Quick, 92 Ill. 580; Holker *v.* Parker, 7 Cranch (U. S.), 436. The English courts, after some vacillation, seem to have settled upon the view that the attorney has power, by virtue of his retainer, to compromise the action in which he is retained, provided he acts *bona fida* and reasonably, and does not violate the positive instructions of his client, and that the compromise will bind the client even if he

such engagements and stipulation in or out of court as he may deem proper in the conduct of the litigation,[1] and where they are entered into without fraud or collusion, they will bind his client.[2] In short, according to Dr. Greenleaf, "the effect of a retainer to prosecute or defend a suit, is to confer upon the attorney all the powers exercised by the forms and usages of the court in which the suit is pending."[3]

§ **191.** [**Continued.**] **What he may do.** — He may agree to submit the matter in controversy to *arbitration;*[4] or not to take

does violate instructions, unless the violation is known to the adverse party, — the reason being that the attorney, within the scope of his retainer, is the general agent of his client. Swinfen *v.* Swinfen, 18 C. B. 485; Swinfen *v.* Chelmsford, 5 Hurl. & N. 890; Chambers *v.* Mason, 5 C. B. (N. S.) 59; Chown *v.* Parrott, 14 C. B. (N. S.) 74; Prestwitch *v.* Poley, 18 C. B. (N. S.) 806; Fray *v.* Voules, 1 El. & El. 839; Butler *v.* Knight, L. R. 2 Exch. 109. A few American courts have followed the same rule. Wieland *v.* White, 109 Mass. 392; Potter *v.* Parsons, 14 Iowa, 286; Holmes *v.* Rogers, 13 Cal. 191 (overruled it seems, by Preston *v.* Hill, 50 Cal. 43 and Ambrose *v.* McDonald, 53 Cal. 28). And American courts generally show a leaning in favor of such compromises, when fairly made, and uphold them if they seem advantageous to the party complaining. Holker *v.* Parker, 7 Cranch (U. S.), 436, 452; Whipple *v.* Whitman, 13 R. I. 512. See also Roller *v.* Wooldridge, 46 Tex. 485; Potter *v.* Parsons, 14 Ia. 286; Bank of Georgetown *v.* Geary, 5 Pet. (U. S.) 99; Black *v.* Rogers, 75 Mo. 441; Williams *v.* Nolan, 58 Tex. 708; Bonny *v.* Morrill, 57 Me. 374; Jones *v.* Williamson, 5 Coldw. (Tenn.) 371; Union Mutual Life Ins. Co. *v.* Buchanan, 100 Ind. 63; Albee *v.* Hayden, 25 Minn. 267. Nor has he generally authority to release a surety. Stowe *v.* Sheldon, 13 Neb. 207.

[1] Greenlee *v.* McDowell, 4 Ired. Eq. (N. C.) 485; Branch *v.* Walker, 92 N. C. 89; Moulton *v.* Bowker, 115 Mass. 36; Williamson-Stewart Paper Co. *v.* Bosbyshell, 14 Mo. App. 534, 538; Levy *v.* Brown, 56 Miss. 83; Annelly *v.* Saussure, 12 S. C. 488; Read *v.* French, 28 N. Y. 293; Nightingale *v.* Oregon &c. R. Co., 2 Sawy. (U. S.) 338. See also Schoregge *v.* Gordon, 29 Minn. 367; Clark *v.* Randall, 9 Wis. 135; Nelson *v.* Cook, 19 Ill. 440; Gorham *v.* Gale, 7 Cow. (N. Y.) 739; Union Bank *v.* Geary, 5 Pet. (U. S.) 99; Newberry *v.* Lee, 3 Hill (N. Y.), 526; Oestrich *v.* Gilbert, 9 Hun (N. Y.), 242; Jennie *v.* Delesdernier, 20 Me. 183; Week's Att., § 218; Whart. Ag., § 585 *et seq.* He cannot stipulate that a sheriff shall conduct a business on which he has levied. Alexander *v.* Denaveaux, 53 Cal. 663; *s. c.* 59 Cal. 476.

[2] Beck *v.* Bellamy, 93 N. C. 129.

[3] 2 Greenl. Ev., § 141; Smith *v.* Bossard, 2 McCord Ch. (S. C.) 409.

[4] Sargeant *v.* Clark, 108 Pa. St. 588; Bingham *v.* Guthrie, 19 Pa. St. 418; Tilton *v.* United States Life Ins. Co., 8 Daly (N. Y.), 84; Somers *v.* Bala-

an *appeal* or *writ of error;*[1] or may agree that the opposite party may *take judgment*,[2] and this, too, although he may know that his client has a good defense to the action.[3] So, where he represents the plaintiff, he may, without the consent of his client, dismiss the action,[4] or restore it after a dismissal or *nolle pros.*,[5] or bring a new action;[6] and he may take an appeal, and, according to one opinion, bind his client by a recognizance in the name of the latter for the prosecution of it.[7] So, he may have printed, at the charge of his client, such briefs or arguments as he may judge advisable for the more convenient presentation of the cause in an appellate court.[8] In all these cases if, in the absence of collusion with the opposite party, he acts contrary to the express directions of his client, or to his injury, the client must look to the attorney, and not to the opposite party, for redress.

§ **192.** [**Continued.**] **What he may not do.**— But there is even here a line which he cannot overstep. He cannot, by virtue of his general authority, *accept service* for his client of the original process by which the action is begun;[9] nor, under the old law excluding interested witnesses, could he *release* a claim of his client against a witness, in order to render the latter competent

brega, 1 Dall. (U. S.) 164; Holker *v.* Parker, 7 Cranch (U. S.), 436; Buckland *v.* Conway, 16 Mass. 396. Compare Connett *v.* Chicago, 114 Ill. 233.

[1] Shisler *v.* Keavy, 75 Pa. St. 79.

[2] Hudson *v.* Allison, 54 Ind. 215. Compare Pike *v.* Emerson, 5 N. H. 393; Talbott *v.* McGee, 4 T. B. Mon. (Ky.) 377; Union Bank *v.* Geary, 5 Pet. (U. S.) 99.

[3] Thompson *v.* Pershing, 86 Ind. 304, 310. So, an attorney has authority, in virtue of his general retainer, to bind his client by a stipulation to take a judgment on a verdict already rendered, and such a stipulation does not lose its force by the lapse of over ten years before judgment is entered, if no revocation of the authority of the attorney has taken place in the meantime. Barlow *v.* Steel, 65 Mo. 611, 618.

[4] McLeran *v.* McNamara, 55 Cal. 508; Gaillard *v.* Smart, 6 Cow. (N. Y.) 385.

[5] Reinhold *v.* Alberti, 1 Binn. (Pa.) 469.

[6] Scott *v.* Elmendorf, 12 Johns. (N. Y.) 315.

[7] Adams *v.* Robinson, 1 Pick. (Mass.) 462.

[8] Williamson-Stewart Paper Co. *v.* Bosbyshell, 14 Mo. App. 534; Weisse *v.* City, 16 La. Ann. 46.

[9] Bayley *v.* Buckland, 1 Exch. 1; Masterson *v.* Le Claire, 4 Minn. 163; Anderson *v.* Hall, 87 N. C. 381.

to testify;[1] nor release *sureties;*[2] nor execute a *replevin bond* for his client;[3] nor enter a *retraxit;*[4] nor, according to one doubtful opinion, stipulate *what law* shall govern the case,— as that a particular statute was or was not duly enacted;[5] nor *assign the judgment* when recovered;[6] nor *release* or postpone the *lien* thereof;[7] nor act for the *legal representatives* of his deceased client.[8]

§ 193. Binding Nature of his Stipulations. — Such being the extensive nature of his powers in the conduct of the litigation, it follows that his stipulations, made in open court with the opposite counsel, have in general the force of *contracts*, the performance of which the court will enforce.[9] Some decisions add, as a condition of the binding character of a stipulation, that it be also *entered of record*.[10] But, on principle, it would seem sufficient, to give the stipulation or promise, made *in facie curiæ*, the binding nature of a contract, that the other party has *acted upon it*. This conclusion is supported upon the familiar principle of an *estoppel in pais*, which is that when a party, by his declaration or conduct, has induced another to act in a particular manner

[1] Shores *v.* Casswell, 13 Metc. (Mass.) 413. See also Marshall *v.* Nagel, 1 Bail. (S. C.) 308.

[2] Givens *v.* Briscoe, 3 J. J. Marsh. (Ky.) 532.

[3] Proprietors *v.* Wentworth, 36 Me. 339. But *aliter* as to an *indemnifying* bond to a sheriff, in the name of his principal. Ford *v.* Williams, 13 N. Y. 577.

[4] Lambert *v.* Sanford, 2 Blackf. (Ind.) 137.

[5] Graves *v.* Alsap, 1 Ariz. Ter. 274.

[6] Wilson *v.* Wadleigh, 36 Me. 496.

[7] Wilson *v.* Jennings, 3 Oh. St. 528. See also Doub *v.* Barnes, 1 Md. Ch. 27.

[8] Campbell *v.* Kincaid, 3 T. B. Mon. (Ky.) 560; Wood *v.* Hopkins, 3 N. J. 507.

[9] Banks *v.* American Tract Society, 4 Sandf. Ch. (N. Y.) 438; Staples *v.* Parker, 41 Barb. (N. Y.) 648. It is said to have always been the practice in New York "to hold the parties strictly to their engagements made during the trial and in the face of the court, relating to the conduct of the suit, and its proceedings." Staples *v.* Parker, *supra.*

[10] Caldwell *v.* McWilliams, 65 Ga. 99. Under the statute of *Minnesota*, which declares that the authority of an attorney to bind his client shall extend to "any of the proceedings in an action or special proceeding, duly made, or entered upon the minutes of the court," it has been held that a stipulation touching the conduct of a cause, so made and entered, is in the nature of a contract, which the court cannot set aside at the instance of one of the parties. Bingham *v.* Supervisors, 6 Minn. 137

which he would not otherwise have done, such party will not afterwards be permitted to set up a claim inconsistent with such declaration and conduct, if such claim will work an injury to the other party or to those claiming under him.[1] Sometimes the qualification is added that the agreement be *fair and reasonable*. Thus, it is said in Tennessee by the court, speaking through Reese, J.: "The power of the court, as well as the duty, to enforce fair and reasonable agreements relating to the conduct and dispatch of business before it, is necessarily incident to the nature of its position and required to insure the orderly and faithful determination of causes. It is a power which this court has repeatedly exercised upon deliberation and examination of authorities, and very recently in a highly important case." [2]

§ 194. Setting aside and relieving against such Stipulations. — Such being the nature of the stipulations of counsel made in court touching the cause of the trial, it follows that they will not be set aside upon any lower grounds than those which would warrant the rescission of a contract, — namely, fraud, collusion, accident, surprise, or some ground of the same nature.[3] The court will not relieve parties from the effects of a stipulation made under a full understanding of the facts existing at the time.[4] The mere fact that a party, by such a stipulation, has *waived defenses* which he might otherwise urge, is no sufficient ground for setting it aside.[5] But, by analogy to the relief of parties from contracts entered into under a mutual *mistake of fact*, it is clear that a court will relieve a party against a stipulation made under such a mistake.[6] It has been held that an order setting aside a stipulation of counsel touching the conduct of a case, is *appealable*.[7] But this, under most systems, would obviously depend

[1] Banks *v.* American Tract Society, 4 Sandf. Ch. (N. Y.) 438, 467.

[2] Jones *v.* Kimbro, 6 Humph. (Tenn.) 319.

[3] Bingham *v.* Supervisors, 6 Minn. 136; Keogh *v.* Main, 52 N. Y. Super. 160.

[4] Conner *v.* Belden, 8 Daly (N. Y.), 257.

[5] Bingham *v.* Supervisors, *supra*.

[6] Wells *v.* American Express Co., 49 Wis. 224. In this case the mistake does not appear to have been *mutual* and yet the stipulation was set aside.

[7] Bingham *v.* Supervisors, 6 Minn. 136.

upon the nature of the order; it would not be appealable unless it were in the nature of a final judgment dispositive of a substantial right.

§ 195. [ILLUSTRATION.] AGREEMENT THAT SEVERAL CAUSES SHALL ABIDE THE EVENT OF ONE. — Where several cases are pending in court, depending upon the same facts or questions of law, it is competent for the attorneys, in virtue of their general retainers, to stipulate that only one shall be tried and that the others shall abide the result of that one.[1] Such a stipulation is not merely an independent executory agreement, but it operates presently to affect the status of the case itself, and invests the plaintiff with rights in respect to its conduct, which he otherwise would not have had, and of which neither the opposite party nor the court can lawfully divest him. When, therefore, one suit was selected from among a number which were founded upon the same cause of action, and a stipulation made that all the causes then pending on appeal from a justice should abide the final determination of this case, — the defendant thereafter had no right to dismiss his appeal in the case in which the stipulation was entered of record.[2]

§ 196. [FURTHER ILLUSTRATIONS.] THAT THE OPPOSITE PARTY MAY TAKE JUDGMENT. — The foregoing principle no doubt extends so as to give binding force to a stipulation that one of the parties to the suit may take judgment, since it is competent for counsel to make such an agreement.[3] Under a statute providing that parties may agree to a judgment by *writing* filed in open court, it is held that an agreement between the parties to an action, stipulating the terms upon which a decree shall be entered, when filed in open court, becomes a part *of the record*, and is in effect an answer or pleading, and, unless for good cause shown, should be so regarded by the court, and cannot hence be stricken from the files or withdrawn upon the motion of the parties; and accord-

[1] North Missouri R. Co. *v.* Stephens, 36 Mo. 150. As to the effect of a stipulation that one cause shall abide the result of another, see Gilmore *v.* American Central Ins. Co., 67 Cal. 366.

[2] McKinley *v.* Wilmington Star Mining Co., 7 Bradw. (Ill.) 386.

[3] Pike *v.* Emerson, 5 N. H. 393; Talbott *v.* McGee, 4 T. B. Mon. (Ky.) 377; Union Bank *v.* Geary, 5 Pet. (U. S.) 99; 2 Greenl. Ev. § 141. It has been held that a party who obtains a judgment in violation of his written stipulation on file, dismissing the action, — may be restrained or *enjoined* from enforcing it by the court in which it was obtained. McLeran *v.* McNamara, 55 Cal. 508.

ingly, that a subsequent pleading, filed by one of the parties, inconsistent therewith, should be stricken from the files.[1]

§ 197. [Further Illustrations.] Admissions in the Pleadings. — The pleadings are drawn by the attorneys of the parties, except in those few cases where parties are foolish enough to endeavor to act as their own attorneys; and no better illustration of the principle under discussion could be furnished than is found in the binding nature of the admissions in the pleadings. Such admissions are *evidentiary* in their character, are an absolute *estoppel* upon the party making them, unless he seasonably withdraws them by amendment, and obviates the necessity of the other party proving the facts thus admitted. Much could be written upon this subject. There are *implied* admissions as well as *express* admissions. It has been held that, where an answer sets up several distinct defenses, a denial in one is qualified by an admission in another, — which is merely an application of the rule that a party's pleading, like any other written instrument, is to be construed as a whole, and in case of any incongruities or contradictions, is to be taken most strongly against the pleader. If, therefore, a party in one count of an answer denies a fact alleged in the petition or complaint, and in another count admits it, the admission, and not the denial, will be taken to be true. It will estop him, and the plaintiff will not be bound to prove the fact thus admitted. For instance, where the action was replevin for unlawfully taking the plaintiff's goods, and the answer contained two defenses: (1) a general denial of the allegations of the complaint, and (2) a justification of the taking under a levy upon execution, — it was held that the answer admitted the taking for the purposes of the trial, and that to that extent the second defense vacated the first.[2] In another case, the same court, applying the same principle, held that a general denial in one count of the answer was inconsistent with special matter alleged in another count, and was to be construed as modified by the latter.[3] This principle has been applied by the Supreme Court of the United States in a case originating in the Circuit Court of the United States for the District of Minnesota, — the court holding that the admission of the plaintiff's title contained in an equitable defense set up in the third count of the answer, overrode and controlled a denial of the plaintiff's title in the first count, and was conclusive upon the question of title.[4]

[1] Vail *v.* Stone, 13 Iowa, 284.

[2] Derby *v.* Gallup, 5 Minn. 119.

[3] Scott *v.* King, 7 Minn. 494. See also Zimmerman *v.* Lamb, 7 Minn. 421.

[4] Northern Pacific R. Co. *v.* Paine, 7 Sup. Ct. Rep. 323, 325.

§ **198. Admissions and Agreements of State's Attorney.** — Admissions made by the State's attorney of facts for the purpose of the trial are to be considered, for all the purposes to which they are relevant, in precisely the same light as if they had been proved by testimony instead of admitted.[1] Where the State's attorney is not in a condition to go to trial or to demand the forfeiture of a recognizance, he may lawfully agree in consideration of a consent to the *forfeiture*, that it shall be set aside on the appearance of the defendant at the next term.[2]

§ **199. Stipulation cannot confer Jurisdiction.** — An exception to the rule touching the binding force of stipulations of counsel as to the conduct of a cause is founded in the principle that consent cannot confer jurisdiction over the subject matter of a litigation: a stipulation giving the court jurisdiction which it does not possess is invalid.[3]

§ **200. Verbal Stipulations, How far Binding.**— Subject to the statute of frauds, verbal promises, whether made in or out of court, if *acted upon* by the other party, are binding as contracts, at least by way of estoppel, on a principle already suggested.[4] Acting upon this principle, one court has ruled that although there may be a rule of court intended to prevent disputes and uncertainties, requiring stipulations of counsel touching the conduct of causes to be put in writing, yet where such an agreement has been orally made between counsel, and the substance of it is admitted, the court will not allow one of the counsel to disregard it, after it has been acted upon by the other. "We think it well established by the authorities," said Paine, J., "that, although the rule requires stipulations to be in writing in order to be binding, yet it was not designed to allow a party who had entered into a verbal stipulation, upon which his adversary had relied and acted, to obtain an unjust advantage, and destroy

[1] People *v.* Tyler, 36 Cal. 522, 531.

[2] Esmond *v.* People, 18 Bradw. (Ill.) 114.

[3] Bingham *v.* Supervisors, 6 Minn. 136, 147.

[4] *Ante*, § 193.

the other's rights by disregarding it himself.[1] Another court has ruled, proceeding upon the necessity of avoiding disputes between counsel, that verbal stipulations with reference to proceedings pending an action cannot be regarded, except so far as they are admitted by the parties against whom they are sought to be enforced.[2] For stronger reasons, a verbal stipulation not entered of record will not be enforced after a long and *unexplained delay*, as for instance, a stipulation that a default may be set aside where a delay of seven years has intervened before making the application to the court to enforce the same.[3] Statutes exist in some States like the following: "An attorney and counsellor has authority to bind his client in any of the steps of an action or proceeding, by his agreement filed with the clerk or entered upon the minutes of the court, and not otherwise."[4] Such statutes are regarded as in the nature of a *statute of frauds*.[5] Under them an attorney cannot bind his client, by a verbal stipulation, made during the progress of a trial and not entered on the minutes, to waive the rights of his client under an issue made by the pleadings,—as, for instance, that the judgment of the plaintiff, if he recover, shall be for payment in gold coin;[6] or even extending the time for filing a bill of exceptions.[7]

§ 201. Solemnity and Formality Required in Admissions of Counsel. — In order that admissions of counsel of facts may take the place of evidence in a civil trial, such admissions "must be distinct and formal, or such as are termed *solemn admissions*, made for the express purpose of alleviating the stringency of some rule of practice, or of dispensing with the formal proof of

[1] Burnham *v.* Smith, 11 Wis. 258. The court cite Gaillard *v.* Stuart, 6 Cow. (N. Y.) 385; Ex parte Lassell, 8 Cow. (N. Y.) 119; Montgomery *v.* Ellis, 6 How. Pr. (N. Y.) 326; Wager *v.* Stickle, 3 Paige (N. Y.), 407; Turner *v.* Burrows, 1 Hill (N. Y.), 627.

[2] Patterson *v.* Ely, 19 Cal. 35; Reese *v.* Mahony, 21 Cal. 305, 308.

[3] Reese *v.* Mahony, *supra*.

[4] Cal. Code Civ. Proc., § 283.

[5] Borkheim *v.* Insurance Co., 38 Cal. 623, 628.

[6] Merritt *v.* Wilcox, 52 Cal. 238. Under a substantially similar statute the same rule exists in Indiana. Louisville &c. R. Co. *v.* Boland, 70 Ind. 595.

[7] Goben *v.* Goldsberry, 72 Ind. 44 (distinguishing Ridgway *v.* Morrison, 28 Ind. 201).

some fact at the trial."[1] The *remarks* of counsel during the progress of a trial are not to be regarded as admissions by which the rights of the client are to be determined.[2] It has even been held that counsel who, when *evidence* is offered, make declarations that it is offered for a *limited purpose* only, are not *estopped*, after it is received, from drawing from it deductions other than those contained in the offer, unless injustice will be done to the opposite party by permitting such new deductions. Counsel, it is reasoned, have no power to limit the effect of evidence, but its effect is regulated by the court in its charge to the jury. The statement by counsel of the purpose for which evidence is offered is only a reason given why the evidence should be received.[3] But the *failure to object to evidence* in the course of the trial will, in many cases, have the effect of an admission of certain facts which flow as a natural consequence from acts done or evidence admitted. Thus, in a suit upon notes where certain notes are offered in evidence without objection, this, it has been held, is equivalent to a tacit admission that they were the notes in suit. "If they were not," said the court, "by timely objection, by pointing out any substantial difference between the notes sued on and those offered, he (defendant) could very easily have prevented their introduction in evidence."[4]

§ 202. INTERPRETATION OF VARIOUS STIPULATIONS AND AGREEMENTS. — A stipulation which on its face purports to be "a *statement of the facts* in this action" does not, unless its terms so import, preclude the parties from introducing other evidence on the trial.[5] - - - - An agreement to *supply lost papers* or dismiss cause at the next term, is construed to mean at that period of the term when the cause is reached for trial on the docket in regular course of business.[6] - - - - An agreement to *submit* a case *on briefs* to be decided in vacation, the order and decree to be entered as of that or the next term, is con-

[1] 1 Greenl. Ev., § 186; Ferson *v.* Wilcox, 19 Minn. 449, 451. See also Gen. Stat. Minn., chap. 88, § 8.

[2] McKeen *v.* Gammon, 33 Me. 187. See for illustration, Stewart *v.* Shaw, 55 Mich. 613.

[3] Sill *v.* Reese, 47 Cal. 294.

[4] Fitzgerald *v.* Barker, 85 Mo. 13, 20.

[5] Dillon *v.* Cockcroft, 90 N. Y. 649.

[6] Jones *v.* Kimbrough, 3 Humph. (Tenn.) 319.

strued as a submission of the whole controversy, and not as merely the submission of a motion to disallow an injunction.[1] - - - - Where the parties, upon the evidence as it stands at a given stage of the trial, stipulate that the *jury may be discharged* and the cause submitted to the court alone, if one of them is thereafter, against the objection of the other, permitted to introduce further evidence, and if the cause is decided by the court with reference to such further evidence, without any waiver by the other party of his right to a jury trial thereupon, it will be error.[2] - - - - Where the defendant moved for a *continuance* to enable him to discredit the testimony of the plaintiff, in case she should be called as a witness in her own behalf; and thereupon her counsel, in order to avoid a continuance, announced that she should not be called, whereupon the court said that, upon that agreement, the continuance would be refused, — it was held that this circumstance did not preclude the counsel of the defendant from *commenting* in his *argument* upon the failure to call her as a witness.[3] - - - - A stipulation that a *stenographer's notes* of testimony taken on a trial of another cause may be used as evidence, subject to objections for immateriality, irrelevancy, or other matter of substance, is a waiver of the right to object that the witnesses were incompetent, or that the parties or issues were different than on the former trial.[4] - - - - An agreement to *amend* the issue and try the case on the *merits* has the effect merely of waiving exceptions to the matter of form, and does not, in any other respect, affect the legal rights of the parties.[5] - - - - A stipulation that the jury, if the court be not in session when they agree upon their verdict, may sign, seal and deliver it to the officer in charge and disperse, is equivalent to an agreement that the court may open the *sealed verdict* in their absence, and, if necessary, reduce it to proper form. It is also a waiver of the right to poll the jury if they should be in court.[6]

[1] Anderson *v.* White, 27 Ill. 57.

[2] Hewitt *v.* Week, 51 Wis. 368.

[3] Hurd *v.* Marple, 10 Bradw. (Ill.) 418.

[4] Weldon Hotel Co. *v.* Seymour, 54 Vt. 582

[5] Banghart *v.* Flummerfelt, 43 N. J. L. 28.

[6] Koon *v.* Insurance Co., 104 U. S. 106. Whether a suit at law and one in chancery are to be tried as *one suit.* King *v.* Chicago &c. R. Co., 98 Ill. 376.

CHAPTER VIII.

OF OTHER SUBJECTS OF JUDICIAL CONDUCT AND CONTROL.

SECTION
205. Establishing Rules of Practice.
206. Controlling the Intercourse between the Court and the Bar.
207. Protracting a Trial during a whole Night.
208. Allowing Members of the Family of the Prosecutrix to sit in court and weep.
209. Allowing one not an Attorney to appear.
210. Consolidating several Actions for Purposes of Trial.
211. Calling an Attorney to Preside.
212. Retiring from the Bench without Suspension of Trial.
213. Change of Judges during the Trial.
214. Who to sign Bill of Exceptions in such a Case.
215. Objection that the Judge presided on a previous Trial of the same Action.
216. Exclusion of Spectators when not a Violation of Right of Public Trial.
217. When Improper to grant Leave of Absence to Counsel.
218. Prejudicing the Minds of the Jurors.
219. [Continued.] Remarks Indicating Opinion as to Facts.
220. Asking Pertinent Question of Counsel.
221. Conversing privately with Witnesses.

§ **205. Establishing Rules of Practice.** — While it is the undoubted province of judicial courts to establish reasonable rules of practice, yet a rule of court which operates to deprive a party of a legal right is void.[1] So held of a rule which empowered the court to disregard a motion to have the jury polled.[2]

§ **206. Controlling the Intercourse between the Court and the Bar.** — It seems that the whole subject of the intercourse between the trial court and the bar is a matter committed to the discretionary control of the trial court and the sense of propriety of the members of the bar. "We presume not," said the Supreme Court of Georgia, "to prescribe the manner of intercourse between the court and the bar. We leave that to the

[1] Crotty *v.* Wyatt, 3 Bradw. (Ill.) 388.

[2] *Ibid.*

good sense and high breeding which so generally characterize both, except where we find that it affects the rights of parties; then it is within our corrective jurisdiction." [1]

§ **207. Protracting a Trial During a whole Night.** — In Kansas, where new trials are granted in cases appealed from justices of the peace, it has been held that it is an unusual and unjust proceeding and a great abuse of discretion for a justice of the peace, without special circumstances existing therefor, to proceed with the trial of an action during the whole night, against the objection and protest of one of the parties litigant. The court said: "Special circumstances might justify a court in proceeding with a trial until after midnight; but the mere fact that a criminal charge was pending against the defendant below, to which he was required to answer on November 12th, 1881, before a justice in another township, was not a sufficient excuse for keeping open the court all night, as the case might have been adjourned, if it were deemed necessary, until after the conclusion of the hearing of the criminal charge.[2]

§ **208. Allowing Members of the Family of the Prosecutrix to sit in Court and weep.** — During the trial of an indictment for rape, certain members of the family of the prosecutrix sat within the bar of the court and occasionally wept during the argument of the prosecuting counsel, and withdrew when the prisoner's counsel began to address the jury. It was held that the failure of the judge to restrain such conduct was no ground for new trial.[3]

§ **209. Allowing one not an Attorney to Appear.** — It has been ruled that, where the judge allows a person not a licensed attorney and counsellor, to appear for and conduct the trial on the part of one of the parties, notwithstanding the objection of the other party, the judgment will be reversed on appeal; [4] but this is a very doubtful holding.

[1] Long *v.* State, 12 Ga. 295, 330.

[2] McGowen *v.* Campbell, 28 Kan. 25, 30.

[3] State *v.* Laxton, 78 N. C. 564, 570.

[4] Newburger *v.* Campbell, 9 Daly (N. Y.), 102; *s. c.* 58 How. Pr. (N. Y.) 313.

§ 210. **Consolidating several Actions for Purposes of Trial.**— It is within the discretion of the presiding judge to order several actions founded on the same subject matter, brought by the same party against several defendants, to be brought together, although the defendants employ different counsel and the evidence in the several causes is different.[1] So, it is clearly within the discretion of the presiding judge to hold parties to an agreement to try together several petitions against different owners of land taken for the public use under a statute; and it seems that the court might so order without an agreement.[2]

§ 211. **Calling an Attorney to preside.** — It has been held manifest error for the trial judge, in a civil case, to call an attorney of the court to occupy the bench while the trial was proceeding. "Judicial functions," says Walker, J., speaking for the court, "cannot be delegated to or exercised by an agent or deputy. They must be performed by the persons who have been designated by law for the purpose. The attorney occupying the bench was not connected with or a part of the judicial department of the State, named in the third article of our constitution; and persons not of that department are prohibited from the exercise of such powers. The putting of the verdict in form and discharging the jury for the term were both judicial acts, and the first related to and affected the rights of appellants. Even if a person not a judge may, by consent of parties, act as such, still it is clear that the presiding judge, of his own motion, cannot substitute another to act for the court; and if it can be done, it must be by consent of the parties appearing on the record; and such consent does not appear, and will not be implied. It has been supposed by some that it would be error if the record showed that any one but the judge acted even with consent; but we refrain from deciding that question until it shall be presented." [3]

[1] Springfield *v.* Sleeper, 115 Mass. 587. See also Witherlee *v.* Ocean Insurance Co., 24 Pick. (Mass.) 67; Kimball *v.* Thompson, 4 Cush. 441; Com. *v.* Robinson, 1 Gray 555; Com. *v.* James, 99 Mass. 438; Com. *v.* Powers, 109 Mass. 353.

[2] Burt *v.* Wigglesworth, 117 Mass. 302.

[3] Davis *v.* Wilson, 65 Ill. 527, 530.

§ 212. **Retiring from the Bench Without Suspending the Trial.** — In a capital case in Georgia it was said by the Supreme Court, speaking through Bleckley, J.: "When, during the trial of a case, the judge leaves the bench and withdraws from the bar, he should order a suspension of business until his return. His immediate presence tends to preserve the legal solemnity and security of the trial, and upholds the majesty of the law. Especially, while a witness for the State is under examination, should the judge not retire beyond the bar, without directing the examination to cease during his temporary absence, however necessary or however brief his absence may be. The guilty and the innocent are alike entitled to be tried according to law, in the immediate presence of one of the State's judges." [1]

§ 213. **Change of Judges during the Trial.** — Where the judge who presides at the trial becomes sick, or is otherwise unable to proceed, after the evidence is all in and the instructions have been given to the jury, the trial, it has been held, should proceed under a *special judge*, before the same jury and without rehearing the testimony. Upon this question the Supreme Court of Wisconsin, speaking through Mr. Justice Eakin, say: "It is submitted as matter for arrest that the jury were not discharged upon the election of the special judge, and a new jury selected. The jury had heard the evidence and instructions, and had dispersed to await the argument of counsel. There is no reason why this should not be made under the presiding control of the special judge. The instructions had not been excepted to, and if it had been important to determine precisely what the evidence had been, the special judge might in several ways sufficiently have advised himself of it, to have enabled him to regulate the discussion. Upon a difference among the attorneys as to testimony during an argument, it is no uncommon practice to call a witness, not for re-examination, but to state what he had testified. After the evidence has been admitted and the law settled, the presidency of the judge is more for the purpose of preserving the order in the discussion, and in the future conduct of the

[1] Hayes *v.* State, 58 Ga. 35, 49.

jury, than for anything else. It would be an unnecessary delay, expense and vexation to clients in such cases, to impanel a new jury and to recall witnesses. It is not demanded by the ordinary requirements of justice." [1]

§ 214. **Who to sign Bill of Exceptions in such a Case.** — A controversy having arisen as to which judge should sign a bill of exceptions in such a case, the court also said: "All matters of exception occurring whilst the regular judge was presiding should have been shown by the bill of exceptions, certified to be true under his signature. As to those matters, the special judge had no authority to sign a bill. If, however, the exceptions regarded any matter which occurred before the special judge, or was first brought to his notice, such as misconduct of the jury, newly discovered evidence, etc., he should have signed the bill himself, although he had vacated the bench. The object of the signature is to give verity to the statement of occurrences complained of as erroneous. As it is the duty of the presiding judge to consider them, he can most properly certify them. In doing so, he performs no judicial act, requiring him to have the present character and authority of a judge. He thereby orders nothing and determines nothing, not already ruled. The certificate has reference to past transactions. The honorable special judge was mistaken in basing his opinion, as to his incompetency to sign the bill of exceptions, upon the ground that he had vacated the bench. He might sign it as to all matters occurring before himself.[2] As to matters arising before the regular judge, he was the only person competent to certify them, except in certain contingencies, when bystanders might do so." [3] Where there was thus a change of judges during the trial, after the evidence had been heard and the instructions given, the Supreme Court held that it could not regard any proceedings as before it for review which were not regularly certified in a bill of exceptions, signed by the regular judge who presided when the proceedings were had.[4]

[1] Bullock *v.* Neal, 42 Ark. 278.

[2] Citing Watkins *v.* State, 37 Ark. 370.

[3] Bulloch *v.* Neal, 42 Ark. 278.

[4] Bulloch *v.* Neal, 42 Ark. *supra*. Compare Cowall *v.* Altchul, 40 Ark. 172.

§ 215. Objection that the Judge presided on a previous Trial of the same Action. — Generally speaking, it is no objection to the qualification of a judge that he presided upon a previous trial of the same cause, though of course a plain manifestation of prejudice against either party on the previous trial might, under statutory rules existing in various jurisdictions, afford ground of a *change of venue*. In a cause of some celebrity in New York, an action for libel against James Gordon Bennett, the publisher of the *New York Herald*, Chief Justice Oakley, of the New York Superior Court, before whom the cause had been previously tried, after consulting with his brethren, when the cause had been reached in its order on the calendar, declined to yield to the request of the plaintiff to have it tried before another judge of the same court. It was held that this was no ground of exception. Bosworth, J., in giving the opinion of the same court, said: "We know of no recognized principle which will justify a judge in holding a circuit court, to direct a cause on the calendar, when reached and ready to be tried, to be postponed and await its opportunity to be tried before another judge, merely because it had been previously tried before himself. The considerations of inconvenience and delay resulting from such a practice in the circuit courts, as they are generally constituted, would not, it is true, exist to the same extent with reference to a court organized as this court is. But that view cannot affect the legal rights of the parties, nor the legal duty of the presiding judge. The objection by either party to retrying a cause before a judge before whom it has been once tried would apply with nearly, if not quite as much force, to trying it before either of the judges who sat at General Term and heard the argument which resulted in granting a new trial. For it is to be presumed that they severally examined the evidence, and formed opinions of the merits according to such evidence, especially in a case where, as in this one, a new trial was sought as well on the ground of excessive damages as of erroneous decisions of questions of law. Even if such a presumption should not entirely and in all respects accord with the fact, yet it would be true that the judge who examined and scrutinized the evi-

dence most closely, and made himself most familiar with its details, would be most obnoxious to such an objection; because the inference would be just that he had more decided views with respect to the whole merits, as developed by the evidence given on the first trial, than one who had given less attention to the evidence in all its particulars. It is no part of the province of a judge to find the facts, and there is no reason to suppose that, on a second trial, he will not apply any rules of law determined by the court which granted a new trial, with as much firmness and accuracy as if he were a stranger to the cause. Any judge would willingly be relieved from trying a cause which he knew either party was averse to trying before him. But although he might be disposed to gratify any such prejudice of either party, he is not at liberty to refuse to try a cause, when reached and ready to be tried, for any reason which the law does not recognize as sufficient. The ground of objection assigned will not warrant us in granting a new trial, either because it was erroneous to overrule it, or because, in the proper exercise of judicial discretion, it should have been sustained.''[1]

§ 216. **Exclusion of Spectators when not a Violation of Right of Public Trial.** — During the progress of a trial for an assault with intent to commit murder, the court made an order directing that the lobby outside of the court-room should be cleared of spectators, and that no person except officers of the court, reporters of the public press, friends of the defendant, and persons necessary for her to have on said trial, should be allowed to remain; but no order was made requiring the doors to be closed, and the friends of defendant and reporters were permitted to come and go at will. The order of the court was made on behalf of the defendant, as well as to preserve order, because the attendance and conduct of a large crowd in the court room tended to excite the defendant. It was held that the defendant's right to a public trial was not violated.[2]

[1] Fry *v.* Bennett, 3 Bosw. (N. Y.) 200. The point was affirmed on appeal and the above reasoning approved. 28 N. Y. 324, 329. Compare Pierce *v.* Delameter, 1 N. Y. 17.

[2] People *v.* Kerrigan (Cal.), 14 Pac. Rep. 849.

§ 217. **When improper to grant Leave of Absence to Counsel.** — In Georgia it seems there is a statute regulation requiring counsel, under what circumstances the writer does not know, to obtain leave of absence from the court. It has been laid down in a case in that State that the granting of leave of absence by court to counsel, unless for providential cause, is of doubtful propriety when it affects the rights and interests of other parties, and should be exercised at all times with caution and circumspection by the court. But where the court had granted the claimant's counsel leave of absence, though the docket did not show him to be of counsel (such, however, otherwise appearing to be the fact), the Supreme Court would not control the *discretion* of the trial court in *continuing* the case because of such absence.[1]

§ 218. **Prejudicing the Minds of the Jurors.** — Undoubtedly, any remarks of the presiding judge made in the presence of the jury, which have a tendency to prejudice their minds against the unsuccessful party, will afford ground for a reversal of the judgment. But it has been held that a mere complaint made by the presiding judge, of the *consumption of time* by counsel, does not fall within this category. Accordingly, it was no ground for a new trial that counsel for the defendant requested, before the concluding argument to the jury on their part was begun, and whilst the argument for the State was in progress, that they be furnished with the authorities relied upon by the State, and the court replied: "You shall be furnished with them before your concluding counsel commences his argument, and they shall be read too, if you desire to consume another hour of the time of the court."[2]

§ 219. [**Continued.**] **Remarks Indicating Opinion as to Facts.** — During the progress of a criminal trial, the clerk of the justice of the peace who had taken down the testimony on the preliminary examination, testifying as a witness, was asked by the court: "Don't you ever make mistakes in taking down

[1] Ross *v.* Head, 51 Ga. 605.

[2] Long *v.* State, 12 Ga. 295, 330.

testimony in the justice's court?" To which the witness replied: "It may be possible, your honor, but we try not to." Whereupon the judge made the remark in the presence of the jury: "Well, if you don't, you are the first justice of the peace I ever heard of who does not make a mistake occasionally." It was held that these remarks were in substance and effect an instruction to the jury upon questions of fact, and were in violation of the constitutional rights of the accused.[1] It is immaterial that a prejudicial remark of this kind is not embodied in the forma instructions, since it would have substantially the same effect upon the jury as if it were so given.[2] The same court in another case, said: "Under our practice the judge should intimate no opinion upon the facts. If he cannot do so directly, he cannot indirectly; if not explicitly, he cannot by innuendo; and the effect of such an opinion cannot be obviated by announcing in distinct terms the jury's independency of him in all matters of fact."[3] The same court, straining this rule, reversed a judgment in a criminal trial, because the trial court, in overruling an objection to certain testimony, remarked in the presence of the jury, "that there was as much testimony that defendant had kicked the deceased upon the chest as upon the face;" although the court subsequently cautioned the jury that he did not wish to be understood as saying how much or how little testimony there was on any particular point, that the whole matter was for them to pass upon, and that they would observe for themselves what the testimony was, — without, however, in terms retracting this opinion formerly expressed.[4] Carrying out the same idea, the Supreme Court of California, where the judge had expressed his opinion as to the respectability of a witness under examination, said: "We should not hesitate to reverse the judgment because of it, if the same depended in any material degree upon the testimony of the witness whose character and standing were thus indorsed."[5]

[1] State *v.* Tickel, 13 Nev. 502, 508.
[2] People *v.* Bonds, 1 Nev. 33, 36.
[3] State *v.* Ah Tong, 7 Nev. 148, 152.
[4] State *v.* Harkin, 7 Nev. 381.
[5] McMinn *v.* Wheelan, 27 Cal. 300, 319.

§ **220. Asking pertinent Question of Counsel.** — The judge may ask counsel a pertinent question during the examination of an expert, even though the effect be to put the witness on his guard by disclosing to him a fact which the counsel wished him not to know.[1]

§ **221. Conversing privately with Witnesses.** — The judge should not converse privately, either in or out of court, with a witness, to ascertain whether he has or has not knowledge of particular facts; nor should he suggest to the witness, after his examination, that there are facts other than those to which he has testified, within his knowledge.[2] But it is not ground for a new trial that the judge conversed with a witness upon the stand, after his examination was through, in an undertone.[3]

[1] City Bank *v.* Kent, 57 Ga. 285.
[2] Sparks *v.* State, 59 Ala. 82, 87.
[3] City Bank *v.* Kent, 57 Ga. 285.

TITLE III.

OPENING THE CASE AND PRESENTING THE EVIDENCE.

Chapter IX. — Of the Right to Open and Close.
Chapter X. — Of the Opening Statement.
Chapter XI. — Excluding Witnesses from the Court Room.
Chapter XII. — Of the Privilege of Witnesses.
Chapter XIII. — Preliminary Questions of fact for the Judge.
Chapter XIV. — Control of the Court over the Examination of Witnesses.
Chapter XV. — Incidents of the Direct Examination.
Chapter XVI. — Of the Use by Witnesses of Memoranda to Refresh Recollection.
Chapter XVII. — Of the Cross-examination.
Chapter XVIII. — Of the Re-examination.
Chapter XIX. — Of Indirect Impeachment.
Chapter XX. — Of Direct Impeachment.
Chapter XXI. — Sustaining and Corroborating Witnesses.
Chapter XXII. — Of the Examination of Experts.
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Chapter XXIV. — Of the Unsworn Statement of the Accused.
Chapter XXV. — Objections to Evidence and Exceptions to the Rulings thereon.
Chapter XXVI. — Of the Production and Use of Books and Papers.
Chapter XXVII. — Of Natural Evidence.

CHAPTER IX.

OF THE RIGHT TO OPEN AND CLOSE.

ARTICLE I. — IN ORDINARY ACTIONS.
ARTICLE II. — IN SPECIAL PROCEEDINGS.
ARTICLE III. — CERTAIN SPECIAL RULES.

ARTICLE I. — IN ORDINARY ACTIONS.

SECTION
225. Preliminary.
226. Importance of the Right.
227. Confusing Ideas upon the Subject.
228. The Plaintiff begins where he has anything to Prove.
229. What this Rule Decides.
230. In Actions for Unliquidated Damages.
231. In Actions on Contracts which Liquidate the Damages.
232. In Actions on Contracts which do not Liquidate the Damages.
233. Doctrine of this Article Restated.

§ **225. Preliminary.** — The right to open and close is strictly a branch of the discussion concerning forensic argument, and hence belongs in the next succeeding article; but as this right must be settled at the outset, before the opening statement is made or before any evidence is introduced, it is perhaps best to consider it here.

§ **226. Importance of the Right.** — The right to open and close the argument in a civil case has been deemed of such importance that it has been the subject of a distinct treatise by a distinguished law writer and judge.[1] It is the settled law in

[1] Best on the Right to Begin.

England,[1] and in most,[2] though not all,[3] American jurisdictions, that a deprivation of this right is substantial *error*, which, if saved and properly presented by a bill of exceptions, will operate to reverse a judgment; while in still others there is a middle rule to the effect that it is a matter within the sound *discretion* of the trial court, which discretion will not be revised except in cases of manifest abuse.[4] A statute prescrib-

[1] Huckman *v.* Fernie, 3 Mees. & W. 505; Mercer *v.* Whall, 5 Ad. & El. (N. S.) 447; Geach *v.* Ingall, 14 Mees. & W. 95; Ashby *v.* Bates, 15 Mees. & W. 589.

[2] David *v.* Mason, 4 Pick. (Mass.) 156; Robinson *v.* Hitchcock, 8 Met. (Mass.) 64; Merriam *v.* Cunningham, 11 Cush. (Mass.) 40, 44; Benham *v.* Rowe, 2 Cal. 387, 408; Singleton *v.* Millett, 1 Nott & McC. (S. C.) 355; Johnson *v.* Wideman, Dudley (S. C.), 70; Huntington *v.* Conkey, 33 Barb. (N. Y.) 218; Ayrault *v.* Chamberlain, 33 Barb. (N. Y.) 229; Hill *v.* Perry, 82 Ind. 28; Johnson *v.* Josephs, 75 Me. 544; Ney *v.* Rothe, 61 Tex. 374; Millerd *v.* Thorn, 56 N. Y. 402; Claflin *v.* Baere, 28 Hun (N. Y.), 204; Johnson *v.* Maxwell, 87 N. C. 18, 22; Penhryn Slate Co. *v.* Meyer, 8 Daly (N. Y.), 61; Millerd *v.* Thorn, 15 Abb. Pr. (N. Y.) 376; *s. c.* 56 N. Y. 402; Lindsley *v.* European Petroleum Co., 3 Lans. (N. Y.) 176; Elwell *v.* Chamberlain, 31 N. Y. 611, 614; Churchwell *v.* Rogers, Hardin (Ky.), 182; Goldsberry *v.* Stuteville, 3 Bibb (Ky.), 345; Blackledge *v.* Pine, 28 Ind. 466; Young *v.* Highland, 9 Gratt. (Va.) 16; Haines *v.* Kent, 11 Ind. 126.

[3] Montgomery *v.* Swindler, 32 Oh. St. 224, 226; Comstock *v.* Hadlyme Ecc. Soc., 8 Conn. 254; Scott *v.* Hull, 8 Conn. 296; Lexington &c. Ins. Co. *v.* Paver, 16 Oh. 324, 330; State *v.* Watham, 48 Mo. 55; Wade *v.* Scott, 7 Mo. 509, 514; Sodousky *v.* McGee, 4 J. J. Marsh. (Ky.) 267, 275; Day *v.* Woodworth, 13 How. (U. S.) 363; Hall *v.* Weare, 92 U. S. 728; Lancaster *v.* Collins, 115 U. S. 222.

[4] In Texas, a deprivation of this right is error for which the judgment will be reversed, unless it appear that the party complaining has not been injured thereby (Ney *v.* Rothe, 61 Tex. 374, 376), and in Iowa (what is substantially the same thing), "while the right to review such a question is not absolutely denied, yet there must be a clear case of prejudice in order to justify a reversal upon this ground." Preston *v.* Walker, 26 Iowa, 205, 207; Fountain *v.* West, 23 Iowa, 9, 14; Goodpastor *v.* Voris, 8 Iowa, 335; Smith *v.* Coopers, 9 Iowa, 379; Woodward *v.* Laverty, 14 Iowa, 381; Viele *v.* Germania Ins. Co., 26 Iowa, 9, 45. In Wisconsin, this is a matter resting in the sound discretion of the trial judge, which discretion is subject to review only in cases of outrage or abuse. Marshall *v.* American Express Co., 7 Wis. 1, 19. A similar doctrine was suggested in a case in New York (Fry *v.* Bennett, 28 N. Y. 324, 331); but, as seen by cases cited in the preceding note, the rule in that State is now the same as in England. This doctrine also prevails in Arkansas (Pogue *v.* Joyner, 7 Ark. 462) and in Missouri. Reichard *v.* Manhattan Life Ins. Co., 31 Mo. 518; Farrell *v.* Brennan, 32 Mo. 328; McClintock *v.* Curd, 32 Mo. 411; Wade *v.* Scott, 7 Mo. 509; Tibeau *v.*

ing which party shall have this right has been held mandatory.[1]

§ **227. Confusing Ideas upon the Subject.**— Prior to the time when the question became settled in England, as will be hereafter stated, the English books were full of confusing ideas upon this subject. These ideas were propagated in this country, and they still disfigure our jurisprudence to a considerable extent. One of them was an attempt to formulate the rule in the proposition that the party sustaining the burden of proof,[2] or, as it is sometimes stated, the burden of the issue,[3] or of the issues,[4] or the affirmative of the issue or issues,[5] possesses the

Tibeau, 22 Mo. 77. This was at one time the rule in England. Goodtitle *v.* Braham, 4 T. R. 497; Branford *v.* Freeman, 1 Eng. Law and Eq. 444; Geach *v.* Ingall, 14 Mees. & W. 97; Booth *v.* Millns, 15 Mees. & W. 669; Doe *v.* Brayne, 5 Com. Bench, 655; Edwards *v.* Matthews, 16 L. J. Exch. 291. In New Hampshire, as late as 1850, it was regarded as an open question whether it was a matter of right or discretion merely (Belknap *v.* Wendell, 21 N. H. 175, 182); but, as above seen, it is now regarded in that State as a matter of right.

[1] Heffron *v.* State, 8 Fla. 73.

[2] Ransone *v.* Christian, 56 Ga. 351; Baker *v.* Lyman, 53 Ga. 339; Com. *v.* Haskell, 2 Brewst. (Pa.) 491; Hudson *v.* Wetherington, 79 N. C. 3; Bradley *v.* Clark, 1 Cush. (Mass.) 293; Patton *v.* Hamilton, 12 Ind. 256; Shank *v.* Fleming, 9 Ind. 189; Mason *v.* Croom, 24 Ga. 211; Higdon *v.* Higdon, 6 J. J. Marsh. (Ky.) 48; Bertody *v.* Ison, 69 Ga. 317; Judah *v.* Trustees, 23 Ind. 272; Baltimore &c. R. Co. *v.* McWhinney, 36 Ind. 436; Hyatt *v.* Clements, 65 Ind. 12; Hill *v.* Perry, 82 Ind. 28, 31; Wright *v.* Abbott, 85 Ind. 154; Goodwin *v.* Smith, 72 Ind. 113; Johnson *v.* Josephs, 75 Me. 544; Tobin *v.* Jenkins, 29 Ark. 151, 153; Yingling *v.* Hesson, 16 Md. 112, 121; Waller *v.* Morgan, 18 B. Mon. (Ky.) 137, 144; 1 Greenl. Ev., § 74 and note.

[3] McLees *v.* Felt, 11 Ind. 218.

[4] Rev. Stat. Ind. (1881), § 536; Iowa Rev. Stat. (1886), § 2780; Judah *v.* Trustees, 23 Ind. 274, 283; distinguishing Howard *v.* Kisling, 15 Ind. 83, and Aurora *v.* Cobb, 21 Ind. 492. Compare McLees *v.* Felt, 11 Ind. 218; Ashing *v.* Miles, 16 Ind. 329.

[5] Goss *v.* Turner, 21 Vt. 440; Dunlop *v.* Peter, 1 Cranch C. C. 403; Beale *v.* Newton, 1 Cranch C. C. 405; Van Cleave *v.* Beam, 2 Dana (Ky.), 155; (compare Higdon *v.* Higdon, 6 J. J. Marsh. (Ky.) 50); Randolph Bank *v.* Armstrong, 11 Iowa, 515; Daviess *v.* Arbuckle, 1 Dana (Ky.), 525; Goldsberry *v.* Stuteville, 3 Bibb (Ky.), 346; Latham *v.* Selkirk, 11 Tex. 314, 322; Auld *v.* Hepburn, 1 Cranch C. C. 122. Compare Sutton *v.* Mandeville, 1 Cranch C. C. 187; Buzzell *v.* Snell, 25 N. H. 474, 478; Chesley *v.* Chesley, 37 N. H. 229; Den d. Hopper *v.* Demarest, 21 N. J. L. 526, 530; Denney *v.* Booker, 2 Bibb (Ky.), 427; Page *v.* Carter, 8 B. Mon. (Ky.) 192; Marshall *v.* Am. Express Co., 7 Wis. 1, 18; Reichard *v.* Manhattan Life Ins.

right to open and close the argument. In cases where the question was free from difficulty, these propositions generally, though not always, conducted the courts to the right results; but the application of them has been attended with the difficulty which always attends in practice the application of general rules: by reason of their generality they have failed to supply a uniform test by which to decide every question of this kind whenever it arises — a thing which is extremely desirable when possible. The rule that the right rests with the party sustaining the burden of proof is not adequate, because in many cases the plaintiff sustains the burden as to some slight or almost formal matter, after which the burden shifts upon the defendant, and either remains with him throughout the case, or else, as sometimes happens, shifts back again upon the plaintiff. In these cases, how is the rule to be applied? The plaintiff sustains the burden at the threshold; he must go forward and produce *some* evidence, albeit slight or formal, such as the introduction of a written instrument, or the proof of a signature, while the substantial contest in the case grows out of defensive matter pleaded by his antagonist. The same may be said substantially as to the rule that the right rests with the party having the burden of the issue, which means the same thing as the burden of proof. Nor has the statutory rule in Indiana and Iowa, that the right rests with the party having the burden of the issues, supplied an unvarying rule for the decision of the question; since in many cases the plaintiff will have the burden of a single issue, and the defendant will have the burden of many others. The same may be said concerning the rule that the right rests with the party having the affirmative of the issues. Although it is conceded that the question must be determined by the trial judge on an inspection

Co., 31 Mo. 518; Banning *v.* Banning, 12 Ch. St. 437; Ross *v.* Gould, 5 Me. 210; Belknap *v.* Wendell, 21 N. H. 175; Curtis *v.* Wheeler, 1 Mood. & M. 493; Montgomery *v.* Swindler, 32 Oh. St. 224; Jackson *v.* Heskete, 2 Stark. N. P. 518; Millerd *v.* Thorn, 56 N. Y. 402; Claflin *v.* Baera, 28 Hun (N. Y.), 204; Colwell *v.* Brower, 75 Ill. 517, 523. It has been said that the right is governed by the same rule as that which governs the production of testimony. Perkins *v.* Ermel, 2 Kan. 325, 330.

of the pleadings,[1] yet is the question to be determined by the *form* of the issues, as held in Texas,[2] or by the *substance* of them as held in New Hampshire,[3] Kentucky,[4] and New York?[5] Again, suppose that the defendant in his plea or answer admits everything which the plaintiff alleges as the ground of his right of action, except the amount of his damages, these being unliquidated, — as in actions for libel, where the fact of the publication is admitted, — is the burden of proof, or the burden of the issue or issues, or the affirmative of the issue or issues, to be held to be on the plaintiff or on the defendant? The general terms in which the rule has been variously formulated, as above given, do not furnish a uniform test by which to determine these questions.

§ 228. The Plaintiff Begins where he has Anything to Prove. — The English decisions upon this subject being in a state of confusion,[6] a decision was rendered in the Queen's Bench in the year 1845, which settled previous conflicts and established a rule which furnishes an absolute test for the decision of the question in all ordinary actions between plaintiff and defendant. That rule is this: That where the plaintiff has anything to prove, in order to get a verdict, whether in an action *ex contractu* or *ex delicto*, and whether to establish his right of action or to fix the amount of his damages, the right to begin

[1] Dahlman *v.* Hammel, 45 Wis. 466; Richards *v.* Nixon, 20 Pa. St. 19, 23.

[2] Latham *v.* Selkirk, 11 Tex. 314, 322.

[3] Chesley *v.* Chesley, 37 N. H. 229, 237. See also Bills *v.* Vose, 27 N. H. 215; Thurston *v.* Kennett, 22 N. H. 151.

[4] Daviess *v.* Arbukle, 1 Dana (Ky.), 525.

[5] Huntington *v.* Conkey, 33 Barb. (N. Y.) 218, 228.

[6] Curtis *v.* Wheeler, Mood. & M. 493; Hoggett *v.* Oxley, Mood. & Rob. 251; Burrell *v.* Nicholson, 1 Mood. & Rob. 304; Carter *v.* Jones, 1 Mood. & Rob. 281; *s. c.* 6 Carr. & P. 64; Staunton *v.* Paton, 1 Carr. & Kir. 148; Rowland *v.* Bernes, 1 Carr. & Kir. 46; Bird *v.* Higginson, 2 Ad. & El. 160; Huckman *v.* Fernie, 3 Mees. & W. 505; Mills *v.* Barber, 1 Mees. & W. 425; *s. c.* Tyr. & G. 835; Lewis *v.* Parker, 4 Ad. & El. 838; Bedell *v.* Russell, Ry. & M. 293; Bonfield *v.* Smith, 2 Mood. & Rob. 519; Pearson *v.* Coles, 1 Mood. & Rob. 206; Pole *v.* Rogers, 2 Mood. & Rob. 287; Reeve *v.* Underhill, 1 Mood. & Rob. 440; Wootton *v.* Barton, 1 Mood. & Rob. 518; Jackson *v.* Hesketh, 2 Stark. N. P. 518; Goodtitle d. Revett *v.* Braham, 4 T. R. 497.

and reply belongs to him.[1] This rule has been generally adopted in this country, as the decisions hereafter cited will show. The unvarying *test* furnished by this rule is to consider which party would, in the state of the pleadings and of the record admissions, get a verdict for substantial damages, if the cause were submitted to the jury without any evidence being offered by either. If the plaintiff would succeed, then there is nothing for him to prove at the outset, and the defendant begins and replies; if the defendant would succeed, then there is something for the plaintiff to prove at the outset, and the plaintiff begins and replies.[2]

§ **229. What this Rule Decides.** — The advantage of this rule is that it *defines* the general propositions stated in the preceding paragraph and tells us the precise meaning of them. It tells us that the party sustaining the burden of proof, or the burden of the issue or issues, or the affirmative of the issue or issues, is in every case the plaintiff, where he has anything, however slight, to prove, in order to get a verdict for other than nominal damages; and that in every other case it is the defendant.[3] It tells us that, although the

[1] Mercer *v.* Whall, 5 Ad. & El. (N. S.) 447; overruling Cooper *v.* Wakley, Mood. & Malk. 248.

[2] Huckman *v.* Fernie, 2 Jur. 444; Veiths *v.* Hagge, 8 Ia. 163; Robinson *v.* Hitchcock, 8 Metc. (Mass.) 64; Perkins *v.* Ermel, 2 Kan. 325, 330; Amos *v.* Hughes, 1 Mood. & R. 464; Ridgway *v.* Ewbank, 3 Mood. & R. 217; McConnell *v.* Kitchens, 20 S. C. 430; Boyce *v.* Lake, 17 S. C. 481; Kennedy *v.* Moore, 17 S. C. 464; Burkhalter *v.* Coward, 16 S. C. 435; Brown *v.* Kirkpatrick, 5 S. C. 267; Pierce *v.* Lyman, 28 Ark. 550; Bertrand *v.* Taylor, 32 *Id.* 470; Camp *v.* Brown, 48 Ind. 575 (with which compare Heilman *v.* Shanklin, 60 Ind. 424; Johnson *v.* Josephs, 75 Me. 544; Rolf *v.* Polland, 16 Nebr. 21; *s. c.* 19 N. W. Rep. 615; Fry *v.* Bennett, 28 N. Y. 324; *s. c.* affi'd 3 Bosw. (N. Y.) 200: Littlejohn *v.* Greeley, 13 Abb. Pr. (N. Y.) 41, 45; Huntington *v.* Conkey, 33 Barb. (N. Y.) 218; Hecker *v.* Hopkins, 16 Abb. Pr. (N. Y.) 301, *n.*; Opdyke *v.* Weed, 18 Abb. Pr. (N. Y.) 223, *n.*; Love *v.* Dickerson, 85 N. C. 5; Dille *v.* Lovell, 37 Oh. St. 415; Young *v.* Highland, 9 Gratt. (Va.) 16.

[3] Johnson *v.* Josephs, 75 Me. 544; Spaulding *v.* Hood, 8 Cush. (Mass.) 602; Thurston *v.* Kennett, 22 N. H. 151; Belknap *v.* Wendell, 21 N. H. 175; Lunt *v.* Wormell, 19 Me. 100; Sawyer *v.* Hopkins, 22 Me. 276; Washington Ice Co. *v.* Webster, 68 Me. 449; Page *v.* Osgood, 2 Gray (Mass.), 260; Dorr *v.* Tremont National Bank, 128 Mass. 359; Comstock *v.* Hadlyme Ecc. Soc., 8 Conn. 254, 261; Bills *v.* Vose, 27 N. H. 215; Chesley *v.* Chesley, 37

burden of proof may *shift* during the trial, yet the right to open and close the argument does not shift with it, but that the right remains with the party on whom it primarily rested.[1] It decides that where there are *several issues*, and the plaintiff has anything to prove under any one of them in the first instance, in order to a recovery, the right to open and close is with him.[2] It tells us that in every case where the *general issue*, or a general or special denial is pleaded, the right to open and close is with the plaintiff, no matter what may be the nature of the controversy, or what special defenses or counter-claims may be set up.[3]

N. H. 229; Seavy *v.* Dearborn, 19 N. H. 351; Fetters *v.* Muncie National Bank, 34 Ind. 251; Baltimore &c. R. Co. *v.* McWhinney, 36 Ind. 436, 444; Hamlyn *v.* Nesbit, 37 Ind. 284; Thompson *v.* Mills, 39 Ind. 528; Williams *v.* Allen, 40 Ind. 295; Camp *v.* Brown, 48 Ind. 575; Aurora *v.* Cobb, 21 Ind. 493, 509; Shaw *v.* Barnhart, 17 Ind. 183; Buzzell *v.* Snell, 25 N. H. 474, 478; Hoxie *v.* Greene, 37 How. Pr. (N. Y.) 97; Carter *v.* Jones, 6 Carr. & P. 64; *s. c.* 1 Mood & Rob. 281; Amos *v.* Hughes, 1 Mood. & Rob. 464; Rogers *v.* Diamond, 13 Ark. 474. Compare Pope *v.* Latham, 1 Ark. 66; Finley *v.* Woodruff, 8 Ark. 328.

[1] Brooks *v.* Barrett, 7 Pick. (Mass.) 94, 100; Belknap *v.* Wendell, 21 N. H. 175; Judge of Probate *v.* Stone, 44 N. H. 593, 602; Ross *v.* Gould, 5 Me. 204. Compare Crerar *v.* Sodo, Mood. & M. 85; Weidman *v.* Kohr, 13 Serg. & R. (Pa.) 17, 24; Cothran *v.* Forsyth, 68 Ga. 560.

[2] Cent. Bank *v.* St. John, 17 Wis. 157; Davidson *v.* Henop, 1 Cranch C. C. 280; Churchill *v.* Lee, 77 N. C. 341; Jackson *v.* Pittsford, 8 Blackf. (Ind.) 194; Jackson *v.* Hesketh, 2 Stark. N. P. 518; Ridgway *v* Ewbank, 2 Mood. & Rob. 217; Burckhalter *v.* Coward, 16 S. C. 435, 442; Johnson *v.* Maxwell, 87 N. C. 18; Bertrand *v* Taylor, 32 Ark. 470; Zehner *v.* Kepler, 16 Ind 290; Bowen *v.* Spears, 20 Ind. 146; Viele *v.* Germania Ins. Co., 26 Ia. 10, 45; Veiths *v.* Hagge, 8 Ia. 163, 192; Sillivant *v.* Reardon, 5 Ark. 141, 157; Montgomery *v.* Swindler, 32 Oh. St. 224; Slauson *v.* Englehart, 34 Barb. (N. Y.) 198; Buzzell *v.* Snell, 25 N. H. 474. Compare Sodousky *v.* McGee, 4 J. J. Marsh. (Ky.) 267, 274, where the subject is reasoned forcibly and at length by Robertson, C. J., taking some positions which are not in conformity with the above rule. As to the right of the court to *sever* the issues, and give the opening and closing to each party, see Central Bank *v.* St. John, 17 Wis. 157; Vuyton *v.* Brenell, 1 Wash. C. C. (U. S.) 467.

[3] Ayer *v* Austin, 6 Pick. (Mass.) 225; Toppan *v.* Jenness, 21 N. H. 232; Jackson *v.* Pittsford, 8 Blackf. (Ind.) 194; Burroughs *v.* Hunt, 13 Ind. 178; Cox *v.* Vickers, 35 Ind. 27; Robinson *v.* Hitchcock, 8 Metc. (Mass.) 64, 66; Perkins *v.* Ermel, 2 Kan. 325, 330; Judge of Probate *v.* Stone, 44 N. H. 593, 602; Belknap *v.* Wendell, 21 N. H. 175; Thurston *v.* Kennett, 22 N. H. 151; Buzzell *v.* Snell, 25 N. H. 478; Brooks *v.* Barrett, 7 Pick. (Mass.) 94, 100; Chesley *v.* Chesley, 37 N. H 227, 237. So, where matter is affirmatively

§ **230. In Actions for Unliquidated Damages.** — It decides that, in all actions for unliquidated damages, except where the defendant, by his plea or answer, admits not only the cause of action, but also the amount of damages claimed, the right is with the plaintiff; since he must introduce evidence showing the extent of his injury,[1] — as where, in any action sounding in damages, the cause of action is admitted, and a plea of confession and avoidance is filed, leaving the amount of damages claimed subject to affirmative proof.[2] Thus, in actions for *libel* or *slander*, where the defendant admits the writing or speaking and pleads justification, or claims privilege and denies malice, the right, according to the modern doctrine, is with the plaintiff. The reason is that the question of malice and of the extent of the damages are both in issue, and that the plaintiff has therefore something to prove in order to make out his case.[3] For the same reasons, in an action for *assault* and *battery*, where the plea is *son assault demense*, followed by a replication *de injuria*, or,

pleaded which amounts merely to the general issue. Denny *v.* Booker, 2 Bibb (Ky.), 427. Compare, *contra*, the text, Bangs *v.* Snow, 1 Mass. 181.

[1] Mercer *v.* Whall, 5 Ad. & El. (N. S.) 447, 461; Aurora *v.* Cobb, 21 Ind. 493, 509; Haines *v.* Kent, 11 Ind. 126; Young *v.* Highland, 9 Gratt. (Va.) 16; Steptoe *v.* Harvey, 7 Leigh (Va.), 501, 544; Cunningham *v.* Gallagher, 61 Wis. 170; Opdyke *v.* Weed, 18 Abb. Pr. (N. Y.) 223, *n.*; Hecker *v.* Hopkins, 16 Abb. Pr. (N. Y.) 301, *n.*

[2] Cunningham *v.* Gallagher, *supra*.

[3] Vifquain *v.* Finch, 15 Neb. 505; Burckhalter *v.* Coward, 16 S. C. 435, 443; Fry *v.* Bennett, 3 Bosw. (N. Y.) 200, 232; *s. c.* affirmed, 28 N. Y. 324. The decision of Lord Tenterden, in Cooper *v.* Wakley, Mood. & M. 248, has been overruled in England, and has not been the law in that country since the decision of Mercer *v.* Whall, 5 Ad. & El. (N. S.) 447, 463, in which last case Lord Denman said: "If ever a decision was overruled on great deliberation, and by an undeviating practice afterwards, it was that in Cooper *v.* Wakley." The English judges, soon after the accession of Lord Denman to the office of chief justice of the Queen's Bench, met and discussed this troublesome question, and adopted the following rule: "In actions for libel, slander and injuries to the person, the plaintiff shall begin, although the affirmative is on the defendant." A sketch of this rule is given by Lord Denman in his opinion in Mercer *v.* Whall, *supra*. Two American decisions (Moses *v.* Gatewood, 5 Rich. L. (S. C.) 234, and Ransone *v.* Christian, 56 Ga. 351) hold that, in actions for libel or slander, where the defendant pleads justification, he assumes the affirmative, and the right to begin and reply is with him; but these decisions are contrary to principle and entirely out of current with modern authority.

as we would say in modern procedure, where the answer is a *justification*, the plaintiff begins and replies; since he must first go forward with his evidence.[1] So, in trespass *de bonis asportatis*, where the defendant pleads the general issue and files "a brief statement" justifying under his authority as an officer, the right is with the plaintiff.[2]

§ 231. **In Actions on Contracts which Liquidate the Damages.** — On the other hand, where the action is upon a contract which, by its terms, *liquidates the damages* — as upon a promissory note,[3] bill of exchange,[4] bank check,[5] bill single,[6] policy of

[1] Young *v.* Highland, 9 Gratt. (Va.) 16; Johnson *v.* Josephs, 75 Me. 544. *Contra*, and out of line with modern authority, are the following old cases. M'Kenzie *v.* Milligan, 1 Bay (S. C.), 248; Goldsberry *v.* Stuteville, 3 Bibb (Ky.), 345; Downey *v.* Day, 4 Ind. 531. Compare Van Zant *v.* Jones, 3 Dana (Ky.), 465, where, in such a state of pleading, the defendant offered no substantial evidence of justification, and it was held that the court might, in the exercise of a sound discretion, withhold from him the advantage, which the court supposed the form of the pleadings gave him, by giving the right to open and close to the plaintiff.

[2] Lunt *v.* Wormell, 19 Me. 100; Ayer *v.* Austin, 6 Pick. (Mass.) 225, overruling Bangs *v.* Snow, 1 Mass. 181. It has been held in old cases, contrary to the general principle stated in the text, that, in such an action, where justification only is pleaded, the defendant is entitled to open and close. Kimble *v.* Adair, 2 Blackf. (Ind.) 320; Downey *v.* Day, 4 Ind. 531. So, it has been held that, in an action of trespass *quare clausum*, where the defendant pleads freehold only, the right to begin and reply is with him. Singleton *v.* Millet, Nott & McC. (S. C.) 355; Davis *v.* Mason, 4 Pick. (Mass.) 156. And one English case holds that this is so, although the declaration alleges special damage. Fish *v.* Travers, 3 Carr. & P. 578. But these two classes of decisions seem to be opposed to the modern rule stated in the text; since in either case, the damages being unliquidated and not admitted in the state of the pleadings, the plaintiff has something to prove in order to get a verdict. See Haines *v.* Kent, 11 Ind. 126.

[3] Kimble *v.* Adair, 2 Blackf. (Ind.) 320; Bowen *v.* Spears, 20 Ind. 146; Harvey *v.* Ellithorpe, 26 Ill. 418; Tipton *v.* Triplett, 1 Metc. (Ky.) 570; Ayrault *v.* Chamberlain, 33 Barb. (N. Y.) 229; Huntington *v.* Conkey, 33 Barb. (N. Y.) 218; Hoxie *v.* Greene, 37 How. Pr. (N. Y.) 97; McShane *v.* Braender, 66 How. Pr. (N. Y.) 294; Hudson *v.* Weatherington, 79 N. C. 3; Blackledge *v.* Pine, 28 Ind. 466; Judah *v.* Trustees, 23 Ind. 272; Shank *v.* Fleming, 9 Ind. 189.

[4] Warner *v.* Haines, 6 Carr. & P. 666; List *v.* Kortepeter, 26 Ind. 27.

[5] Elwell *v.* Chamberlin, 31 N. Y. 611.

[6] Richards *v.* Nixon, 20 Pa. St. 19, 23; Scott *v.* Hull, 8 Conn. 296. Compare Robinson *v.* Hitchcock, 8 Metc. (Mass.) 64.

life[1] or fire insurance,[2] or any other written instrument which by its terms fixes the amount of the recovery,[3] — and the defendant admits the execution of the instrument, but sets up an affirmative defense,[4] such as duress,[5] fraud,[6] want of jurisdiction,[7] usury,[8] a discharge under an insolvent debtor's act[9] or in bankruptcy,[10] want of title in the plaintiff,[11] tender,[12] or other affirmative matter of defense,[13] or pleads a set-off or counter-claim,[14] — in all such cases the plaintiff has nothing to prove in order to recover; upon a default an inquiry of damages would be unnecessary; and therefore the right to begin and reply is with the defendant.

§ 232. In Actions on Contracts which do not Liquidate the Damages. — Outside of these lie a mass of cases, founded upon contracts, express or implied, where the contract itself does not liquidate the damages, and where, although the existence of the contract is admitted in the pleadings, the damages claimed are not admitted; or where defensive matter is set up, apparently in

[1] Brennan *v.* Security Life Ins. Co., 4 Daly (N. Y.), 296. Compare, *contra*, Ashby *v.* Bates, 15 Mees. & W. 589.

[2] Viele *v.* Germania Ins. Co., 2 Iowa, 10, 44.

[3] Aurora *v.* Cobb, 21 Ind. 492, 509.

[4] Auld *v.* Hepburn, 1 Cranch C. C. (U. S.) 122.

[5] Hoxie *v.* Greene, 37 How. Pr. (N. Y.) 97.

[6] Elwell *v.* Chamberlin, 31 N. Y. 611; Brennan *v.* Security Life Ins. Co., Daly (N. Y.), 296.

[7] Tipton *v.* Triplett, 1 Metc. (Ky.) 570; Hoxie *v.* Greene, 37 How. Pr. (N. Y.) 97; McShane *v.* Braender, 66 How. Pr. (N. Y.) 294; List *v.* Kortepeter, 26 Ind. 27.

[8] Harvey *v.* Ellithorpe, 26 Ill. 418; Ayrault *v.* Chamberlain, 33 Barb. (N. Y.) 229; Huntington *v.* Conkey, 33 Barb. (N. Y.) 218; Elwell *v.* Chamberlin, 31 N. Y. 611.

[9] Warner *v.* Haines, 6 Carr. & P. 666.

[10] Richard *v.* Nixon, 20 Pa. St. 19, 23.

[11] Hoxie *v.* Greene, 37 How. Pr. (N. Y.) 97. Compare Hudson *v.* Weatherington, 79 N. C. 3, where it was held that, upon an issue upon a want of title in the plaintiff, the plaintiff must go forward with the evidence, and consequently has the right to begin and reply.

[12] Auld *v.* Hepburn, 1 Cranch C. C. (U. S.) 122. Compare Buzzell *v.* Snell, 25 N. H. 474.

[13] Blackledge *v.* Pine, 28 Ind. 466; Judah *v.* Trustee, 23 Ind. 272; Shank *v.* Fleming, 9 Ind. 189.

[14] Bowen *v.* Spears, 20 Ind. 146; Brown *v.* Kirkpatrick, 5 S. C. 267. Compare Penhryn Slate Co. *v.* Meyer, 8 Daly (N. Y.), 61; Graham *v.* Gautier, 21 Tex. 112.

avoidance, but which really amounts to a denial of the grounds on which the right of recovery is predicated,— in all which cases the right to begin and reply is with the plaintiff. Among these may be mentioned actions of debt on penal bonds where the plea is *nil debit*, performance, set-off, etc., — these pleas not dispensing with the necessity of proving the breaches and the damages; [1] actions for goods sold, answer admitting sale and delivery, but alleging that the goods were not equal to the quality agreed upon, and claiming a recoupment; [2] actions for the value of a physician's services and a plea in reconvention, admitting the services, but alleging damages by reason of want of skill, etc.; [3] actions on promissory notes providing for reasonable attorney's fees, defense of payment, set-off, etc., and an admission that a certain sum would be a reasonable attorney's fee if the plaintiff should recover the amount of the note,— the admission not agreeing what would be a reasonable fee in case he should recover a *part* only of the note; [4] actions upon promises and pleas or answers alleging that the promise was a different promise from that sued on, since this leaves the burden upon the plaintiff of proving the promise which he has alleged; [5] covenant for dismissing a servant, justification and replication *de injuria*, — since the damages are unliquidated and must be proved by the plaintiff; [6] covenant broken, general issue, with notice (under Massachusetts statute) of special defense of discharge under insolvent law, replication admitting discharge but denying its validity; [7] action upon a policy of life insurance — plea, misrepresentation by the assured, replication *de injuria*,— the plea being in substance a mere denial of the averment in the declaration of the truth of the statement by which the assured

[1] Sillivant *v.* Reardon, 5 Ark. 141, 157.

[2] Penhryn Slate Co. *v.* Meyer, 8 Daly (N. Y.), 61.

[3] Graham *v.* Gautier, 21 Tex. 112.

[4] Camp *v.* Brown, 48 Ind. 575.

[5] Davies *v.* Evans, 6 Carr. & P. 619; McConnell *v.* Kitchens, 20 S. C. 430.

[6] Mercer *v.* Whall, 5 Ad. & El. (N. S.) 447 (leading English case). The following decisions are referred to as contrary to the principle of this case, and as having been wrongly decided. Page *v.* Carter, 8 B. Mon. (Ky.) 192; Sutton *v.* Mandeville, 1 Cranch C. C. (U. S.) 187.

[7] Robinson *v.* Hitchcock, 8 Met. (Mass.) 64.

had obtained the policy;[1] actions to foreclose mortgages, since the plaintiff must prove the mortgage debt and all other facts preliminary to his right of foreclosure;[2] an action on bills of exchange with a count on an account stated, plea of payment as to the bills and *non-assumpsit* as to the account stated,— since the plaintiff must give some evidence in order to a recovery upon the account stated;[3] assumpsit for the unworkman-like execution of a contract, plea that the work was properly done;[4] action on an account, cause of action not admitted, defense of payment;[5] action upon a guaranty of payment of certain promissory notes, answer denying any indebtedness and setting up false and fraudulent representations, etc.,— the reason being that it is incumbent on the plaintiff to prove the original indebtedness evidenced by the notes;[6] action for goods sold, general issue except as to a part of the sum demanded, as to a plea of tender;[7] and many other similar cases which might be stated.

§ **233. Doctrine of this Article Restated.** — The doctrine of this article cannot better be restated than in the language of Judge E. Darwin Smith at the conclusion of a learned opinion in the Supreme Court of New York: "1. The plaintiff, in all cases where the damages are unliquidated, has the right to open the case to the jury and of the reply. 2. Whenever the plaintiff has anything to prove, on the question of damages or otherwise, he has the right to begin. 3. In other cases where the damages are liquidated or depend on mere calculation — as the casting of interest — the party holding the affirmative of the issue has the right to begin. 4. The affirmative of the issue in such cases means the affirmative in substance, and not in form, and upon the whole record. 5. The denial of the right to begin, to the party

[1] Ashby *v.* Bates, 15 Mees. & W. 589. Compare Viele *v.* Germania Ins. Co., 26 Iowa, 10, 44; Brennan *v.* Security Life Ins. Co., 4 Daly (N. Y.), 296.

[2] Mason *v.* Croom, 24 Ga 211.

[3] Smart *v.* Rayner, 6 Carr. & P. 721.

[4] Amos *v.* Hughes, 1 Mood. & R. 464.

[5] Wright *v.* Abbott, 85 Ind. 154. See also Ashing *v.* Miles, 16 Ind. 329 (action for use and occupation).

[6] Dahlman *v.* Hammel, 45 Wis. 466, citing Second Ward Savings Bank *v.* Shakman, 30 Wis. 333.

[7] Buzzell *v.* Snell, 25 N. H. 474, 479.

entitled to it and claiming it at the proper time, is error, for which a new trial will be granted, unless the court can see clearly that no injury or injustice resulted from the erroneous decision." [1] The foundation of this doctrine is, as before stated, the leading case of *Mercer v. Whall*,[2] to which most, though not all, American courts have conformed. While, as already stated, the rule of that case is sufficient for the decision of the question in every ordinary case, yet it must not be supposed that it furnishes the key to a decision of the question in every case. In a variety of special proceedings the question which the juror asked of the judge at the conclusion of his charge, "What does your honor mean by the words plaintiff and defendant?" is constantly recurring. To this question, as well as to several other topics connected with the subject, the next article will be devoted.

Article. II — In Special Proceedings.

Section

236. Purpose of this Article.
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238. On an Issue of Sanity.
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(1.) What Rule upon Principle.
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242. In Cases of Interpleader.
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248. Petitioner, Claimant, Administrator.
249. Miscellaneous Cases where the Right was held to be with the Plaintiff.
250. Miscellaneous Cases where the Right is with the Defendant.

§ **236. Purpose of this Article.** — From the former article on this subject it would appear that there is no difficulty in determining, on principle and authority, with which party the right

[1] Huntington *v.* Conkey, 33 Barb. (N. Y.) 218, 228.

[2] 5 Ad. & El. (N. S.) 447.

to open and close the argument rests, in ordinary actions between plaintiff and defendant. But, as was there suggested, in many special proceedings the situation of the parties is such that it is difficult to determine which is to be deemed to stand in the position of plaintiff and which in that of defendant. In these cases the courts have not been able to lay hold of and adhere to any governing principle, and the result is a great confusion and contrariety of holding; so that on perhaps no point can a uniform rule of procedure, applicable in all American jurisdictions, be said to exist.

§ **237. The Governing Principle Stated.** — Recollecting the general principle, developed in the former article, that the right to open and close is generally coincident with the initiatory burden of proof, that is that it belongs to the one who, in order to succeed in his action or defense, must go forward and prove *something* in the event of no proof being offered by the opposing party, — we arrive at a governing principle, which should furnish an adequate rule in every special proceeding, namely, that the right to open and close *belongs to the party who seeks to alter the existing state of things.*

§ **238. On an Issue of Sanity.** — A simple illustration of the application of this principle is found in cases where the issue is whether a certain person is, or was at a certain time, sane or insane. The general presumption is in favor of sanity; because, according to human experience, men and women are commonly sane. The party asserting the sanity of the person whose sanity is in question has therefore at the outset nothing to prove; but the burden, and with it the right to open and close the contest, rests upon the person asserting the contrary. He is the one who seeks to overthrow the general presumption, or to alter the commonly existing state of things. Thus, on the hearing of a commission of lunacy in Pennsylvania, the burden of proof, and with it the right to open and close the argument, is with the commonwealth.[1] So, on an issue from an orphan's court, or

[1] Com. *v.* Haskell, 2 Brewst. (Pa.) 491.

court of probate, to ascertain the sanity of a testator, the party objecting to the probate of the will on the ground of the testator's insanity is the moving party, and the right is with him.[1]

§ 239. On Issues of Devisavit vel non. — (1.) *What rule upon principle.* — The principle already suggested[2] would, if kept in view, furnish a uniform rule for determining with which party the right lies, in cases of contested wills. That rule would be that, when a will is first brought into court and exhibited for probate, the right is with the proponent or party affirming the will; and that, after the will has been admitted to probate in common form, in any future proceeding to contest its validity, whether in the same or in another tribunal, the right is with the contestant, called variously the plaintiff, the petitioner, the *caveator*, or the objector. The reason is that the executor, or other party who first presents the will in the probate court and seeks to prove it and have it admitted to record, is the acting party; he seeks to move the court: he must bring forward some evidence, or the court will not grant his motion. He must at least produce a paper, testamentary in its character, and prove in a formal way that it was executed by the person whose last will and testament it purports to be. If, at this stage of the proceeding, he meets in court an objecting party, as he must produce *some evidence* in order to get what he seeks, he comes within the rule above stated and more fully developed in the former article, which gives the right to open and close to him.[3] On the other hand, if the will is admitted to probate on his motion, and the objecting party persists in his contest, either by an appeal to a higher tribunal,[4] by an issue of *devisavit vel non* triable by a jury in a court of law, by a bill in chancery,[5] or by

[1] Dunlop *v.* Peter, 1 Cranch C. C. (U. S.) 403.

[2] *Ante*, § 237.

[3] McClintock *v.* Curd, 32 Mo. 411.

[4] Rogers *v.* Diamond, 13 Ark. 475, 480; McDaniel *v* Crosby, 19 Ark. 533; Tobin *v.* Jenkins, 29 Ark. 151, 153; Edelen *v.* Edelen, 6 Md. 288 (following Brooke *v.* Townshend, 7 Gill (Md.), 10. Distinguishing Stockton *v.* Frey, 4 Gill (Md.), 407. Compare Kearney *v.* Gough, 5 Gill & J. (Md.) 457).

[5] Contrary to the doctrine of the text, it was early held in Kentucky

some other mode of procedure, generally prescribed by statute, he will become the moving party, the party who seeks to alter the existing state of things. A presumption obtains that the decision of the court of probate was right; he must overthrow that presumption by evidence; and consequently the office of taking the initiative in the production of evidence, and with it the right to open and close the argument, rests with him. But, in the various conclusions at which the courts have arrived, neither the principle of the text, nor any other uniform principle, has been adhered to.

(2.) *Cases which Concede the Right to the Proponents.* — We gather from different jurisdictions a group of cases which, without reference to the stage or form of the proceeding, concede the right to the caveators, objectors or assailants of the will, sometimes called petitioners, and even plaintiffs. Thus, it is held in several of the New England States that, on an appeal from a decree of the probate court establishing a will (the ground of the contest in most cases relating to the sanity of the testator), the burden of proof, and with it the right to open and close, belongs to the executor, or to the party affirming the will.[1] These courts apply this rule without reference to the question which party is the appellant, and without regard to the *form* of the issues as made up; reasoning that, according to the *substance* of the issues, the party assailing the will takes the affirmative. Whether this is true, where the sole ground of the contest is the alleged insanity of the testator, would seem to depend upon the view which is taken of the nature of the proceeding. If it is viewed as an original proceeding, instituted to set

that, in a statutory proceeding by a bill to contest a will which has been admitted to probate in the county court, the burden of proof, and with it the right to open and close, belongs to the proponents of the will, defendants in the proceeding. Vancleave *v.* Beam, 2 Dana (Ky.), 155; Higdon *v.* Higdon, 6 J. J. Marsh. (Ky.) 48. The New England cases cited further on are also opposed to the conclusion of the text.

[1] Comstock *v.* Hadlyme Ecc. Soc., 8 Conn 254; Buckminster *v.* Perry, 4 Mass. 593; Phelps *v.* Hartwell, 1 Mass. 71; Brooks *v.* Barrett, 7 Pick. (Mass.) 94; Ware *v.* Ware, 8 Me. 42, 53; Perkins *v.* Perkins, 39 N. H. 163, 167; Boardman *v.* Woodman, 47 N. H. 120, 132; Goss *v.* Turner, 21 Vt. 437, 440.

aside the judgment of another tribunal, then the rule is contrary to principle, for presumptively the judgment of the probate court is right. But if it is viewed as a new trial in the same proceeding, then the conclusion would be different. An appeal in cases of this kind is not in the nature of a writ of error; its purpose is not to correct errors of law committed by the original court of probate; but it merely secures to the appellant a new trial of the same controversy in a higher tribunal, upon the same or such other evidence as the parties may be able to produce. This being the nature of the case, the proceedings in the original court of probate may be disregarded; they may be treated as having been entirely vacated by the appeal; they may stand as though they had never taken place, — just as, in the case of appeals from justices of the peace to courts of record, in most American jurisdictions, in which cases the issues stand for trial exactly as they stood in the court below; and the party having the burden of proof, and with it the right to open and close in that court, has it in the appellate court. On this principle the New England rule may be vindicated; for, as already pointed out, in every case where a will is offered for probate in the first instance, the proponent assumes the initiatory burden of proof. Viewing the trial of such a contest, when appealed from the probate court, as merely a new trial of the same case before a different tribunal, the New England rule also conforms to another principle pointed out in a preceding article, namely, that the right to open and close the argument does not shift with the shifting of the burden of proof. So that, although in the appellate court the objectors may be required to go forward with the production of evidence, the right to open and close the argument will remain with the proponents.[1] In Ohio, the contestants are at liberty to proceed either according to the forms of a suit in chancery or by petition under the code of civil procedure; but in either case it is laid down that an issue must in some form be made up, "whether the writing produced be the last will of the alleged testator or not;" and in either case, on the trial of such issue, the party or

[1] Brooks *v.* Barrett, 7 Pick. (Mass.) 94.

parties setting up the will hold the affirmative, and are entitled to open and close:[1] and this although the will, admitted to probate and recorded, is *prima facie* evidence of its validity, due execution and contents, so as to cast the burden of proof upon the contestant.[2] The rule is the same in Kentucky, where the proceeding is by a bill in chancery to set aside a will on the ground of the insanity of the testator after it has been admitted to probate in the county court.[3]

§ **240. In Actions of Replevin.** — Lord Tenterden said that, in respect of this question, he could make no distinction between replevin and other forms of action; the principles applicable to all were the same. The consequence was that the plaintiff was entitled to begin, as there was an affirmative issue upon him.[4] The Supreme Court of New Hampshire, following this principle, held that, in replevin, where the plaintiffs alleged that the articles replevied were their property, upon which issue was joined, and also that the articles were mortgaged to them, which allegation was denied by the defendants, upon which denial issue was joined, — the affirmative of both issues was with the plaintiffs, and that they had the right to open and close.[5] But the Supreme Court of Indiana has held that, where the answer sets up, in avoidance, that the defendant is entitled to a lien upon the goods for freight, wherefore the plaintiffs are not entitled to the possession of them, and the reply is a denial of such new matter, — the burden of the issue is upon the defendant, and he is entitled to open and close.[6] The court, in so holding, recognize as correct doctrine the *dictum* of Professor Greenleaf, that whenever the plaintiff is obliged to produce any proof in order to establish his right to recover, he is generally required to go into his whole case and is entitled to reply.[7] In Kentucky,

[1] Brown *v.* Griffiths, 11 Ohio St. 329.

[2] Banning *v.* Banning, 12 Ohio St. 437. See also Randebaugh *v.* Shelley, 6 Ohio St. 307.

[3] Van Cleave *v.* Bean, 2 Dana (Ky.), 155; Higdon *v.* Higdon, 6 J. J. Marsh. (Ky.) 48.

[4] Curtis *v.* Wheeler, 1 Mood. & M. 493.

[5] Belknap *v.* Wendell, 21 N. H. 175, 182.

[6] McLees *v.* Felt, 11 Ind. 218.

[7] 1 Greenl. Ev., § 74.

where the answer admits that the possession of the chattel is in the plaintiff, but denies that the chattel was taken from plaintiff's possession as alleged in the petition, and then sets up that the defendant is the owner of the chattel,—it has been held that the right to open and close the argument to the jury is with the defendant. The ruling is based upon the provision of the Kentucky Code of Practice, § 347, that the party having the burden of proof has the right to conclude the argument. "It is evident," said Simpson, C. J., "that, on this state of pleading, if no evidence had been adduced by either party, the plaintiffs would have been entitled to a judgment for the slave. Their possession was *prima facie* evidence of title; and that being admitted by the defendant, it then devolved upon him to introduce evidence to repel that presumption, and if he failed to do it, a judgment should have been rendered against him. Consequently the burden of proof was upon him, and he had a right to the conclusion of the argument with the jury." [1] In Illinois it has been ruled that, in replevin for goods levied upon by an officer, under an execution, as belonging to the defendant in the execution, where the defendant pleads facts to estop the plaintiff in replevin from claiming the property or denying that it belongs to the defendant in execution, which facts are denied by the plaintiff, the defendant has the right to open and close.[2] These last decisions overlook the fact that the object of the statutory action of replevin is not merely the recovery of the possession of the chattel. The plaintiff seeks, in the event the chattel is not restored to him prior to the trial under his delivery order, or subsequently under execution issuing to enforce his judgment, an alternative judgment for its value; and in either event he also seeks a judgment for the damages which he has sustained in consequence of its detention by the defendant. Unless, therefore, the chattel has been restored to him prior to the trial, and unless he also waives his right to a recovery of damages for its detention, he must, if his action is brought in the usual form, *prove something* in order to the full relief which

[1] Vance *v.* Vance, 2 Metc. (Ky.) 581. [2] Colwell *v.* Brower, 75 Ill. 517.

he seeks, notwithstanding the defendant may in his answer have made the admissions above stated. In conformity with Lord Tenterden's view, and with the settled rule as shown in the preceding article, the right to open and close would rest with him, and not with the defendant.

§ 241. In Cases of Replevin of Cattle Distrained for Rent with Avowry of Rent in Arrear. — Unless repealed by recent statutory enactments, an unjust rule of the common law still defaces the jurisprudence of two or three of the older American States, by which a landlord, whose tenant is in arrear for rent, may go upon the land occupied by the tenant and drive away and impound any cattle which he may find there, whether belonging to the tenant or to any innocent third person, and hold them until the rent is paid, — thus making himself not only a judge in his own cause, but, in a controversy between himself and his tenant, rendering judgment in his own favor without notice to the tenant, without the formality of a trial, and executing his judgment at the same instant, and equally without notice. The remedy of the tenant, if the cattle were his, and if no rent were arrear, or if the cattle were not on the freehold of the landlord at the time of the distress, was an action of replevin. In this action the landlord filed a plea called an *avowry*, in which he admitted the possession of the plaintiff, but set up that the cattle were distrained when upon his (defendant's) freehold, whereof the plaintiff was tenant, and that the plaintiff was in arrear for the rent. To this the plaintiff would ordinarily reply, either denying that he was in arrear for the rent, or alleging that the cattle, when distrained, were not upon the freehold of the defendant, but on the freehold of some other person, naming him.[1] There seems to be nothing to distinguish such a case from any other action of replevin, in respect of the right to begin and reply. The plaintiff would have something to prove, in order to establish the value of the chattels, or the amount of damage sustained by reason of their caption and detention, unless

[1] See the nature of the action and the form of the plea as stated in Chitty Pl. 618.

these allegations of his declaration, as well as that asserting his original right of possession, were admitted by the defendant's plea, — which would vest the right to begin and reply in him; and it has been so held.[1] Thus, in replevin for cattle alleged to have been illegally taken and impounded by the defendant, the defendant avowed the taking of the cattle upon a certain lot of ground, alleging that the same was his soil and freehold. The plaintiff replied that the soil and freehold were in one T., and tendered an issue thereon, which the defendant joined. It was held that the plaintiff had the right to open and close.[2]

§ 242. **In Cases of Interpleader.** — In the case of a bill of interpleader in equity, or of the corresponding proceeding under codes of procedure, where a party has possession of a fund belonging to one or more of several parties who contend against each other for the possession of it, and, to exonerate himself, presents a bill or petition in court, praying that these rival claimants may be required to interplead for the fund and that he may pay it into court and be exonerated, — it is difficult to say with which one of the rival claimants the right to begin and reply rests, since all are equally plaintiffs and defendants; each is an actor and each defends against the contention of the others. It is supposed that such a case must yield to the sound discretion of the court, and that this discretion would be best exercised by giving each claimant a stated period in which to argue in support of his own claim and against the evidence adduced in support of the claim of his opponents. As all would be equally entitled to a reply and as all could not have a reply without giving the last word to some one of them, it would seem that none should be allowed to make a second argument. A case which presented less difficulty was a proceeding by garnishment, in which, under the issue as made up, it was held that the interpleading claimants had the affirmative and consequently the right to begin and reply.[3]

[1] Kearney *v.* Gough, 5 Gill & J. (Md.) 457; Hungerford *v.* Burr, 4 Cranch C. C. (U. S.) 349. See also Greer *v.* Nourse, 4 Cranch C. C. (U. S.) 527

[2] Thurston *v.* Kennett, 29 N. H. 151, 158 (following Belknap *v.* Wendell, 21 N. H. 175).

[3] Randolph Bank *v.* Armstrong, 11 Ia. 515.

§ **243. In Criminal Cases.** — In criminal cases the defendant is presumed to be innocent until he is proved to be guilty. The burden rests upon the State to prove, beyond a reasonable doubt, every fact essential to a conviction. From this it necessarily follows that, in all cases, the right to open and close is with the prosecution, unless a different rule is declared by statute. This is so, although the accused offers no evidence; [1] nor does the fact that the accused sets up the defense of insanity shift the right to him. Where counsel are employed by private parties to assist the prosecuting officer of the State in a criminal trial, it is within the discretion of the court to allow such counsel to make the concluding argument to the jury in the place of the prosecuting attorney, although the prosecution is for a felony[2] which is capital.[3] But a statute which changes this rule and gives the right of concluding the argument in a particular event to the defendant, is not directory but mandatory; it clothes him with a substantial right, which the court is not at liberty to disregard or abridge, the denial of which will work a reversal of a conviction. It has been so held in respect of a statute giving the defendant this right in cases wherein he introduces no testimony.[4]

§ **244. In Cases of Fraud.** — A general presumption of right-acting attends human conduct; and therefore fraud is never presumed, but must be affirmatively proved as a fact; and of course the burden of proving it lies upon the party alleging it. It does not follow from this that, where fraud is set up as a defense to an action on a contract, this necessarily shifts the burden of proof, and with it the right to open and close, to the defendant. If the fraud which is thus pleaded is what the civilians call *dolus dans locum contractui*, that is a fraud giving occasion to the contract itself, the pleading of it may be regarded as no more than a *special denial* of the facts on which the plaintiff predicates his right of action; since it is not very material in principle

[1] Doss *v.* Com., 1 Gratt. (Va.) 557; State *v.* Millican, 15 La. Ann. 557.

[2] State *v.* Waltham, 48 Mo. 55; Jarnagin *v.* State, 10 Yerg. (Tenn.) 529.

[3] State *v.* Hamilton, 55 Mo. 520.

[4] Heffron *v.* State, 8 Fla. 73.

whether the defendant merely denies the existence of the contract, or affirmatively states certain specific facts which, if true, show that the contract, though formally made, was void. There is room, however, for the view that an answer setting up such a defense should be regarded as setting up an extrinsic defense; since fraudulent representations or concealments, whereby a party has been induced to enter into a contract, do not make the contract void *ab initio*, that is to say, non-existent from its inception, but merely give to the party thus induced to enter into it the right to disaffirm it within a reasonable time after discovering the fraud. He may affirm or disaffirm, but he cannot do both; he cannot keep the benefits which he may have received under the contract from the other contracting party, and at the same time disaffirm it so far as it imposes duties or obligations upon him. His right, therefore, when sued upon the contract, is at most a right of rescission, — that is, either a right to have it then rescinded for the fraud, or a right to plead and prove that, because of the fraud, he had, within a reasonable time after discovering the fraud, elected to rescind it. In this view the defense of fraud, set up in an action upon the contract, may well be regarded as an extrinsic defense; since it amounts to something more than a mere denial or traverse of the allegation of the existence of the contract. We find that courts have taken both views of this question, some treating such an answer as a special denial, and others treating it as the pleading of an affirmative defense. Whichever view is taken, the opening and closing is, on principle and authority,[1] to be given to the defendant in every case where the contract liquidates the damages. In other cases, if the allegation of fraud is to be regarded as a special denial, the right remains with the plaintiff; but if it is to be regarded as the pleading of an extrinsic defense, the right plainly rests with the defendant.

§ **245**. [**Continued.**] **Opposing Views.** — When, therefore, the plaintiff sues to recover specific chattels and his right to re-

[1] Elwell *v.* Chamberlin, 31 N. Y. 611; Brennan *v.* Security Life Ins. Co., 4 Daly (N. Y.), 296. Compare Patton *v.* Hamilton, 12 Ind. 256.

cover is predicated on his establishing a *bona fide* ownership of the property, he cannot, it has been held, be deprived of his right to open and close, by reason of the fact that the defendant alleges that his title is fraudulent and void, — the court regarding this as in the nature of a special denial.[1] In like manner, it has been held that, in an action for the recovery of damages for the wrongful seizure and conversion of goods to which the plaintiff claims title, if the defendant answers, simply alleging fraud in the assignment under which the plaintiff claims, the plaintiff, on the trial, is entitled to open and close; because the effect of the answer is not to admit that the plaintiff ever had title to the goods, but it is in effect only a special denial of the title alleged in the petition. The court say: "Before the plaintiff would be entitled to recover at all, he would have to show a title in himself; but the answer admits nothing but a fraudulent assignment, which is not an admission of any title. This state of the pleadings, under the third clause of section 266 of the [Ohio] code, gave the affirmative of the issue to the plaintiff."[2] On the contrary, and apparently on the view that the defense of fraud is an affirmative defense, it was held, in an action to recover the value of goods attached by a sheriff, where the defendant, before the trial, filed a pleading in which he admitted the plaintiff 's possession and that he had the right of possession at the time of the seizure, but alleged that his title was obtained by a transfer from the attachment debtor in fraud of his creditors, — that the burden, and with it the right to open and close, was with the defendant.[3] So, in Georgia, it has been held that, where an insolvent debtor, arrested and held in execution under a *ca. sa.*, institutes a proceeding in the inferior court to obtain the benefit of the statute for the relief of insolvent debtors, and creditors appear and object on the ground of fraud, the burden of the issue which is made up is on the objecting creditors, and the corresponding right to open and close rests with them. The reason

[1] Churchill *v.* Lee, 77 N. C. 341. See also McRae *v.* Lawrence, 75 N. C. 289; 1 Greenl. Ev., § 74.

[2] Beatty *v.* Hatcher, 13 Oh. St. 115, 119.

[3] Bixby *v.* Carskaddon (Ia.), 29 N. W. Rep. 626.

for this holding is that the debtor has no proof to make — nothing to do but to take the oath and be discharged, for which reason the creditor alleging the fraud assumes the substantial burden of proof, and is the movant within the meaning of the rule of court which governs the question.[1]

§ 246. In Proceedings on Reports of Commissioners, Auditors, Referees. — In Indiana, on appeal from proceedings before a board of commissioners in reference to the location of a highway, where the remonstrance is for damages only, the remonstrant has the burden of proof, and is therefore entitled to open and close. The reason seems to be that if there is no remonstrance, no proof will be required from the petitioners, but the report of the viewers will be final.[2] Under the code of Georgia, the report of an auditor is *prima facie* evidence, and the burden is on the exceptor to show error in it and to make good his exceptions. When an order is made that the report be filed and granting leave and time to except thereto, the report becomes such evidence. The burden thus being on the exceptor, he is entitled to open and conclude, unless the other party introduces no testimony, in which case the right of conclusion shifts to the other party. To cross-examine a witness of the objector and to continue the cross-examination after a temporary suspension of it by the court, is not an introduction of testimony by the party so cross-examining, in such a sense as to give him the right to the conclusion.[3] In Massachusetts, where the report of an auditor is in favor of the plaintiff, and the defendant files exceptions to it, the right to open and close, in the contest raised by the exceptions, remains with the plaintiff, although the report makes a *prima facie* case in his favor,— on the principle alluded to in the former article, that where the right once attaches to a party, it does not shift with the shifting of the burden of proof.[4] The same conclusion has been reached in New

[1] Johnson *v.* Martin, 25 Ga. 269, 271.

[2] Peed *v.* Brenneman, 89 Ind. 252.

[3] Arthur *v.* Commissioners, 67 Ga. 221, 224.

[4] Snow *v.* Batchelder, 8 Cush. (Mass.) 513.

Hampshire, in a case which was referred to commissioners under a statute, who had reported in favor of the plaintiff, the defendant electing to have the case afterwards tried by a jury, and filing, under the terms of the statute, a statement of the particulars in which he expected to change the result of the report. The court, on a consideration of the state of the case and the terms of the statute, being of opinion that the issue was in substance the general issue, in which case the opening and closing is always with the plaintiff, gave the right to him.[1]

§ 247. In Proceedings to Condemn Land and Assess Damages. — In a proceeding to condemn land for public uses and for the assessment of the compensation to be made to the land-owner, the petitioner holds the affirmative of the issue, and consequently has the right to begin and reply, both in the introduction of evidence and in the argument to the jury.[2] The reason is that the petitioner, the party seeking to condemn the land, is the moving party. Under the constitution the land cannot be taken without just compensation being made to the owner. The proceeding of the petitioner is therefore a proceeding to ascertain what is just compensation, and, should no proof be offered under this head, he would be defeated.[3]

§ 248. Petitioner, Claimant, Administrator. — The right is with the applicant for a license to sell intoxicating liquors, under a statute of Indiana, in a proceeding to try his right to such a license;[4] with the claimant or creditor in case of a claim preferred

[1] Chesley *v.* Chesley, 10 N. H. 327.

[2] South Park Commissioners *v.* Trustees, 107 Ill. 489; McReynolds *v.* Burlington &c. R. Co., 106 Ill. 152; Neff *v.* Cincinnati, 32 Oh. St. 215.

[3] McReynolds *v.* Burlington &c. R. Co., 106 Ill. 152. The contrary is held in Arkansas, the court reasoning that the land-owner is the real actor. No matter which party initiates the proceeding, the court say, the extent of the damage is the object of the inquiry, and the burden of proof is upon him. Springfield &c. R. Co. *v.* Rhea, 44 Ark. 258, 264 (citing Mansfield's Arkansas Dig., § 5131; Pierce on Railroads, 187; Mills on Eminent Domain, § 92). On principle the burden in these cases would, however, seem to be upon the petitioner, since the petitioner cannot succeed without introducing evidence.

[4] Hill *v.* Perry, 82 Ind. 28; Goodwin *v.* Smith, 72 Ind. 113.

against a decedent's estate which is contested;[1] with the administrator on the trial of exceptions filed to his final settlement.[2]

§ 249. Miscellaneous Cases where the Right was held to be with the Plaintiff. — Passing from these we come to a number of miscellaneous cases, some of which appear to have been decided according to principle and others not, which, within the limits of this article, can only be referred to without explanation or discussion. The right rests with the plaintiff in a proceeding called "claim" under a statute of Georgia where land has been levied upon;[3] but in cases of "illegality," under another statute of the same State, it is with the defendant.[4] It is with the plaintiff a proceeding under a statute of Texas to try the right of property levied upon by execution,[5] and in an action against an administrator who pleads payment and *plene administravit*.[6]

§ 250. Miscellaneous Cases where the Right is with the Defendant. — In like manner the right has been held with the defendant on a plea in abatement to an action on bills of exchange, which sets up the *non-joinder* of a joint maker or promissor;[7] in Alabama, where the defendant in a judgment applies for a *supersedeas* under a statute, the proceeding being a substitute for the common-law writ of *audita querela*;[8] in Delaware, on the trial of a *caveat* filed against proceedings to locate vacant lands under a private act of assembly;[9] and, as stated in the preceding paragraph, on the trial of an affidavit of "illegality" in Georgia.[10]

[1] Yingling *v.* Esson, 16 Md. 112, 121.

[2] Taylor *v.* Burk, 91 Ind. 252; Hanlyn *v.* Nesbit, 37 Ind. 284; Brownlee *v.* Hare, 64 Ind. 311.

[3] Baker *v.* Lyman, 53 Ga. 339.

[4] Bertodi *v.* Ison, 69 Ga. 317.

[5] Latham *v.* Selkirk, 11 Tex. 314.

[6] Clay *v.* Robinson, 7 W. Va. 350.

[7] Fowler *v.* Coster, Mood. & M. 241, per Lord Tenterden, C. J. This case, though decided before the rule became settled in England, is in conformity with correct principle.

[8] Persall *v.* McCartney, 28 Ala. 110, 125. Compare Worsham *v.* Goar, 4 Port. (Ala.) 441; Shearer *v.* Boyd, 10 Ala. 279; Grady *v.* Hammond, 21 Ala. 428; Edwards *v.* Lewis, 16 Ala. 813; Bruce *v.* Barnes, 20 Ala. 219.

[9] Records *v.* Melson, 1 Houst. (Del.) 139.

[10] Bertodi *v.* Ison, 69 Ga. 317.

ARTICLE III. — CERTAIN SPECIAL RULES.

SECTION

253. Express Waiver of General Denial.
254. Failure of the Defendant to Offer Evidence.
255. Effect of Admitting Plaintiff's Cause of Action.
256. Admission of a Part of the Plaintiff's Cause of Action.
257. Right to Begin Carries with It Right to Reply.
258. Refusal of Right to Open not Cured by Granting Right to Conclude.
259. The Right to Reply how Affected by Waiving the Right to Begin.

§ **253. Express Waiver of General Denial.**— As seen in the former article, in a suit on a contract which liquidates the damages, if the defendant files no denial but sets up an affirmative defense, the right to begin and reply is with him. It has been held that this rule is capable of application in an action upon such an instrument before a justice of the peace, where no formal defensive pleading is required, but where, by the terms of the statute, the case stands as though the defendant had pleaded the general denial; in which case he may, by filing of record an express waiver of the general denial, confine himself to an affirmative defense and acquire the right to open and to close.[1]

§ **254. Failure of the Defendant to Offer Evidence.** — It is scarcely necessary to say that the failure of the defendant to offer evidence does not oust the plaintiff of his right to open and close the argument, if he otherwise has it under the rules already stated.[2] And where the defendant files a plea setting up an affirmative defense which would give him the right to begin and reply if evidence were offered under it, he does not have the right if he offers no evidence under it; for otherwise, by filing a sham plea, a defendant might acquire a right which the law does not intend to give him.[3]

§ **255. Effect of Admitting Plaintiff's Cause of Action.** — But in Massachusetts, where the courts have been driven for the

[1] Cross *v.* Pearson, 17 Ind. 612.

[2] Worsham *v.* Goar, 4 Port. (Ala.) 441.

[3] Daviess *v.* Arbuckle, 1 Dana (Ky.), 525; approving Sodousky *v.* McGee, 4 J. J. Marsh. (Ky.) 275, and qualifying Goldsberry *v.* Stuteville, 3 Bibb (Ky.), 346.

sake of convenience to adopt a uniform rule,[1] giving the plaintiff the right to open and close in all cases, the fact that the defendant admits the plaintiff's cause of action and that the only issue for the jury is on the defendant's declaration in set-off, does not shift the right to the defendant.[2] In New Hampshire, it is held, on somewhat doubtful grounds, that, although the defendant admits the plaintiff's claim, which he has formally denied in his answer, yet as the admission is only in the nature of evidence, it does not change the burden of proof, and does not entitle the defendant to begin and reply. "The right," says Bell, J., "depends on the form of the pleadings, and is determined by the fact that the affirmative of one of the issues is upon the plaintiff; and this is in no way affected by the circumstance that the plaintiff has greater or less facilities for making the required proof. Any material fact may be proved by the admissions of the adverse party; and it does not change the burden of proof upon the pleadings, that the defendant has admitted the claim which he formally denies by his plea. Nor is it in any way material in what form the admission is made, so long as he chooses to deny it upon the record, and join issue upon it."[3] In Texas, where the defendant files a written admission, in accordance with a rule of court numbered 31, that the plaintiff has a good cause of action as set forth in his petition, except so far as it may be defeated, in whole or in part, by the facts constituting the defense which may be established on the trial, he is entitled to open and close, both in adducing evidence and in arguing the case.[4] Under a rule of court, numbered 59, which has, been in force for many years in South Carolina, the defendant is likewise entitled to begin and reply, when he ad-

[1] 8 Cush. (Mass.) 603, note.

[2] Page *v.* Osgood, 2 Gray (Mass.), 260. Compare Bradley *v.* Clark, 1 Cush. (Mass.) 293; Wigglesworth *v.* Atkins, 5 Cush. (Mass.) 212; Spaulding *v.* Hood, 8 Cush. 602; Merriman *v.* Cunningham, 11 Cush. 40, 44, — which were decided under a rule of the Court of Common Pleas of that State prior to the adoption of this uniform rule.

[3] Buzzell *v.* Snell, 25 N. H. 474, 479.

[4] Ney *v.* Roth, 61 Tex. 374.

mits upon the record the plaintiff's cause of action and takes upon himself the burden of proof.[1]

§ 256. Admission of a Part of the Plaintiff's Cause of Action. — It is scarcely necessary to say that the admission by the defendant of a part only of the plaintiff's case, or of a part only of the evidentiary facts upon which the plaintiff relies for a recovery, will not give the right to begin and reply to the defendant. Thus, in ejectment where each party claimed as heir at law, and the real question was as to the legitimacy of the defendant, who was clearly heir if legitimate, he proposed to admit that, unless he was legitimate, the lessor of the plaintiff was the heir at law. It was held that the admission did not give him the right to begin.[2] So, in an action of ejectment, the lessor of the plaintiff claimed as devisee under the will of J. S. At the trial the defendant admitted the seizin of J. S., and the due execution of that will, and that the plaintiff was *prima facie* entitled under it, and proposed to set up a subsequent will, revoking the first will. It was held, reversing the trial court, that the plaintiff was entitled to begin. The reasoning of the learned judges was, that the lessor of the plaintiff claimed as devisee under the will, that is, under the will that was a good and valid will at the time of the testator's death; therefore the defendants proposed to admit a part only of the plaintiff's case, and in fact did set up a case which denied that the plaintiff was such devisee.[3]

[1] Burckhalter *v.* Cowerd, 16 S. C. 435, 441.

[2] Doe d. Warren *v.* Bray, Mood. & M. 166.

[3] Doe d. Bather *v.* Brayne, 5 Com. Bench, 655, 670. The case was distinguished from cases where the plaintiff claims as heir at law, and where the defendant admits the whole title of the plaintiff, that is, that the ancestor died seized and that the plaintiff is his heir at law. Doe d. Wollaston *v.* Barnes, 1 Mood. & Rob. 386. The court also distinguish Doe d. Corbett *v.* Corbett, 3 Camp. 368. On the right of the devisee to begin. See also Goodlittle d. Revett *v.* Braham, 4 T. R. 498; Doe d. Tucker *v.* Tucker, Mood & M. 536. Several other early cases were cited in the argument: Doe d. Warren *v.* Bray, Mood. & M. 166; Doe d. Pill *v.* Wilson, 1 Mood. & Rob. 323; Doe d. Lewis *v.* Lewis, 1 Carr. & K. 122. But, as several of these were *nisi prius* cases, decided at a period before the

§ 257. Right to Begin Carries with It Right to Reply. — The right to begin, based upon this so-called primary burden of proof, carries with it the right to reply.[1]

§ 258. Refusal of Right to Open not Cured by Granting Right to Conclude. — The refusal to the party having the burden of proof, of the right to open his case to the jury, is an error which is not cured by according to him the right to have the concluding argument. In the opinion of the court so holding, Daly, C. J., said: "The opening of the case to the jury by the plaintiffs, and the laying before them of their evidence in the first instance, and confining the defendant to evidence in the way of reply, are a part of their legal right, of which they are deprived under exception; and I fail to see how the error is cured by allowing them afterwards what was their further right, the final address to the jury. Depriving a party of one part of his legal rights is certainly not cured by allowing another part." And the judgment was reversed for this error alone, although the case had been already tried three times.[2]

§ 259. The Right to Reply how Affected by Waiving the Right to Begin. — Where the plaintiff waives the opening argument to the jury, it has been thought that, on strict grounds, this might give the defendant the right to close; but it was said: "If such a waiver should still leave the closing argument to the plaintiff, it certainly confined it to a strict reply to the defendant's argument, excluding general discussion of the case. The sole object of all argument is the elucidation of the truth, greatly aided, in matter of fact, as well as in matters of law, by full and fair forensic discussion. And this is always imperiled when either party is able to present his views of the case to the jury without opportunity of the other to comment on them. And if

rule had become settled in England in the leading case of Mercer *v.* Whall (5 Ad. & El. (N. S.) 447), it is thought unnecessary to examine them in detail.

[1] Robinson *v.* Hitchcock, 8 Metc. (Mass.) 64; Judge of Probate *v.* Stone, 44 N. H. 593, 606; Elwell *v.* Chamberlin, 31 N. Y. 611, 612.

[2] Penhryn Slate Co *v.* Meyer, 8 Daly (N. Y.), 61.

the party entitled to the opening argument, relying on the strength of his case without discussion, waive the right to open, he waives the right to discuss the case generally, and should not be permitted to do so out of his order, and after the mouth of the other party is closed. His close, if permitted to close the argument, would be limited to comment on the argument of the other side. This is essential to the fairness and usefulness of juridical discussion at the bar." [1] In a civil case, where the court, after the close of the evidence, directed counsel for the plaintiff to go on and state his points relied on for a recovery, which counsel did, and the defendant's counsel then asked the court to charge the jury, but the plaintiff's counsel insisted upon his right to argue the case to the jury, which was denied him by the court, — it was held that the ruling was erroneous. This holding was predicated upon the view that the court, in directing the plaintiff's counsel to state his points, meant to restrict him in his opening to a naked statement of his points, to the exclusion of argument in support of them. The reviewing court did not hold that, where the plaintiff has the privilege of argument and declines it, he is entitled to make the closing argument, although the defendant declines argument.[2] In a civil case, after the testimony is closed and the case is opened by the plaintiff's counsel, if the defendant's counsel submits the cause to the jury without argument on his part, the plaintiff is not entitled to make any further argument to the jury.[3]

[1] Brown *v.* Swineford, 44 Wis. 282, 290, opinion by Ryan, C. J.

[2] Cartright *v.* Clopton, 25 Ga. 85.

[3] Tyre *v.* Morris, 5 Harr. (Del.) 3.

CHAPTER X.

OF THE OPENING STATEMENT.

SECTION

260. Reading the Pleadings.
261. The Opening Statement.
262. Whether Anticipate Defense of Opposing Party.
263. No Right to rehearse Facts which cannot be Proved.
264. Nor Irrelevant and Prejudicial Matters.
265. Instructing the Jury to Disregard such Statements.
266. Abuse of Discretion in this Regard Revisable on Appeal.
267. Rehearsal of Testimony not Allowed.
268. Exhibiting Diagrams.
269. Dismissing the Cause on the Plaintiff's Opening Statement.
270. Defendant's Opening Statement.

§ 260. Reading the Pleadings. — The case is ordinarily opened by reading the pleadings. This is usually done thus: The counsel (or, if there be more than one, the *junior* counsel) of either party, beginning with the party who sustains the burden of proof, reads his own pleading to the jury. This formality may be dispensed with in the *discretion* of the court. On this subject it has been observed: "It was purely a matter of discretion with the judge whether he would allow the pleadings to be read. He might call upon the counsel to read them, or to state their substance, if it was necessary to enable the court to understand the issues which were raised and were to be tried. The pleadings, which are presumed to be statements in legal form of those facts which constitute the charge or defense of the parties, are for the consideration of the court. When evidence for the consideration of the jury is offered or given to sustain or establish those facts, it becomes necessary for the court to understand what issues are raised, and which are properly triable in the case. The facts stated in the pleadings, except so far as admitted, could not be considered by the jury until proved

by competent testimony."[1] It should be kept in mind that matters concerning the pleadings are ordinarily addressed to the judge, whose duty it is to *state the issues* to the jury when he comes to deliver to them his *instructions;* and that comments on the pleadings to the jury are in general out of place, and sometimes unprofessional.

§ **261. The Opening Statement.**— The counsel for the party sustaining the burden of proof next makes a short address to the jury, in which he states the nature of the issues to be tried and what he expects to prove, in order to sustain the action (or defense, as the case may be.) According to an approved writer, "the opening address usually states first, the full extent of the plaintiff's claims, and the circumstances under which they are made, to show that they are just and reasonable; secondly, at least an outline of the evidence by which those claims are to be established; thirdly, the legal grounds and authorities in favor of the claim or of the proposed evidence."[2]

§ **262. Whether anticipate Defense of Opposing Party.** — As to the foregoing there is no difference of opinion; but the writer last quoted from adds: "Fourthly, an anticipation of the expected defense, and a statement of the grounds on which it is futile, either in law or justice, and reasons why it ought to fail."[3] That such is the English practice is shown by other authorities.[4] In some American jurisdictions this rule is denied, and it is laid down that each party should be confined to a legitimate and proper opening of his own case, — the plaintiff's counsel to a statement of his cause of action, and the defendant's counsel to a statement of his answer to the plaintiff's case and the evidence he proposes to give to sustain it; and that it is improper for the counsel of the plaintiff in his opening to

[1] Willis *v.* Forrest, 2 Duer (N. Y.), 310, 317.

[2] 3 Chit. Pr. 880.

[3] 3 Chit. Prac. 880.

[4] Meagoe *v.* Simmons, 3 Car. & P. 75; Brown *v.* Murray, Ry. & M. 254. See also Lacon *v.* Higgins, 3 Stark. 178; *s. c.* D. & R. 178.

state the case as made by the defendant in his answer, or the evidence he expects to give in reply to the defense set up in the answer.[1]

§ 263. No Right to Rehearse Facts which cannot be Proved.— Counsel has no right in his opening statement, to rehearse before the jury facts which he is not in a condition to prove.[2] It is the duty of the judge to see that this rule is not overstepped, and therefore he has a right to ask the counsel if he means to prove what he has stated.[3] As was well said by Mr. Justice Graves: "The decisions unite in substantially denying the right to get before the jury a *detail* of the testimony expected to be offered, and especially any not positively entitled to be introduced, and deny the right to use it as a cover for any topics not fairly pertinent."[4]

§ 264. Nor Irrelevant and Prejudicial Matters.— It is equally the duty of the trial court to restrain every effort on the part of counsel, in their statements to the jury, to introduce matters which are foreign to the issues, and especially matters which have a tendency to excite the prejudice of the jury. It was so held where it was charged, though not established, that

[1] Ayrault *v.* Chamberlain, 33 Barb. (N. Y.) 229, 234; Elwell *v.* Chamberlin, 31 N. Y. 611, 614. Ayrault *v.* Chamberlain was affirmed by the Court of Appeals, as stated in the opinion in Elwell *v.* Chamberlin, *supra*, but the decision affirming does not seem to have been reported. In a bastardy proceeding the counsel for the prosecution, in opening the case to the jury, stated, in effect, that the accused would introduce testimony as to the character of the complainant, and as to what he tried to prove on the former trial. Upon objection to these remarks, the court promptly ruled that he must confine himself to stating the case of the prosecution, and not the case of the accused. *Held*, that this ruling was sufficient protection to the accused from being prejudiced by anything thus stated. Baker *v.* State (Wis.), 33 N. W. Rep. 52; *s. c.* 69 Wis. 32.

[2] Stevens *v.* Webb, 7 Carr. & P. 60; Duncombe *v.* Daniell, 8 Carr. & P. 222; Scripps *v.* Reilly, 35 Mich. 371. He could not, therefore, under the old law, give his client's account of the transaction, where his client was not permitted to testify. Duncombe *v.* Daniell, *supra*.

[3] Darby *v.* Ouseley, 36 Eng. Law. & Eq. 518, 525, per Pollock, C. B.

[4] Scripps *v.* Reilly, 35 Mich. 371, 388.

the plaintiff's counsel, in his opening speech to the jury, had stated that, on a former trial of the cause, the defendants had *suborned* their little son, then a child of four years, to commit perjury, and that one of the defendants had committed perjury in his affidavit for a change of venue.[1] So, in an action for *libel* it is held error to permit the plaintiff's counsel, in opening his case to the jury, to read at length, against objection, *other publications* by the defendant which are not relevant or admissible as evidence, and which, afterward on the trial are not offered as evidence.[2]

§ 265. Instructing the Jury to disregard such Statements.— Where counsel have overstepped the bounds of the preceding rule, it is the plain duty of the judge, as was done by Lord Denman, C. J., in one case,[3] to reprove the practice in the hearing of the jury, and afterwards, in *instructing* the jury, to admonish them to dismiss from their minds the statements thus made;[4] though where the privilege of advocacy in opening the case has been greatly abused in this regard, such an instruction may not

[1] Hennies *v.* Vogel, 87 Ill. 242.

[2] Scripps *v.* Reilly, 35 Mich. 371.

[3] Duncombe *v.* Daniell, 8 Carr. & P. 222. Counsel in this case having referred in his opening to a document which he did not expect to prove, Lord Denman, by way of punishment, allowed *secondary evidence* to be given of its contents.

[4] In such a case Lord Denman, C. J., in his charge to the jury, rebuked the conduct of Mr. Attorney-General Campbell (Lord Denman's successor as Lord Chief Justice), in his summing up, by saying: "With respect to the manner in which the plaintiff's case has been conducted, I must say that I do not recollect any case in which a statement was made of independent facts not drawn from the libelous matters themselves, but tending to disprove them, and in which the jury were addressed as to facts tending to establish the innocence of the plaintiff, without some proof being given of those facts by the counsel stating them; yet that has been done on the present occasion. I do not believe that the statement here will make any difference in your opinion; for you will no doubt regard (as you ought) the evidence only as to facts, and listen to counsel only for their observation on the facts. Still, I think that the practice which has been adopted on this occasion is not one encouraged, and that counsel ought not to be instructed to go into a particular detail of circumstances, unless they are prepared to give some evidence of the truth of those circumstances." Duncombe *v.* Daniell, 8 Carr. & P. 222, 227.

be sufficient to cure the irregularity, but it will be ground of new trial.[1]

§ 266. Abuse of Discretion in this Regard revisable on Appeal. — No doubt, the limits of privilege allowed to counsel in this regard are very much within the *discretion* of the trial court, but subject, as in other cases of the exercise of judicial discretion, to be revised on appeal in case of manifest abuse.[2] In such a case the Supreme Court of Michigan, speaking through Graves, J., said: "There is no doubt of the right of this court to revise in such a case as this. If the trial court may pursue any course it pleases in relation to the opening statement, if it may act independently of all control, then the idea of a rule to be prescribed by this court, under the constitution and legislative enactment, for its guidance and government, is preposterous and absurd. But the point is too plain for argument. This court will not revise such matters unless there is plain evidence of action amounting to what is called an abuse of discretion, and calculated to injuriously affect the legal rights of a party; and where such is the case, whether the result of accident, or inadvertence, or misconception, it will take cognizance. The error in this case was not cured, and is one subject to review, and is sufficient to require a reversal.[3]

[1] Where counsel for the plaintiff, in his opening statement in a *libel* case, grossly abused the privilege of advocacy, by reading many irrelevant matters to the jury, prejudicial in their nature, which were not even offered in evidence, the court held that error had been committed by the trial court in allowing him to pursue this course; and, although the court had not instructed the jury to disregard such matters, the reviewing court held that such an instruction, if made, would not have cured the error. "Because," said Graves, J., "it is quite impossible to conclude that the jury had not been influenced too far by the erroneous rulings and proceedings, to be brought into the same impartial attitude by the court's admonition, which they would have held if counsel for the defendant in error had been properly confined in his opening statement. The course of fair and settled practice was violated to the prejudice of plaintiff in error, and it is not a satisfactory answer to say that the court went as far as practicable afterwards to cure the mischief, so long as an inference remained that the remedy applied by the court was not adequate." Scripps *v.* Reilly, 35 Mich. 371, 391.

[2] Ayrault *v.* Chamberlain, 33 Barb. (N. Y.) 229, 235.

[3] Scripps *v.* Reilly, 35 Mich. 371, 392.

§ 267. **Detailed Rehearsal of Testimony not allowed.** — In the case last cited, where this subject was much considered, it was said by Mr. Justice Graves: "A brief summary or outline of the substance of the evidence intended to be offered, with requisite clear and concise explanations, are considered proper. But a relation of expected oral testimony at length, or a reading of expected documentary proofs at large, or any other course fitted to mislead the triers, should not be tolerated. Of course, there may be cases and instances where the statement of the evidence itself, or a reading of a paper, may be convenient and harmless. Such, however, must be exceptional, and not within the spirit of the general requirement."[1] From this it would necessarily follow that counsel is not *confined*, in the introduction of evidence, to the statement which he makes in the opening of his case;[2] since this would oblige him, at his peril, to announce to the jury each item of evidence which he intended to introduce, — a practice which would be a reversal of the rule above declared.[3]

§ 268. **Exhibiting Diagrams.** — In an action for damages for a negligent injury, where the exact location of the injury is material, it is the right of the counsel for either party to exhibit to the jury, in his opening statement, a diagram showing the place of the injury, the same being correctly drawn and admissible in evidence, and in fact afterwards admitted; and a denial of this right to counsel is error.[4]

[1] Scripps *v.* Reilly, 35 Mich. 371, 388.

[2] Kelly *v.* Troy Ins. Co., 3 Wis. 254.

[3] It has been held, in view of the provision of the English Common Law Procedure Act, which has been more or less adopted in this country (Stat. 17 & 18 Vict., c. 125, sec. 18), that, where counsel announce their intention not to adduce evidence, they cannot alter their purpose at a subsequent stage of the trial and introduce evidence. Darby *v.* Ouseley, 36 Eng. L. & Eq. 518, 525. Before the passage of this act, as stated by Pollock, C. B., "you never could compel a defendant's counsel to say whether he would call witnesses or not, until he had concluded his address to the jury. That makes the defendant's counsel bind himself on the subject before the plaintiff concludes his case." *Ibid.*

[4] Battishill *v.* Humphrey (Mich.), 31 N. W. Rep. 894.

§ 269. Dismissing the Cause on the Plaintiff's Opening Statement. — In jurisdictions where the court has power to order a nonsuit, it is the frequent practice of the judge, where the plaintiff's opening statement discloses no cause of action, without waiting for the introduction of evidence, to direct a nonsuit at once. The principles on which he should proceed in so doing are analogous to those relating to a demurrer to the evidence, or to a motion for a nonsuit or for a peremptory instruction in behalf of the defendant, at the close of the plaintiff's case. All the facts referred to in his opening, or offers of proof, should be considered, including facts not stated in the complaint, as well as those stated, unless objection to proof of such additional facts is made on the specific ground that it is not admissible under the pleadings.[1]

§ 270. Defendant's Opening Statement. — Regularly, the defendant's opening statement is not made until the evidence for the plaintiff has been heard and the plaintiff has rested. He then introduces his case by an opening statement; and, in a criminal case, where a statute prescribes that the defendant shall be allowed to make his opening statement at this time, it is error to require him to make it immediately after that of the prosecuting attorney, or not at all.[2]

[1] Clews *v.* Bank (N. Y.), 11 N. East. Rep. 814; *s. c.* 105 N. Y. 398.

[2] Willey *v.* State, 52 Ind. 421. This was held under a statute which provided: "1. The prosecuting attorney must state the case, and offer the evidence in support of the prosecution. 2. The defendant or his counsel may then state his defense and offer evidence in support thereof." Ind. Acts 1873, chap. 74, page 183; Buskirk Ind. Prac. 403.

CHAPTER XI.

EXCLUDING WITNESSES FROM THE COURT ROOM.

SECTION

275. The Practice Stated.
276. Discretionary with Trial Court.
277. Doctrine that it is a Matter of Right.
278. What Witnesses Exempt from the Rule.
279. Parties in Interest cannot be so Excluded.
280. Nor the Agent of a Party, when.
281. Consequences of Violating the Rule
282. [Continued.] Illustrations.

§ 275. The Practice stated. — "In the trial of causes, both civil and criminal, it is a rule of practice, devised for the discovery of truth and the detection and exposure of falsehood, and well adapted to the ends designed, for the presiding judge, on the motion of either party, to direct that the witnesses shall be examined out of the hearing of each other. Such an order, upon the motion or suggestion of either party, it is said, is rarely withheld. But, by the weight of authority, the party does not seem entitled to it as a matter of right.[1] To effect this object, generally the respective parties are required to disclose the names of the witnesses intended to be examined, and then the witnesses are simply ordered to withdraw from the court room and directed not to return until called; or, as is sometimes the case, they are placed under charge of an officer of the court, to be kept by him out of hearing, in the jury room or some other convenient place, and brought into court when and as they may be severally needed for examination. If a witness, or the officer in charge, willfully disobeys or violates such order, he is liable to be punished for his contempt; and at one time, according to the English practice, it was considered that the judge, in the exercise of his discretion, might even exclude the testimony of such a

[1] Citing 1 Greenl. Ev., § 432.

witness. But now, it seems to be the practice to allow the witness to be examined, subject to observation as to his conduct in disobeying the order." [1]

§ 276. **Discretionary with the Trial Court.** — According to a much prevailing view, whether the court will thus sequester the witnesses, or, as it is sometimes called, "put them under the rule," is a matter of sound judicial *discretion*, which discretion will not be revised on error or appeal in the absence of an appearance of abuse.[2] Upon this question the Supreme Court of Alabama, speaking through Somerville, J., said: "The examination of witnesses in cases, civil or criminal, is in a great measure, necessarily under the control of the presiding judge, and subject to a just, wise and sound judicial discretion. If he deem it necessary, in order to elicit the truth and promote justice, he may, *proprio motu*, or on the application of either party to the suit or proceeding, order all the witnesses, except the one under examination, to leave the court. This practice is thought to be coeval with judicature, having long been administered in the British Parliament, and the courts of both England and Scotland. When requested by counsel or parties, though not a matter of right, the order is rarely withheld." [3] Accordingly, it has been held not error, in the absence of a plain appearance of abuse of discretion and prejudice, to admit, against the objection of the defendant, the testimony of a witness for the State in a criminal case, who had not been put under the rule.[4] In Georgia it has been ruled that, where there is an order for the separation

[1] Hey *v.* Com., 32 Gratt. (Va.) 946, 948, opinion by Burks, J.

[2] Errissman *v.* Errissman, 25 Ill. 136; McLean *v.* State, 16 Ala. 672; Johnson *v.* State, 2 Ind. 652; Benaway *v.* Conyne, 3 Chand. (Wis.) 214; Nelson *v.* State, 2 Swan (Tenn.), 237. Powell *v.* State, 13 Tex. 244, 252; Walling *v.* State, 7 Tex. App. 625; People *v.* Sam Lung (Cal.), 11 Pac. Rep. 673; Avery *v.* State, 10 Tex. App. 199, 213; Jones *v.* State, 3 Tex. App. 150; Ham *v.* State, 4 Tex. App. 645; Estep *v.* State, 9 Tex. App. 366; Johnson *v.* State, 10 Tex. App. 571; People *v.* O'Loughlin, 3 Utah, 133. Compare Tex. Code Cr. Proc., art. 666; Brown *v.* State, 3 Tex. App. 295.

[3] Ryan *v.* Couch, 66 Ala. 244, 248; citing 2 Best Ev., § 636; 1 Greenl. Ev., § 432.

[4] Avery *v.* State, 10 Tex. App. 192, 213.

of the witnesses, *exceptions* therefrom as to witnesses not parties to the suit, are discretionary with the court, and in the particular case the discretion was not abused in refusing to make the exception requested.[1]

§ 277. **Doctrine that it is a Matter of Right.** — In an English *nisi prius* case Mr. Baron Alderson said that it was "the right of either party at any moment to require that the unexamined witnesses shall leave the court."[2] But this was very different from holding that a judgment would be reversed because the trial court had refused to grant such an application. In 1881 the Supreme Court of Texas, in a heated decision delivered by the Commission of Appeals, a body organized to assist the Supreme Court in clearing its docket, held that it is error in a civil case, for which a judgment will be reversed, to refuse the application of a party thus to exclude witnesses from the court room. The reasoning of the learned commissioner appealed to general principles of law, but he failed to cite any common-law authorities which sustain the court in its conclusion. On the contrary, the text writers cited by him do not sustain the conclusion of the court.[3] The opinion is capable of being sustained on the ground that, in the particular case, a suit to establish a nuncupative will it was an abuse of discretion not to grant such rule, and upon no other. In Tennessee the rule is favored as a mode of eliciting the truth, and may be demanded as a matter of right in all cases, upon affidavit of facts showing its necessity.[4] In Georgia it has been ruled that the defendant may demand the separation of the witnesses.[5] In New Jersey it is a strict rule of practice that the prisoner's witnesses shall not be in the court room while the State's witnesses are being examined.[6]

§ 278. **What Witnesses exempt from the Rule.** — It has been said that ordinarily witnesses who are summoned as *experts*,

[1] City Bank *v.* Kent, 57 Ga. 285.

[2] Southey *v.* Nash, 7 Carr. & P. 632.

[3] Watts *v.* Holland, 56 Tex. 54.

[4] Rainwater *v.* Elmore, 1 Heisk. (Tenn.) 363; Nelson *v.* State, 2 Swan (Tenn.), 237; Smith *v.* State, 4 Lea (Tenn.), 428, 430.

[5] Johnson *v.* State, 14 Ga. 55.

[6] State *v.* Zellers, 7 N. J. L. 220.

as well as *attorneys* in the case, and witnesses called to testify to the *character* of another witness, are excepted from the rule and permitted to remain in the court room while the rest of the witnesses are sent out.[1] Accordingly, where the court exempted from the rule an *attorney* of the court, who was one of the prosecuting counsel in the case, it was held that there was nothing which could be assigned for error.[2] When *medical experts* are called solely as such, the better practice is said to be to allow them to remain in the court room and hear the testimony of all the other witnesses, in order that, from the whole testimony, they may be able to determine, from the evidence itself, the matter upon which their opinion is desired.[3] It is submitted by the writer, however, that this is not a sound reason for allowing expert witnesses to be exempt from the rule; since, as elsewhere seen,[4] the weight of opinion is that such witnesses do not deliver their testimony from their own conclusions as to the evidence given by the other witnesses, but upon questions propounded to them by counsel, presenting hypothetical states of fact, which the jury are or are not to find true, accordingly as they may view the evidence. It is laid down in Texas that where expert witnesses have been put under the rule, and have not been permitted to hear the evidence of the other witnesses, a hypothetical case embracing the facts in evidence may, in all cases, be submitted to them for their opinions.[5] And finally, it is laid down that the court does not abuse its discretion in the slightest by subjecting medical experts to the operation of the rule.[6] The writer expresses the view, with confidence, that it is the better exercise of discretion to put such witnesses under the rule; since, where they are permitted to remain in court during the trial, they are apt to form theories from the evidence toward which their testimony will be directed, instead of its being directed in a colorless manner

[1] Brown *v.* State, 3 Tex. App. 295.

[2] Powell *v.* State, 13 Tex. 244.

[3] Johnson *v.* State, 10 Tex. App. 571, 577.

[4] *Post*, ch. XXII.

[5] Webb *v.* State, 9 Tex. App. 490; Hunt *v.* State, 9 Tex. App. 156.

[6] Johnson *v.* State, 10 Tex. App. 571, 577.

to the hypothetical states of fact which may be submitted to them by counsel on either side.

§ 279. **Parties in Interest cannot be so excluded.** — An order excluding witnesses from the court room ought not to be extended to parties in interest; since, although they are competent to testify as witnesses, it is their right to be present and to aid in or observe the progress of the trial.[1] "It is obvious," said Somerville, J., "that this rule of exclusion ought never to be applied so as to debar a *party* to a suit from being present during the progress of his cause. He has a right to be present, for the purpose of aiding and instructing his counsel in prosecuting or defending his suit. To order him from the court room while his case is in process of judicial investigation would be violative of the spirit, if not of the very letter of the Declaration of Rights, which declares that 'no person shall be debarred from prosecuting or defending, before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.'"[2]

§ 280. **Nor the Agent of a Party, when.** — The Supreme Court of Alabama, while conceding that the exercise of this discretion is not revisable on error or appeal, nevertheless, in view of the practical importance of the question, have deemed it proper to indicate the correct rule of practice in cases of this character, as follows: "Where a judge is satisfied, from the statement of counsel in open court, or otherwise, that a witness in a cause has acquired such an intimate knowledge of the facts, by reason of having acted as the authorized agent of either of the parties, that his services are required by counsel in the management of the trial, he ought not, especially in the necessary absence of his principal, to be placed under the rule. * * * To exclude such a one from the valuable privilege of consultation with the attorney of his principal during the progress of the trial, is not required by the reason of this rule of evidence. The sounder and better practice is to permit him to remain in the court room."[3]

[1] Chester *v.* Bower, 55 Cal. 46.

[2] Ryan *v.* Couch, 66 Ala. 244, 248.

[3] Ryan *v.* Couch, 66 Ala. 244, 248.

§ 281. **Consequences of Violating the Rule.** — The better opinion now is that the violation of the rule by a witness, although it will subject him to punishment for contempt of court, will not deprive the party, whose witness he is, of the benefit of his testimony, where the party himself is without fault, and that the court cannot lawfully refuse to permit the examination of the witness: [1] although it will be a matter for observation to the jury upon his evidence.[2] After such an order has been made, it is no cause for a *new trial* that a witness, who had not gone out, but had remained and heard the other witnesses, was afterwards allowed to be examined; [3] but it will be a matter of *discretion* with the trial court whether a new trial will be granted for such a reason, and this discretion is not reviewable.[4] In Illinois it is laid down that where a witness, after being put under the rule, converses with other witnesses, after they have testified, and with counsel calling him, in violation of the court's order, it is a mat-

[1] 2 Tayl. Ev. (5th Am. ed.) 744; 1 Bish. Crim. Proc., §§ 1191, 1192; Cobbett *v.* Hudson, 1 El. & Bl. 11; Cook *v.* Nethercote, 6 Carr. & P. 741; Rex *v.* Colley, 1 Mood. & M. 329; Thomas *v.* David, 7 Carr. & P. 350; Chandler *v.* Horne, 2 Mood. & Rob. 423; Nelson *v.* State, 2 Swan (Tenn.), 237; Hey *v.* Com , 32 Gratt. (Va) 946; Burk *v.* Andis, 98 Ind. 79; Davis *v.* Byrd, 94 Ind. 525 (overruling Jackson *v.* State, 14 Ind. 327); Davenport *v.* Ogg, 15 Kan. 363; Pleasant *v.* State, 15 Ark. 624; State *v.* Salge, 2 Nev. 321; Grimes *v.* Martin, 10 Ia. 347; Bell *v.* State, 44 Ala. 393; Keith *v.* Wilson, 6 Mo. 435; People *v.* Boscovitch, 20 Cal. 436; Gregg *v.* State, 3 W. Va. 705; Smith *v.* State, 4 Lea (Tenn.), 428; Keith *v.* Wilson, 6 Mo. 435; Lassiter *v.* State, 67 Ga. 739; Rooks *v.* State, 65 Ga. 330 (citing Ga. Code, § 3863); Thomas *v.* State, 27 Ga. 288; Hubbard *v.* Hubbard, 7 Ore. 42, 47. It was formerly held in Indiana to be a matter of *discretion* for the court trying the cause, whether the testimony of a witness who had willfully disobeyed the order of the court to remain out of the court room until called, should be rejected for that reason, and that this discretion would not be reviewed on appeal unless it appeared that it had been abused. Porter *v.* State, 2 Ind. 435; Jackson *v.* State, 14 Ind. 327. But in later cases the same court have adopted this as the true rule: "Where a party is without fault, and the witness disobeys an order directing a separation of witnesses, the party shall not be denied the right of having the witness testify, but the conduct of the witness may go to the jury upon the question of his credibility." Davis *v.* Byrd, 94 Ind. 525; Burk *v.* Andis, 98 Ind. 59, 64.

[2] Chandler *v.* Horne, 2 Mood. & Rob. 423.

[3] State *v.* Sparrow, 3 Murph. (N. C.) 487.

[4] Purnell *v.* Purnell, 89 N. C. 42; 1 Greenl. Ev., §§ 431, 432, and notes.

ter of *discretion* with the court whether to allow him to testify as a witness, and hence not error to permit him to testify. Scholfield, J., said: "If witnesses, after an order of separation, upon being spoken to by third parties in violation of the order of court, would become thereby disqualified to testify, a wide door would be open to unscrupulous friends of those charged with crime to disqualify material prosecuting witnesses. There might probably be such an interference with witnesses, in disregard of the order of court, as would justify the court in setting aside a verdict based upon their evidence, the defendant being free of fault, and the facts being brought to his attention for the first time after the examination of all the witnesses had concluded."[1]

§ 282. [**Continued.**] **Illustrations.** — In Tennessee, where, as already seen, the rule is a matter of right when the demand for it is supported by affidavit, if it has been asked for by both parties, and a witness is discovered who knows an important fact, who has been in court and heard the testimony of other witnesses, it will not be ground of refusing to allow him to testify that he was not under the rule with the other witnesses.[2] In Georgia, although at the request of the defendant's counsel in a criminal case, the witnesses had been sworn and put under the rule, yet it was no ground for a new trial that a witness who remained in the court room was allowed to testify merely as to the *correctness of a diagram* which he had made of the scene of the homicide.[3] In the same State it is held that, where objection is made to the witness on this ground, if the witness testifies that he heard none of the testimony nor the prisoner's statement, the court may admit him to testify.[4] It is further held in the same State that the fact that a witness for the State, after being put under the rule, and, after having testified, may have heard the

[1] Bulliner *v.* People, 95 Ill. 394, 399. To the same doctrine see State *v.* Brookshire, 2 Ala. 203; Sidgreaves *v.* Myatt, 22 Ala. 617; Sartorious *v.* State, 24 Miss. 602; Laughlin *v.* State, 18 Oh. 99; State *v.* Fitzsimmons, 30 Mo. 236.

[2] Smith *v.* State, 4 Lea (Tenn.), 428.

[3] Betts *v.* State, 66 Ga. 508.

[4] Lyman *v.* State, 69 Ga. 405.

prisoner's statement, would not disqualify him from being reintroduced as a witness.[1] The same court has also held that the fact that the bailiff in charge of the jury is a witness in a criminal trial and is put under the rule, but nevertheless retires with the jury (upon a call of nature) is no ground for a new trial.[2] In Louisiana, it was held that the accused in a criminal trial could not be deprived of the testimony of some of his witnesses, who were not in court when the order was made, and who only presented themselves the day after. The court had no hesitation in saying that, when the witnesses made statements under oath that they had held no communication with the accused on the subject of the trial, they should have been permitted to testify.[3] In general, it may be stated that, where a witness, who has been thus excluded, has *inadvertently* come into court in violation of the order, the court should have no hesitancy in receiving his testimony.[4]

[1] Lyman *v.* State, 69 Ga. 405.

[2] Wade *v.* State, 65 Ga. 756.

[3] State *v.* Gregory, 33 La. Ann. 737, 742.

[4] People *v.* O'Loughlin, 3 Utha, 133; Dyer *v.* Morris, 4 Mo. 214. See further. Anon., 1 Hill (S. C.), 251; State *v.* McElmurray, 3 Strobh. (S. C.) 33.

CHAPTER XII.

OF THE PRIVILEGE OF WITNESSES.

SECTION
285. Preliminary.
286. Privilege against Self-Crimination.
287. Against Questions Tending to Degrade.
288. Against Questions Exposing to Penalty or Forfeiture.
289. Against Questions Forming Links in a Chain of Criminating Evidence.
290. Disclosing the Names of Accomplices.
291. [Continued.] Application of this Rule.
292. Compelling Witness to Exhibit his Body.
293. Effect of Statutes preventing Answer from being Used against Witness.
294. Illustration under Massachusetts Statute.
295. Effects of Promise not to Prosecute.
296. Privileged Communications between Attorney and Client
297. [Continued.] History of this Privilege.
298. [Continued.] Rule Limited where Question of Crime not Involved.
299. [Continued.] Confidential Communications.
300. [Continued.] Witness not Exclusive Judge of Privilege.
301. [Continued.] These Principles, how far changed by Statutes Compelling Parties to Testify.
302. Attorney has no greater Privilege than Client.
303. Trade Secrets Privileged.
304. Refusing to Expose Defense.
305. Testimony of the Judge as to Former Trials.
306. Privilege must be Claimed by the Witness himself.
307. Privilege may be Waived.
308. [Continued.] Illustrations.
309. Question Decided by Court, not by Witness.
310. Compulsory Answer not Evidence against Witness.
311. Whether Refusal to Answer is Evidence against Witness.
312. Whether Court Bound to Instruct Witness.

§ **285. Preliminary.** — It is supposed in this chapter that the witness is on the stand and undergoing examination, and that a question is put to him in respect of which he interposes a claim of privilege. It is not the design of this chapter to consider the subject of privilege in its relation to the *compulsory attendance* of witnesses, the service of subpœnas upon them under

circumstances which clothe them with a privilege;[1] or (except incidentally) their privilege in respect of the production of books and papers;[2] or the right of an *accused person*, testifying as a witness for himself, to refrain from answering certain questions on *cross-examination*.[3] These questions are elsewhere considered. The privilege which it is the purpose of this chapter to discuss relates to the claim which the witness may interpose against being compelled to answer *particular questions*.

286. Privilege Against Self-Crimination. — It is a fundamental principle of Anglo-American jurisprudence, that a person, summoned as a witness before any inquisitorial body, judicial or legislative, is absolutely privileged from answering a question put to him, if he will state upon his oath, in answer to such question, that he refuses to answer the same, for the reason that his answer thereto, if given, would subject him to an indictment for a crime; and that, if such an answer be not deemed sufficient by the inquisitorial body, and the witness be imprisoned for contempt for refusing further to answer, he will be entitled to his discharge on *habeas corpus*.[4] The rule, as stated by Chief Justice Marshall in Burr's Trial,[5] is this: "It is the province of the court to judge whether any direct answer to the questions that may be proposed will furnish evidence against the witness. If such answer may disclose a fact which forms a necessary and

[1] *Ante*, ch. VI.

[2] *Post*, ch. XXVI.

[3] *Post*, ch. XXIII.

[4] Emory's Case, 107 Mass. 172. It was so held in this case, where the committing body was a legislative body, — the Senate of the State of Massachusetts. See also People *v.* O'Brien, 66 Cal. 602; Taylor *v.* McIrwin, 94 Ill. 488; Re Graham, 8 Ben. (U. S.) 419; Lister *v.* Boker, 6 Blackf. (Ind.) 439; Coburn *v.* Odell, 30 N. H. 540; Jaurin *v.* Scammon, 29 N. H. 280; People *v.* Mather, 4 Wend. (N. Y.) 229; People *v.* Rector, 19 Wend. (N. Y.) 569; Poole *v.* Perrett, 1 Spears (S. C.), 128; Chamberlin *v.* Wilson, 12 Vt. 491; Robinson *v.* Neal, 2 T. B. Mon. (Ky.) 212; Neale *v.* Cunningham, 1 Cranch C. C. (U. S.) 76; Hayes *v.* Caldwell, 10 Ill. 333; United States *v.* Moses, 1 Cranch C. C. (U. S.) 170; United States *v.* Lynn, 2 *Id.* 309; Sanderson's Case, 3 *Id.* 638; Ex parte Lindo, 1 *Id.* 445; United States *v.* Strother, 3 *Id.* 432; Short *v.* State, 4 Harr. (Del.) 568; State *v.* Marshall, 36 Mo. 400; Fries *v.* Brugler, 12 N. J. L. 79; Southard *v.* Rexford, 6 Cow. (N. Y.) 254.

[5] 1 Burr Trial, 245.

essential link in the chain of testimony, which would be sufficient to convict him of any crime, he is not bound to answer it so as to furnish matter for that conviction. In such case, the witness must himself judge what his answer will be; and if he say on his oath that he cannot answer without accusing himself, he will not be compelled to answer." [1] Some of the constitutional provisions extending this immunity to witnesses are construed to apply only in cases where the person himself is prosecuted, and not merely where he is called upon to testify in a criminal proceeding against another. This construction has been placed upon the provision of the fifth amendment to the constitution of the United States, that "no person shall be compelled in any criminal action to be a witness against himself." [2]

§ 287. **Against Questions which tend to Degrade.** — The rule is that a witness is not bound to answer a question the answer to which will subject him to disgrace, unless the evidence is material to the issue on trial,[3] or unless it tends to impeach his credibility, under principles hereafter stated.[4] In England the rule is said to be that the asking of questions which tend to degrade the witness is regulated by the discretion of the trial court in each particular case.[5] It has been said by Mr. Justice Cooley: "When discreditable facts are aside from the issue, a witness

[1] This rule was declared by the Supreme Court of Missouri in 1829 to be the true rule of law. Ward *v.* State, 2 Mo. 120, 123. See also South Bend *v.* Hardy, 98 Ind. 577, 583.

[2] United States *v.* McCarthy, 18 Fed. Rep. 87; *s. c.* 21 Blatchf. (U. S.) 469. Under a statute of Maryland (Md. Acts of 1882, chap. 112), providing that, in case of the illegal sale of liquor by any company or corporation, "each or any member of such company, corporation, or association, shall be liable, and shall suffer imprisonment as prescribed by this act," — it is held that a member of an incorporated *club* cannot be compelled to testify to facts tending to prove the guilt of the club, in a prosecution against it by indictment for the illegal sale of intoxicating liquors. Chesapeake Club *v.* State, 63 Md. 446.

[3] Lohman *v.* People, 1 Comst. (N. Y.) 379; Great Western Turnpike Co. *v.* Loomis, 32 N. Y. 127; State *v.* Staples, 47 N. H. 113. The court may, in its *discretion*, permit disparaging questions to be asked, but it is not error to exclude them even when they are irrelevant. Conway *v.* Clinton, Utah T. 215, 220.

[4] *Post*, ch. XVII, Art. III.

[5] Rex *v.* Pitcher, 1 Carr. & P. 85.

may sometimes refuse to impair his evidence by a disclosure; but when they are relevant, it is no excuse for his refusal to testify concerning them that they may exhibit him in a light that is not creditable. His dishonesty or fraud, when not criminal, may as properly be proved by him as by any other person."[1] "If the answer," says Mr. Commissioner Black, "would tend merely to degrade the character of the witness, and if it be relevant and material to the issue, whether it will go to his credibility or not, he may not decline to answer, and the party cannot object. If, however, the answer to a question on cross-examination would be collateral and irrelevant, and would merely disgrace the witness, but would not affect his credibility, the witness may decline to answer; the court should in all cases sustain any objection made by counsel, and the court may, without objection made, interpose to protect the witness from the impertinence.[2] If the cross-examination tends merely to disgrace the witness, but relates to a collateral and independent fact, and goes clearly to the credibility of the witness, whether in such case he has the privilege to decline or not, the matter so far rests in the discretion of the trial court that, in the absence of a claim of privilege, if the question relate to a matter of recent date and would materially assist the jury or court in forming an opinion as to his credibility, the court will usually require an answer, over the objection of counsel, but may sustain an objection. When the answer would tend to criminate the witness, but would be collateral and irrelevant to the issue, and yet would affect his credibility, if he do not claim his privilege, no distinction, so far as the discretion of the court and the right of the party to call for its exercise by an objection are concerned, can be perceived between such a case and one differing from it only in that the answer would merely disgrace the witness. In short, where the question relates to a particular act which is collateral and irrelevant to the issue, it is proper for the party to object, and it is within the sound discretion of the court, where the witness does not exercise a privilege to decline, to permit an answer, if, by affecting the

[1] Jennings *v.* Prentice, 39 Mich. 421. [2] Citing 1 Greenl. Ev., § 458.

credibility of the witness, it will subserve justice, or to sustain the objection if such purpose will not be promoted by the answer; and if the answer would not affect the credibility of the witness, the court should sustain the objection, and has no discretion to admit the evidence." [1] This immunity is not founded in *constitutions*, but rests on principles of the common law; therefore it is competent for the legislature to pass an act under which a witness may be compelled to answer questions which will involve him in shame and reproach.[2] Where the witness claims his privilege on this ground, he should not be obliged to disclose *why* he declines to answer the question; because so to do would of itself defeat his claim of privilege.[3]

§ 288. Against Questions Exposing to Penalty or Forfeiture. — By the Code of Civil Procedure of New York,[4] a witness shall not be required to give an answer which will tend to

[1] South Bend *v.* Hardie, 98 Ind. 577, 583, 584. For cases illustrating the rule, see Great Western Turnpike Co. *v.* Loomis, 32 N. Y. 127; Shepherd *v.* Parker, 36 N. Y. 517; Vaughn *v.* Paine, 3 N. J. L. 728; Sodusky *v.* McGee, 5 J. J. Marsh. (Ky.) 621; Campbell *v.* State, 23 Ala. 44; United States *v.* Dickinson, 2 McLean (U. S.), 325; People *v.* Heneck, 13 Johns. (N. Y.) 82; Grannis *v.* Brandon, 5 Day (Conn.), 260; State *v.* Bailey, 2 N. J. L. 415; United States *v.* Craig, 4 Wash. C. C. (U. S.) 729; Galbreath *v.* Eichelberger, 3 Yeates (Pa.), 515.

[2] Kellar *v.* Roberts, Bright. (Pa.) 109. A witness cannot be compelled to testify as to his *opinions* on matters of *religious faith*. Dedric *v.* Hopson, 62 Ia. 562; 1 Greenl. Ev., § 370; Com. *v.* Smith, 2 Gray (Mass.), 516; Odell *v.* Coppee, 5 Heisk. (Tenn.) 88; Arnd *v.* Amling, 53 Md. 192; The Queen's Case, 2 Brod. & Bing. 284. And although he may have testified as to his belief in God, he does not thereby *waive* his right to refuse to testify as to his belief in a future life. Dedric *v.* Hopson, *supra*. Where there is a statute providing that no witness who shall give evidence in a prosecution touching any *unlawful gaming*, "shall be ever proceeded against for any offense of unlawful gaming committed by him at the time and place indicated in such prosecution," — a witness cannot refuse to answer questions touching the unlawful gaming, on the ground that his testimony "might tend to disgrace him." Kendrick *v.* Com., 78 Va. 490. Against objection, the court permitted a witness to be asked if he had ever been confined in jail; and then instructed him that he need not answer, and he did not answer. It was held that this ruling presented no prejudicial error. Smith *v.* State, 64 Md. 25; *s. c.* 54 Am. Rep. 752.

[3] Merluzzi *v.* Gleeson, 59 Md. 214.

[4] § 837.

expose him to a penalty or forfeiture.[1] An action brought against a party to recover a debt due by a manufacturing corporation, of which the defendant was a *trustee* or *director*, seeking to make him liable on the ground that he failed to make the annual report required of him by the statute, is not one for a penalty within the meaning of this statutory privilege.[2] Aside from statutory provisions the rule is that the constitutional immunity does not extend to the mere protection of property, but to immunity from criminal prosecutions.[3] Therefore, a liability to a *civil action* or to a *pecuniary loss* is no ground of privilege.[4]

§ 289. Against Questions forming Links in a Chain of criminating Evidence. — The better opinion is that it is not necessary, in order to bring the witness within the privilege, that the answer to the question might directly criminate him, but that it is sufficient if the court can see that it would probably form a link in a chain of criminating evidence against him.[5]

[1] See Merchants' Bank *v.* Bliss, 35 N. Y. 412; Veeder *v.* Baker, 83 N. Y. 156; Stokes *v.* Stickney, 96 N. Y. 326; Re Dickinson, 58 How. Pr. (N. Y.) 260. And he is not required to verify a pleading where he would be privileged from testifying as a witness on this ground. Gadsden *v.* Woodward (N. Y. Ct. of App.), 8 N. East. Rep. 653.

[2] Gadsden *v.* Woodward, *supra*. Compare Wiles *v.* Suydam, 64 N. Y. 173; Veeder *v.* Baker, 83 N. Y. 156, 160.

[3] Devoll *v.* Brownell, 5 Pick. (Mass.) 448; Keith *v.* Woombell, 8 *Id.* 217.

[4] Bull *v.* Loveland, 10 Pick. (Mass.) 9; Baird *v.* Cochran, 4 Serg. & R. (Pa.) 397; Ward *v.* Shaw, 15 Vt. 115; Harper *v.* Burrow, 6 Ired. L. (N. C.) 30; Matter of Kip, 1 Paige (N. Y.), 601; Lowney *v.* Perham, 20 Me. 235; Hays *v.* Richardson, 1 Gill & J. (Md.) 366; Com. *v.* Thurston, 7 J. J. Marsh. (Ky.) 62; Tancey *v.* Kemp, 4 Harr. & J. (Md.) 348; Naylor *v.* Semmes, 4 Gill & J. (Md.) 273; Copp *v.* Upham, 3 N. H. 159; Alexander *v.* Knox, 7 Ala. 503; Judge of Probate *v.* Green, 1 How. (Miss.) 146; Zollicoffer *v.* Turney, 6 Yerg. (Tenn.) 297; Gorham *v.* Carroll, 3 Litt. (Ky.) 221; Black *v.* Coorgh, *Id.* 226. In an action under a statute relating to copyright (Rev. Stat. U. S., § 4965) to recover penalties and for a forfeiture of certain photographic plates, the defendant cannot be compelled, under a subpœna *duces tecum*, to produce his books of account and plates to be used in evidence for the plaintiff. Johnson *v.* Donaldson, 18 Blatchf. (U. S.) 287.

[5] 1 Burr Trial, 245; Printz *v.* Cheeney, 11 Iowa, 469; Lea *v.* Henderson, 1 Coldw. (Tenn.) 146.

§ 290. **Disclosing the names of Accomplices.** — But a witness is not protected from giving evidence, from the mere fact that the evidence which he will be obliged to give in answer to the questions propounded, may disclose the names of *other witnesses* whose testimony may convict him of a pending criminal charge, or may furnish the means of procuring other evidence to convict him of such charge.[1] Thus, a person may be compelled to disclose to a grand jury the names of persons whom he has seen betting at an unlawful game, although by so doing he may disclose the names of witnesses who may be called to testify that he himself also bet at the same game.[2] But it has been held that a statute[3] which provides that any person concerned in a trespass may be compelled to testify against any other person therein concerned, is in direct contravention of the provision in the constitution of that State that "no person in any criminal prosecution, shall be compelled to testify against himself."[4]

§ 291. [Continued.] Application of this Rule. — A grand jury caused a subpœna to be issued for one Ward to appear before them and testify generally, without specifying the particular matter or cause about which he was to testify. Ward appeared and was sworn to give evidence before the grand jury. He went before the grand jury to testify. The first question asked by the foreman of the grand jury was this: "Do you know of any person or persons having bet at a faro table in this county within the last twelve months?" To which the witness answered, "I do." The foreman then desired the witness to tell what person or persons had so bet, other than himself, and not naming himself. The witness declined to answer, saying that he could not answer without implicating himself. He was then directed by the court to answer, but not to name himself as a better. This he refused to do, alleging that to answer would implicate himself; whereupon the court committed him to prison until he should consent to give the evidence

[1] LaFontaine *v.* Southern Underwriters, 83 N. C. 132, 141; Ward *v.* State, 2 Mo. 120; Kiernan *v.* Abbott, 1 Hun (N. Y.), 109; *s. c.* 3 Thomp. & C. (N. Y.) 755.

[2] Ward *v.* State, *supra*, where the question was reasoned at length by McGirk, J.; followed and its reasoning approved in La Fontaine *v.* Southern Underwriters, 83 N. C. 132, 141.

[3] 2 Rev. Stat. Ind. 1876, chap. 463, § 14.

[4] State *v.* Enoch, 69 Ind. 314.

required, and until the further order of the court. He sued out a writ of error; and on an application to the Supreme Court for a *supersedeas*, this relief was refused. The court, applying the foregoing rule, held that the answer to the question would not necessarily criminate the witness, and that the witness could not refuse to answer a question on the ground that it might excite the vengeance of other malefactors against him.[1] - - - - In an action to enjoin the defendant from surreptitiously obtaining and communicating to another certain foreign news dispatches, sent by the Atlantic cable exclusively to the plaintiff the defendant, after testifying that the foreign news which he so furnished was obtained by him several times each day directly by cable from London, and that the dispatches came to a banking house in New York, from whom he received them, was asked, "What banking house was that?" It was held that this question was proper and pertinent, since the plaintiff had a right to contradict the statement and to test its accuracy in any legal manner; and accordingly that the defendant was in contempt for refusing to answer it.[2]

§ 292. Compelling Witness to Exhibit his Body. — The privilege of not giving self-criminating evidence extends so far that a witness on trial for a crime will not be compelled to exhibit to the jury a portion of his body, where this might disclose a fact prejudicial to him. Accordingly, on the trial of an indictment for murder where it became material to disclose the extent of an amputation of one of the prisoner's legs, it was held error to compel him to exhibit his leg to the jury.[3] Contrary to this, it was held on a criminal trial, where the identity of the accused was in question, that no error was committed in compelling him to exhibit his arm to the jury, which disclosed certain tattoo marks tending to identify him as the person who committed the crime.[4]

§ 293. Effect of Statutes Preventing Answer from being used against Witness. — As a general rule, a witness will not be protected in refusing to give testimony on the ground that the testimony, if given, would furnish evidence on

[1] Ward *v.* State, 2 Mo. 120.

[2] Kiernan *v.* Abbott, 3 Thomp. & C. (N. Y.) 755; *s. c.* 1 Hun (N. Y.), 109.

[3] Blackwell *v.* State, 67 Ga. 76; *s. c.* 44 Am. Rep. 717

[4] State *v.* Ah Chuey, 14 Nev. 79 (Leonard, J., dissenting). See *post*, chap. XXVII.

which he might be convicted in a criminal prosecution, where there is a statute which expressly provides that the testimony so given shall not be used as evidence against the witness in a criminal proceeding; [1] but there are holdings to the contrary.[2] But in order to have this effect, the protection of the statute must be complete. A statute providing that testimony which a witness may give upon an investigation shall not be used against him, is ineffectual to deprive the witness of his constitutional privilege of exemption from being compelled to accuse himself, or to furnish evidence against himself, unless it is so broad that it secures him from future liability and from exposure to prejudice, in any criminal proceeding against him, as fully and extensively as would be secured by availing himself of the constitutional privilege.[3] So, if a prosecution for the offense is barred by the *statute of limitations*, the witness must answer.[4]

§ 294. [Continued.] Illustration under Massachusetts Statute.— A statute of Massachusetts enacted as follows: "No person who is called as a witness before the Joint Special Committee on the State Police shall be excused from answering any question, or from the pro-

[1] La Fontaine *v.* Southern Underwriters, 83 N. C. 132; United States *v.* McCarthy, 18 Fed. Rep. 87; 21 Blatchf. (U. S.) 469; Kendrick *v.* Com., 78 Va. 490; Kain *v.* State, 16 Tex. App 282; State *v.* Warner, 13 Lea (Tenn.), 52; Wilkins *v.* Malone, 14 Ind. 153. Compare Temple *v.* Com., 75 Va. 892; Kneeland *v.* State, 62 Ga. 395.

[2] State *v.* Nowell, 58 N. H. 314. Thus, the statutes of Tennessee, existing from an early day, give the grand juries in cases of gambling, inquisitorial powers. Those statutes also contain a provision which forbids the indictment or prosecution of any witness for any offense as to which he has testified before the grand jury. Code of Tenn., § 5089. In view of this provision, it is held that, where a person is summoned before the grand jury, and is asked if he knows of any persons playing cards for a wager within the last six months, within the county, and no objection is taken to the form of the question, and he refuses to answer, upon the ground that if he make any disclosures upon the subject, he will be obliged, in criminating others also to criminate himself, — he may be required by the court to answer, upon pain of imprisonment for contempt. Hirsch *v.* State, 8 Baxt. (Tenn.) 89.

[3] Emery's Case, 107 Mass. 172.

[4] Floyd *v.* State, 7 Tex. 215; Weldon *v.* Burch, 12 Ill. 374; Moloney *v.* Dows, 2 Hilt. (N. Y.) 247; Wolfe *v.* Goulard, 15 Abb. Pr. (N. Y.) 336.

duction of any paper relating to any corrupt practice or improper conduct of the State police, forming the subject of inquiry by such committee, on the ground that the answer to such a question, or the production of such paper, may tend to criminate himself, or to disgrace him, or otherwise render him infamous, or on the ground of privilege; but the testimony of any witness examined before said committee, upon the subject aforesaid, or any statement made, or paper produced by him upon such examination, shall not be used as evidence against such witness, in any civil or criminal proceeding in any court of justice-*provided however*, that no official paper or record produced by such witness on such examination shall be held or taken to be included within the privilege of said evidence, so to protect such witness in any civil or criminal proceeding as aforesaid, and that nothing in this act shall be construed to exempt any witness from prosecution and punishment for perjury committed by him in testifying as aforesaid."[1] With this statute in force, a person was summoned to appear as a witness before a joint special committee of the Senate and House of Representatives of the General Court of Massachusetts appointed "to inquire if the State police is guilty of bribery and corruption," and, in obedience to the summons, appeared before the commiteee at the State house when interrogatories were propounded to him which he declined to answer. These facts being reported to the Senate, that body ordered the sergeant-at-arms to arrest the witness and bring him before the Senate to answer for contempt in refusing to answer the interrogatories. The sergeant-at-arms arrested him and brought him to the bar of the Senate, whereupon the Senate passed the following order: "That the President propound to Henry Emery, now arraigned at the bar of the Senate, the following questions: 'Are you ready and willing to answer before the joint special committee appointed by this Senate and House of Representatives of Massachusetts to 'inquire if the State police is guilty of bribery and corruption,' the following questions namely: First, whether, since the appointment of the State constabulary force, you have ever been prosecuted for the sale or keeping for sale of intoxicating liquors? Second, have you ever paid any money to any State constable and do you know of any corrupt practices or improper conduct of the State police? If so, state fully what sums and to whom you have thus paid money, and also what you know of such corrupt practices and improper conduct.'" The President of the Senate then and there propounded the questions ordered by the Senate to the

[1] Mass. Stat. of 1871, chap. 91.

petitioner, and he answered in writing as follows: "Intending no disrespect to the honorable Senate, I answer, under the advice of counsel, that I am ready and willing to answer the first question; but I decline to answer the second question, upon the ground, first, that the answer thereto will accuse me of an indictable offense; second, that the answer thereto will furnish evidence against me by which I can be convicted of such an offense." The Senate thereupon passed an order that, whereas the witness, "in contempt of the authority of this Senate, did give an unsatisfactory answer to the second question," he "be committed to the custody of the sergeant-at-arms, to be by him confined in the jail of the county of Suffolk for the space of twenty-five days, or until the further order of the Senate, unless he shall sooner signify his willingness to appear and purge himself of his contempt, and testify before the joint special committee and this Senate, and satisfactorily answer the questions propounded to him by the joint special committee and this Senate, and the President of the Senate is hereby authorized to issue his warrant to commit said Henry Emery to the custody of the sergeant-at-arms, to be imprisoned in the common jail of the county of Suffolk;" and "whenever the said Henry Emery, under the foregoing order, shall inform the sergeant-at-arms that he is willing to testify before the said joint special committee and this Senate, it shall be the duty of the sergeant-at-arms immediately to take the said Emery before the Senate and hold him subject to its order." In conformity with this order, the President of the Senate issued his warrant for the arrest of the witness; whereupon the witness sued out a writ of *habeas corpus* in the Supreme Judicial Court. The sergeant-at-arms returned the warrant of commitment as his justification for holding the petitioner restrained of his liberty. The Supreme Judicial Court, after able argument and full consideration, announced its decision which bore "the approval and unanimous concurrence of all the members of the court," discharging the prisoner from custody. The court held that the statute did not furnish the prisoner with an exemption from criminal prosecution in case he should answer the question propounded to him, as broad and effectual as the constitutional provision that "no one shall be * * * compelled to accuse or furnish evidence against himself," furnished him in the event of his refusal to answer it. In giving the opinion of the court upon this point, Wells, J., after discussing at length the constitutional provision, said: "It follows from the considerations already named that, so far as this statute requires a witness who may be called, to answer questions and

produce papers which may tend to criminate himself, and attempts to take from him the constitutional privilege in respect thereto, it must be entirely ineffectual for that purpose, unless it also relieves him from liabilities, for protection against which the privilege is secured to him by the constitution. The statute does undertake to secure him against certain of those liabilities, to wit, the use of any disclosures he may make as admissions of direct evidence against him in any civil or criminal proceeding. In the case already referred to,[1] it was held that such a provision by statute removed all the liability against which the witness was secured by the constitutional exemption, and that, being thus otherwise furnished with all the protection to which the constitution entitled him, he had no further occasion and therefore no right to set up the claim of privilege as a protection against that to which he was not exposed. But this decision was made upon the ground that the terms of the provision relied on in the constitution of New York protected the witness only from being compelled 'to be a witness against himself,' and did not protect him from the indirect and incidental consequences of a disclosure which he might be called upon to make. The terms of the provision in the constitution of Massachusetts require a much broader interpretation, as has already been indicated; and no one can be required to forego an appeal to its protection, unless first secured from future liability and exposure to be prejudiced in any criminal proceeding against him, as fully and extensively as he would be secured by availing himself of the privilege accorded by the constitution. Under the interpretation already given, this cannot be accomplished so long as he remains liable to prosecution criminally for any matters or causes in respect of which he shall be examined, or to which his testimony shall relate. It is not done, in direct terms, by the statute in question; it is not contended that the statute is capable of an interpretation which will give it that effect; and it is clear that it can not and was not intended so to operate. Failing, then, to furnish to the persons to be examined an exemption equivalent to that contained in the constitution, or to remove the whole liability against which its privileges were intended to protect them, it fails to deprive them of the right to appeal to the privilege therein secured to them. The result is, that, in appealing to his privilege as an exemption from being exposed to answering inquiries put to him, the petitioner was in the exercise of his constitutional right; and his refusal to answer upon that

[1] People *v.* Kelley, 24 N. Y. 74.

ground was not and could not be considered as disorderly conduct, or a contempt of the authority of the body before which he was called to answer. There being no legal grounds to authorize the commitment upon which he is held, he must be discharged therefrom. He is discharged accordingly." [1]

§ 295. **Effect of Promise not to Prosecute.** — The privilege which a witness may have to refrain from answering a particular question on the ground of self-crimination, is not removed by the promise of the State's attorney not to prefer an indictment against him.[2]

§ 296. **Privileged Communications between Attorney and Client.** — Professional communications between attorney and client are regarded as confidential, and are protected on grounds of public policy.[3] But this is a privilege of the client; it may be waived by him; if the client sees fit to be a witness, he makes himself liable to full cross-examination in respect of communications made by himself to his counsel.[4] Moreover, the rule extends merely to communications which the attorney and client have themselves seen fit to entrust only to each other; if they make the communication in the presence of a *third person* the privilege is waived, and he may disclose it on the witness stand.[5] Obviously, the rule does not extend to statements made by the client *to other persons*, or to statements made by other persons to the client, in the presence of the attorney.[6] It is said

[1] Emery's Case, 107 Mass. 172, 185-186.

[2] Muller *v.* State, 11 Lea (Tenn.), 18.

[3] Mobile &c. R. Co. *v.* Yeates, 67 Ala. 164; Jackson *v.* French, 3 Wend. (N. Y.) 337.

[4] Woburn *v.* Henshaw, 101 Mass. 193; Landsberger *v.* Gorham, 5 Cal. 450.

[5] Jackson *v.* French, 3 Wend. (N. Y.) 337; Hoy *v.* Morris, 13 Gray (Mass.), 519; Hatton *v.* Robinson, 14 Pick. (Mass.) 416; People *v.* Barker, 60 Mich. 277; *s. c.* 27 N. W. Rep. 539; Mobile &c. R. Co. *v.* Yeates, 67 Ala. 164. See also Martin *v.* Anderson, 21 Ga. 301; Brown *v.* Payson, 6 N. H. 443. See also Doe *v.* Jauncey, 8 Carr. & P. 99; Barnes *v.* Harris, 7 Cush. (Mass.) 576.

[6] Gallagher *v.* Williamson, 23 Cal. 331, 334. See also Coveney *v.* Tannehill, 1 Hill (N. Y.), 33; Rochester City Bank *v.* Suydam, 5 How. Pr. 254; Bramwell *v.* Lucas, 2 Barn. & Cres. 745.

in Connecticut, by Sanford, J.: "No reason of necessity requires that any witness (*save an interpreter*) should ever be present at a consultation between a client and his attorney; and if the client procures or submits to the presence of such a witness, he voluntarily confides his secrets, not to his attorney only, but also to the witness, in whose custody the law cannot protect them when the interests of justice require that they should be disclosed."[1] In like manner it is said by Merrick, J., in a Massachusetts case: "The privilege of exemption from testifying to facts actually known is extended only to an attorney or legal adviser who derives his knowledge from a communication by the client who applies and makes disclosures to him in his professional character, and to those other persons whose intervention is strictly necessary to enable the parties to communicate with each other."[2] The rule is therefore carried to the extent of holding that a statement to an attorney in the presence and at the instance of his client, by a third party, is not privileged.[3] Nor does the privilege extend to any facts within the attorney's knowledge or to any information acquired by him in any other way than through the channel of a confidential communication from his client.[4] *Papers* intrusted to an attorney in professional confidence are not necessarily to be deemed confidential communications; and if he asserts that he is ignorant of their contents, he may be ordered to produce them for the inspection of the court, and if he refuse to do so, he will be guilty of a contempt.[5]

§ 297. [CONTINUED.] HISTORY OF THIS PRIVILEGE. — In a very well considered case before Daly, F. J., in the New York Court of Common Pleas, the following sketch was given of the history of the privilege of an attorney, in respect of *producing documents* belonging to his client,

[1] Goddard *v.* Gardner, 28 Conn. 172, 175. See also Gainsford *v.* Grammar, 2 Campb. 9; 2 Stark. Ev., § 239; 1 Phil. Ev. 162.

[2] Hoy *v.* Morris, 13 Gray (Mass.), 519, 521.

[3] Perkins *v.* Guy, 55 Miss. 153, 167. See also Ripon *v.* Davies, 2 Nev. & M. 310; Shore *v.* Bedford, 5 Man. & G. 271; Griffith *v.* Davies, 5 Barn. & Ad. 502.

[4] Hunter *v.* Watson, 12 Cal. 363, 377.

[5] Mitchell's Case, 12 Abb. Pr. (N. Y.) 249.

or making disclosures of matters communicated by his client to him in professional confidence: "Before the important change in the law requiring a party to an action to be examined as a witness at the instance of the adverse party, the general principle was recognized that no one in a court of law could be compelled to give evidence against himself.[1] This principle had its most extensive application where the question put to the witness would or might have a tendency to expose him to a criminal charge or penal liability, or to any kind of punishment; and so far as protecting a party from an inquiry that may have such a tendency, this broad principle of the common law remains untouched. In such a case, as the witness knows what the court does not know, and which he could not communicate without becoming his own accuser, he is permitted to judge for himself what the effect of his answering the inquiry would be; the power of the court being limited simply to determining whether the question is one that might admit of an answer having such a tendency.[2] The shelter of the principle extends also to everything confidentially communicated by the party to his attorney; and it is for the attorney, as it would be for the party, to judge what would be the effect of the inquiry. Thus in *Rex* v. *Dixon*,[3] it was held that an attorney was justified in disobeying a subpœna *duces tecum*, directing him to bring before a grand jury certain papers which had been placed in his hands confidentially by his client, where the object in requiring him to do so was to found a prosecution against his client for forgery." [4]

§ 298. [Continued.] Rule Limited where Question of Crime not Involved. — "But the principle that a party could not be compelled to give evidence against himself, was far more limited in its application when no question of crime was involved, both in relation to the obligations of the witness and the power of the court in determining whether he should be absolved from answering or not. The principle of exemption was applied, in its broadest extent, to parties to actions at law, who could not be compelled to give evidence; and in respect to the production of documentary testimony, as a party to an action was not bound to give evidence, he could not be required to

[1] Citing Cook *v.* Corn, 1 Tenn. (Overt.) 349. See also Owings *v.* Low, 5 Gill & J. (Md.) 134; Mauran *v.* Lamb, 7 Cow. (N. Y.) 174. So bail were not compellable to testify against their principal. Shotwell *v.* Maurice, 1 N. J. L. (Coxe), 224.

[2] Citing 1 Burr Trial, 245.

[3] 3 Burr. 1687.

[4] Mitchell's Case, 12 Abb. Pr. (N. Y.) 249, 257.

produce papers to be used against him as evidence; and if a paper had been deposited by him with his attorney, the attorney's possession was deemed the possession of the party, and the attorney could not be required to produce it, nor even any other person having the temporary possession of it in right of the party.[1] If a document was in the possession of a party to an action at law, or in the possession of his attorney, all that could be done was to give him notice to produce it; and if he failed to do so, the other party was at liberty to give secondary evidence of its contents; or if the production of the document itself was essential, and he would not produce it, the court would, if he was a defendant, strike out his answer, or, if a plaintiff, non-suit him[2] — a practice introduced into courts of law from the court of chancery. But the attorney might be called and was bound to answer whether or not he had the paper in his possession, that the other party might be enabled to give secondary evidence of its contents, which he could not do until he had first shown that he was unable to produce it; and though the attorney could not be required to disclose the contents of the paper, his examination might be carried at least so far as to show, with reasonable certainty, that the document introduced was the one respecting which the other party proposed to give evidence.[3] The protection of this rule was also applied, to a certain extent, in favor of witnesses called on behalf of third persons. Neither they nor their attorneys, if called as witnesses, could be required to produce documents to be used in evidence, if the production of the paper might materially affect the rights or prejudice the interests of the persons to whom it belonged, which was a question which the court would determine upon the inspection of the document." [4]

§ 299. [CONTINUED.] CONFIDENTIAL COMMUNICATIONS. — "The rule was also well established, that neither a party nor his legal adviser

[1] Citing Bank of Utica *v.* Hillard, 5 Cow. (N. Y.) 419.

[2] Citing 3 Rev. Stat. N. Y. (5th ed.) 293, 294; 4 Cow. & Hill's notes (3rd ed.) 648.

[3] Citing Bevan *v.* Waters, 1 Mood. & M. 235; Eicke *v.* Nokes, *Id.* 303; Rhoades *v.* Selin, 4 Wash. C. C. (U. S.) 715, 718; Coveney *v.* Tannahill, 1 Hill (N. Y.), 33; Jackson *v.* McVey, 18 Johns. (N. Y.) 330; Brandt *v.* Klein, 17 *Id.* 335; 1 Greenl. Ev., §§ 241, 245; Cow. & Hill's notes (3rd ed.), Part 2, note 152.

[4] Mitchell's Case, 12 Abb. Pr. (N. Y.) 249, 259. Citing Copeland *v.* Watts, 1 Stark. 95; Bull *v.* Loveland, 10 Pick. (Mass.) 9; Amey *v.* Long, 9 East, 473; Bateman *v.* Phillips, 4 Taunt. 157; Field *v.* Beaumont, 1 Swanst. 209; Cowan & Hill's Notes (3rd ed.), Part 2, note 316; 1 Greenl. Ev., § 246; Dunlap Pr. 607.

would be compelled in a court of justice to disclose the confidential communication which had passed between them in respect of the matter upon which the party had sought professional advice. The principle, which appears to have been recognized as far back as the days of Elizabeth,[1] was not confined to courts of law but was equally acted upon by the court of chancery, where the aid of the court was sought to compel a discovery of evidence. On an application for a discovery, a court of equity would neither compel nor permit a solicitor to disclose what his client had communicated to him in professional confidence, nor compel the production of letters which had passed between them, or through intermediate agents on the business, containing or asking legal advice or opinions, nor cases prepared at the instance of the client for the opinion of counsel.[2] Both courts of law and of equity recognized the necessity of a free and unrestricted intercourse between the client and his professional adviser, which would not exist if what was imparted to the former in professional confidence could be afterwards used against him. Everything of this nature was regarded, therefore, as inviolate, and neither the client to a certain extent, nor his professional adviser, would be required, either at law or in equity, to disclose it. As this was a rule, however, susceptible of great abuse, it was always kept within just and rational limits. As it has, in the language of Chief Justice Shaw,[3] 'a tendency to prevent the full disclosure of the truth, it is to be construed strictly;' to which may be added the very pertinent observation of Lord Langdale, M. R.,[4] upon what he deemed a too extensive application of it: 'It seems strange to say that justice can be promoted by concealing the truth, by suppressing the knowledge of any fact or any statement of the parties which bears upon the question to be decided. It is often easier to exclude evidence than to determine what weight ought justly to be attributed to it when received. A bad cause may suffer, and the evasion of justice may be prevented by compelling a party to disclose a material fact; but the object is not to save the trouble or lessen the responsibilities of the judge to protect a bad cause, or to facilitate the evasion of justice,

[1] Citing Cary, 127, 88, 89.

[2] Citing Lord Walsingham *v.* Goodricke, 3 Hare, 122; Mayor of Dartmouth *v.* Holdsworth, 10 Sim. 476; Bolton *v.* Corporation of Liverpool, 3 *Id.* 467; Hughes *v.* Biddulph, 4 Russ. 190; Nias *v.* Northern & Eastern R. Co., 2 Keen, 76; Bunbury *v.* Bunbury, 2 Beavan, 173; Greenough *v.* Gaskell, 1 Myl. & K. 98; Holmes *v.* Baddeley, 1 Phil. Ch. 476; Walker *v.* Wildman, 6 Madd. 37, 48; Bank of Utica *v.* Merserau, 3 Barb. Ch. (N. Y.) 528; March *v.* Ludlum, 3 Sandf. Ch. (N Y.) 35.

[3] In Foster *v.* Hall, 12 Pick. 89.

[4] In Nias *v.* Railway Co., *supra.*

but, if possible, to do justice, and for that purpose to get at the whole truth; and I confess I have yet to learn how the concealment of the truth or hiding from the court that which is known to any of the parties, and relates to the matter in question, can in any way promote justice.'" [1]

§ 300. [CONTINUED.] WITNESS NOT EXCLUSIVE JUDGE OF PRIVILEGE.— "Whenever, in the practical application of these rules, the question of privilege arose, it was not * * * the right of the witness to judge, except where the matter might criminate him, whether the matter inquired of was privileged or not. That was the province of the court. If the production of a document was called for, and the witness declined to produce it, upon the ground that the reading of it in evidence would be prejudicial to his interests, or to the interests of the party for whom the witness acted as attorney, the witness was required to submit the document to the inspection of the court, and if the judge, after perusing it, differed from the witness, he would direct it to be read; [2] or if a witness swore that a question put to him could not be answered without a disclosure of secrets communicated to him by his client, it was for the court to determine, from the nature of the inquiry, whether the principle of protection extended to it or not; [3] and if the court decided that it did not, the witness, should he refuse to answer, would be guilty of a contempt, nor would the court even hear counsel upon the plea of the witness' objection.[4]

§ 301. [CONTINUED.] THESE PRINCIPLES HOW FAR CHANGED BY STATUTES COMPELLING PARTIES TO TESTIFY. — "Such was the state of the law before the enactment of the provision compelling parties to actions to be examined as witnesses at the instance of an adverse party. That provision has brought about a very material change. * * * The provision in question declares that a 'party to an action may be examined as a witness, at the instance of the adverse party, and for that purpose may be compelled to testify in the same man-

[1] Mitchell's Case, 12 Abb. Pr. 249, 259, 260.

[2] Copeland *v.* Watts, 1 Stark. 95; Bradshaw *v.* Bradshaw, 1 Russ. & Myl. 358; Walsh *v.* Trevanion, 15 Sim. 578.

[3] Citing Morgan *v.* Shaw, 4 Madd. 57; Parkhurst *v.* Lawton, 3 *Id.* 121; Beer *v.* Ward, Jacob, 77; Com. *v.* Braynard, Thach. Cr. Cas. (Mass.) 146.

[4] Mitchell's Case, 12 Abb. Pr. (N. Y.) 249, 260 (citing to the last proposition Doe *v.* Earl of Egremont, 2 Moody & Rob. 386).

ner and subject to the same rules of examination as any other witness.' This sweeps away the rule of the common law, that parties to actions could not be compelled to give evidence against themselves; and every privilege, either of the party or of his attorney, that was founded upon it, is gone. I suppose that the protection that was extended to the confidential communications between attorney and client remains unaffected, as the reason upon which that rule was founded is as applicable now as it was before; but, with this exception, a party to an action or his attorney is no longer privileged to withhold testimony. A party to an action may now be compelled by a subpœna *duces tecum*, to produce papers and documents upon the trial, to be read in evidence.[1] The contrary was held by Justice Rosevelt in a previous case;[2] but the construction he put upon the statute was repudiated, after a careful examination, by Justice Wells; and I entertain no doubt but that the conclusion arrived at by the latter was the correct one. If a party, then, may be compelled to produce documents, the attorney, whose privilege can be no greater than his client, must be equally bound. *In Doe dem. Courtail* v. *Thomas*,[3] which was an action at law, an attorney was called upon to produce a lease, who declared that he had received it from his client in the character of his attorney, and that he held it in that character; but, it appearing that the client had been ordered, by the court of chancery, to deposit the lease for the inspection of the plaintiff, in a suit brought by the plaintiff against the client in the court of chancery, the court ordered the attorney to produce the lease; and, when the case came up for review, Lord Tenterden held that the client might have been subpœnaed upon the trial and compelled to produce the lease, and that if he could be compelled to produce it, then the attorney, who stood in the same situation as his client, was equally bound to do so. If this were not so, all that a party would have to do, to evade the production of papers, would be to put them into the custody of his attorney. 'The production of written, as well as oral testimony,' said Lord Ellenborough,[4] 'is essential to the very existence and constitution of a court of common law, which receives and acts upon both descriptions of evidence, and could not possibly proceed with due effect without them;' holding that the writ of subpœna *duces tecum* was as essential and of as compulsory obligation as the ordinary writ by which

[1] Citing Bonesteel *v.* Lynde, 8 How. Pr. (N. Y.) 226.

[2] Trotter *v.* Latson, 7 *Id.* 261.

[3] 9 Barn. & Cress. 288.

[4] In Amey *v.* Long, 9 East, 47

a witness is commanded to appear and testify. The object sought in the examination of a witness is to obtain from him, not only the evidence which he may give orally, but the written evidence which may be in his possession or under his control. One is as much a part of what he is called upon to furnish, and in respect to which he may be examined, as the other. When the code, therefore, declares that a party to an action may be compelled to testify in the same manner and subject to the same rules of examination as other witnesses, it is obvious that the meaning is that whatever may be required of other witnesses may be required of him. If they must produce books and papers, so must he; and if he has placed them in the possession of his attorney, agent, or any other person, the one who has them in actual custody may be compelled to bring them before the court, to be used as evidence. In courts of equity, the principle of protection was never extended to all papers belonging to the client which he may have put into the hands of his solicitor. But the general rule was, that whatever the client was bound to produce for the benefit of a third person, his solicitor, if the document or paper was in his possession, was also bound to produce;[1] and if the solicitor was not a party to the suit, he might be compelled, by a subpœna *duces tecum* to produce it.[2] Indeed, the principle of protection, recognized in courts of equity, does not appear to have extended, so far as the adjudged cases show, beyond letters or other communications passing between a client and his solicitor or their intermediate agents, or papers or documents prepared by the solicitor at the client's request, and in certain cases to the title deeds of the client in the hands of his solicitor,[3] or to a general application upon a solicitor to produce his client's papers.[4] The general rule of courts of equity, that whenever the client may be called upon to produce papers, the attorney, if they are in his possession, may be required to produce them, is the proper rule, now that parties to communications are made witnesses. There may possibly be cases in which the deposit of a document with an attorney, for advice and counsel, may bring it within the rule of protection; though I can conceive of none, if the client would himself be bound, if he had it in his possession, to produce it as a witness." [5]

[1] Citing Furlong *v.* Howard, 2 Sch. & Lef. 115; Fenwick *v.* Reed, 1 Meriv. 114.

[2] Citing Burk *v.* Lewis, 6 Madd. 29.

[3] Citing Stratford *v.* Hogan, 2 Ball & B. 164; McCann *v.* Beere, 1 Hogan, 129.

[4] Citing Wright *v.* Mayer, 6 Ves. 280.

[5] Mitchell's Case, 12 Abb. Pr. 249, 264.

§ 302. [CONTINUED.] ATTORNEY HAS NO GREATER PRIVILEGE THAN CLIENT HAS. — "The exemption of an attorney was never regarded as his personal privilege, but as existing purely for the protection of his client;[1] and, even though willing or desirous to do so, he would not be allowed, unless by his client's consent, to reveal anything entrusted to him in professional confidence.[2] He was, in this respect, in the language of Chief Baron Gilbert 'considered as one and the same person with his client;'[3] and if, by a change of the law, a party to an action has no longer any privilege, it follows as a matter of course, that his attorney would have none."[4]

§ **303. Trade Secrets Privileged.** — Although the rule does not extend to the protection of *property*,[5] yet in an action to restrain the use of the plaintiff's *trade-mark*, the plaintiff will not be compelled to disclose the ingredients of which his goods are made, merely because the defendant in his answer alleges that they contain injurious materials.[6]

§ **304. Refusing to Expose Defense.** — A person who has been indicted, and also made a defendant in a civil action in respect of the same matter, and who is brought out of jail on an order of court to testify as a witness in the civil case, is not privileged to refuse answering relevant questions which are put to him, on the ground that his answers thereto will expose his defense in the criminal case, and put him "in the hands of his enemies," — that is, in the hands of the complainant in the civil case and of the prosecuting attorney in the criminal case. He can only escape answering the questions, by putting himself upon his privilege, and claiming that the answers which he would be bound to give would furnish evidence on which he might be convicted of a crime. In so holding, the court said:

[1] Buller N. P. 284.

[2] Petrie's Case, cited, 4 T. R. 756.

[3] Gilbert Ev. 138.

[4] Mitchell's Case, 12 Abb. Pr. (N. Y.) 249, 262, opinion by Daly, F. J.

[5] *Ante*, § 288.

[6] Tetlow *v.* Savournin, 15 Phil. (Pa.) 170. Compare Burnett *v.* Phalon, 21 How. Pr. (N. Y.) 100, — where a similar question was allowed, but only on the ground that the plaintiff in his examination in chief had opened the question, and thus had made it relevant on cross-examination.

"It is true, that in the ordinary course of criminal proceedings, the defendant is enabled to conceal the grounds of his defense until the prosecution has made a *prima facie* case before the jury; but this is merely incident to the course of those proceedings, and not in any true sense a privilege. As a defendant in the criminal action, he can stand upon the presumption of his innocence, and is not bound to offer any defense until a case has been proved against him; but, as a party to a civil action, his privilege is just the same, whether he has been indicted or not; he can only refuse to answer when his answers would tend to criminate or degrade him, and he must himself invoke his privilege.[1] This is the plain rule of the statute, and there is no public policy superior to the rule. To conceal his defense until the day of trial, is, no doubt, a valuable privilege to the criminal; for it will often deprive the State of all opportunity of exposing its falsity; but it is difficult to see how it is to benefit an innocent defendant, who relies upon the truth for his vindication, unless it is assumed that the State will suborn false witnesses for the purpose of destroying him."[2] There is a statute in New Hampshire providing that a party testifying as a witness shall not be compelled to disclose his witnesses nor the manner of proving his case.[3] This does not excuse him from testifying as to all he knows upon the issue.[4]

§ **305. Testimony of the Judge as to Former Trials.** — On grounds of public policy, the judge of a court is excused from testifying as to what witnesses have testified to on former trials before him; but it has been held that he may *waive* the privilege and testify without furnishing just ground of exception.[5]

§ **306. Privilege must be claimed by Witness himself.** — The privilege in respect of self crimination or disgrace is *personal* to the *witness*, and cannot be claimed by the party whose

[1] Comp. Laws Nev., § 1455.

[2] Maxwell *v.* Rives, 11 Nev. 213, 220.

[3] Gen. Laws N. H., chap. 228, § 14.

[4] Penniman *v.* Jones, 59 N. H. 119.

[5] Welcome *v.* Batchelder, 23 Me. 85.

witness he is.[1] "Where the answer would thus tend to expose the witness to a criminal charge, if it be material and relevant to the issue, the privilege belongs to the witness alone, and must be claimed by him; the objection cannot be interposed by a party, but the witness, advised of his privilege, will be permitted to answer if he choose to do so."[2] The general rule is that, where a question is put tending to *criminate* or *degrade* the witness, the claim of privilege from answering it must be made by the witness himself, and is not available when made merely by the party whose witness the witness is. It is merely a question between the witness and the court, with which the party has nothing to do, and with which the counsel for a party has no right to interfere.[3] Thus, on a trial for murder, the accused, testifying for himself, was asked on cross-examination, whether he had not been arrested for an assault with intent to kill. The question was objected to, the objection was overruled, and the accused answered without claiming his privilege. It was held that the ruling was not erroneous.[4] Where, upon cross-examination, a witness refuses to answer a question which, although upon collateral matter, is not otherwise objectionable, but the answer to which may tend to criminate or degrade him, the cross-examining party may further ask him his *reason* for refusing to answer, and thus *compel him to claim* his privilege, if his refusal is based upon that ground.[5]

§ **307. Privilege may be Waived.** — The refusal to answer a question on the ground that the answer might subject the witness to a criminal prosecution is a privilege which the witness is at liberty to *waive*. It therefore follows that a question

[1] Ingalls *v.* State, 48 Wis. 647; Clark *v.* Reese, 35 Cal. 89; Com. *v.* Shaw, 4 Cush. (Mass.) 594; Soudusky *v.* McGee, 5 J. J. Marsh. (Ky.) 621; State *v.* Bilansky, 3 Minn. 246; Newcomb *v.* State, 37 Miss. 383; State *v.* Patterson, 2 Ired. (N. C.) 346.

[2] South Bend *v.* Hardie, 98 Ind. 577, 583.

[3] Cloyes *v.* Thayer, 3 Hill (N. Y.), 564; Southard *v.* Rexford, 6 Cow. (N. Y.) 254; People *v.* Brown, 72 N. Y. 571, 573.

[4] Hanoff *v.* State, 37 Oh. St. 178; *s. c.* 41 Am. Rep. 496.

[5] New *v.* Fisher, 11 Daly (N. Y.), 309.

can never be *objected* to upon this ground, if it is otherwise proper. The extent of the rule is that a witness can never be compelled by compulsory process to answer such a question.[1] Where a co-defendant in a criminal case "*turns State's evidence*" and attempts to convict others by proof which would also convict himself, he has no right to claim any privilege concerning any of the facts bearing upon the issue. He has *waived* all privilege which would permit him to hold anything.[2] Such a waiver covers *confidential communications* made to attorneys; since there is no more reason for saving these than for saving the privilege of a witness from criminating himself. Each may be waived, and each is, by such criminating disclosures, conclusively waived. Both client and attorney may be compelled to disclose the client's statements which are pertinent to the issue.[3] If a witness discloses a *part* of a criminal transaction, without claiming his privilege, he must disclose the whole. He cannot, after voluntarily testifying in chief, decline cross-examination on the ground that his answer may criminate or disgrace him.[4] So, if he voluntarily states that he knows a fact, he may be compelled to state *how* he knows it.[5] One who *volunteers his testimony* in behalf of the defendant in a criminal case, cannot refuse to submit to a cross-examination on the ground that his answers will expose him to a criminal charge growing out of the transaction concerning whichhe has volunteered to testify.[6] And it seems that a witness, by voluntarily answering as to a transaction, where his answers tends to criminate him, waives the privilege of refusing to answer which he might have had at the outset if he had seen

[1] People *v.* Arnold, 40 Mich. 710.

[2] Hamilton *v.* People, 29 Mich. 173, 184; Foster *v.* People, 18 Mich. 266; Lockett *v.* State, 63 Ala. 5; Alderman *v.* People, 4 Mich. 414; Com. *v.* Price, 10 Gray (Mass.), 472.

[3] Aderman *v.* People, 4 Mich. 414; Hamilton *v.* People, *supra*.

[4] People *v.* Freshauer, 55 Cal. 575; Com. *v.* Pratt, 126 Mass. 462; Foster *v.* Pierce, 11 Cush. (Mass.) 437; Norfolk *v.* Gaylord, 28 Conn. 309; State *v.* Foster, 23 N. H. 348; Coburn *v.* Odell, 30 N. H. 540; People *v.* Carroll, 3 Park. Cr. (N. Y.) 73; Chamberlin *v.* Wilson, 12 Vt. 491; East *v.* Chapman, Mood. & M. 47; *s. c.* 2 Car. & P. 570; Dixon *v.* Vale, 1 Car. & P. 278.

[5] State *v.* K ——, 4 N. H. 562.

[6] State *v.* Hall, 20 Mo. App. 397, per Hall, J.; See Whart. Crim. Ev., § 470 and cases cited.

fit to claim it.[1] But the fact that the witness testified before the *grand jury*, and that it was on his testimony that the indictment was found, does not deprive him of his privilege of declining to testify *on the trial*.[2]

§ 308. [CONTINUED.] ILLUSTRATIONS. — Thus, a witness in a bastardy case testified for the defendant that a person other than the defendant had had sexual intercourse with the prosecutrix. He was required by the court, on cross-examination, to state who that person was, and thereupon he said that it was himself. It was held that this was no error; since, by appearing for the defendant to testify to such a fact, he waived his privilege of not criminating himself.[3] - - - - In a proceeding to revoke letters of administration granted upon an estate on the ground that the supposed decedent was alive, a witness swore that he himself was the supposed decedent; that he left the place in 1875 and did not return until 1880; but he declined to disclose his whereabouts in the meantime, on the ground of self-crimination, — adding that he had neither been in prison nor under arrest. It was held, (1) that he had not waived his privilege; but, (2) that he did not disclose a sufficient basis to enable him to claim it.[4] - - - - A physician testified without objection as to the condition of his patient, and then refused to give his opinion as to the cause of the symptoms discovered, unless he should receive an expert's fee. It was held that he must answer.[5]

§ 309. Question decided by Court, not by Witness. — The question of privilege must be decided by the judge, and not by the witness.[6] The rule under this head was thus stated in a case in Wisconsin by Dixon, C. J.: "Although the witness is the judge of the effect of his answer, and is not bound to disclose any facts or circumstances to show how the answer would affect him, as that would defeat the rule and destroy the protection afforded

[1] Youngs *v.* Youngs, 5 Redf. (N. Y. Surr.) 505.

[2] Temple *v.* Com., 75 Va. 892.

[3] State *v.* Nichols, 29 Minn. 357.

[4] Youngs *v.* Youngs, 5 Redf. (N. Y. Surr.) 505.

[5] Wright *v.* People, 112 Ill. 540.

[6] United States *v.* Burr, 1 Burr Tr. 245; United States *v.* Miller, 2 Cranch C. C. (U. S.) 247; United States *v.* Devaughn, 2 *Id.* 501; Sanderson's Case, 3 *Id.* 638; State *v.* Duffy, 15 Iowa, 425; Richman *v.* State, 2 G. Greene (Iowa), 532; Com. *v.* Braynard, Thach. Cr. (Mass.) 146; Floyd *v.* State, 7 Tex. 215.

by the law, yet the court is to determine, under all the circumstances of the case, whether such is the tendency of the question put to him, and whether he shall be required to answer; as otherwise it would be in the power of every witness to deprive parties of the benefit of his testimony, by the merely colorable pretense that his answers to questions would have a tendency to implicate him in some crime or misdemeanor, or would expose him to a penalty or forfeiture when it is clear * * * that the questions have no such tendency."[1] This was decided by Chief Justice Marshall in Burr's trial, as shown by the quotation in a preceding section; and there is a general concurrence of authority to the same effect. "The court must," said Smith, C. J., "in the first instance, determine whether the question is such that it may be reasonably inferred that the answer made is criminating; and the nature of the answer, as it is known to the witness alone, he alone must decide. If the information sought *may* be self-accusing, and the witness says it is, he need not answer."[2] In like manner Prof. Greenleaf says: "Whether it [the answer] may tend to criminate or expose the witness, is a point which the court will determine under all the circumstances of the case."[3] It is accordingly said by Marcy, J., in a case in New York: "My conclusion is that where the witness claims to be excused from answering a question because the answer may disgrace him or render him infamous, the court must see that the answer *may*, without the intervention of other facts, fix on him moral turpitude. Where he claims to be excused from answering because his answer will have a *tendency* to implicate him in a crime or misdemeanor, or will expose him to a penalty or forfeiture, then the court are to determine whether the answer he may give to the question *can* criminate him directly or indirectly, by furnishing direct evidence of his guilt, or by establishing one of many facts which, together, may constitute a chain of testimony sufficient to warrant his conviction, but which one fact, of itself, could

[1] Kirschner *v.* State, 9 Wis. 140 (reaffirmed in State *v.* Lonsdale, 48 Wis. 348, 368.

[2] LaFontaine *v.* Southern Underwriters, 83 N. C. 132, 138.

[3] 1 Greenl. Ev., § 451.

not produce such result."[1] Considering these authorities, the Supreme Court of North Carolina hold the rule to be: "That to entitle a party called as a witness to the privilege of silence, the court must see from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is *no reasonable ground* to apprehend danger to the witness from his being compelled to answer."[2] So, it has been said in Iowa: "It is not left alone to the witness to determine whether the answer would tend to criminate him. He is not required to explain how he would be criminated; for this would or might annihilate the protection secured by the rule. But it is for the court to determine whether the answer can criminate him, directly or indirectly, by furnishing direct evidence of his guilt, or by establishing one of many facts which, together, may constitute a chain of testimony sufficient to warrant his conviction, but one part of which, by itself, could not produce such result."[3] If the *production of a document* be called for, and the witness decline to produce it, upon the ground that the reading of it in evidence would be prejudicial to his interests, or to the interests of a person toward whom he stands in a confidential relation respecting the instrument, the witness may be required to submit the document to the *inspection of the court.* In so holding Daly, F. J., said: "It was a contempt wilfully to deprive the court of the means of determining whether the principle of protection extended to the papers in his possession or not; and it would not be the less a case of contempt, even assuming that, by what was stated to the court, a case of privilege was shown; for though the judge should decide erroneously upon the question of privilege, the order he makes is nevertheless to be obeyed. If it were otherwise, it will always be in the power of a witness to withhold evidence wherever he thought fit to consider himself privileged."[4]

[1] People *v.* Mather, 4 Wend. (N. Y.) 254. See also Ward *v.* State, 2 Mo. 123; 1 Whart. Crim. L., § 807. See Osborne *v.* London Dock Co., 10 Exch. (H. & G.) 701.

[2] LaFontaine *v.* Southern Underwriters, 83 N. C. 132, 141.

[3] State *v.* Duffy, 15 Ia. 425, 427, per Wright, J.

[4] Mitchell's Case, 12 Abb. Pr. (N. Y.) 249.

§ 310. Compulsory answer not Evidence against Witness. — This question was considered in England by the judges, when a majority were of opinion that, if a witness claims the protection of the court on the ground that his answer would tend to criminate himself, and there appears to be ground for believing that it would do so, he is not compellable to answer; and, if obliged to answer notwithstanding, what he says must be considered to have been obtained by compulsion, and cannot afterwards be given in evidence against him. The judges also held that it made no difference in the right of the witness to protection, that he had before answered in part; on the contrary, they were of opinion that he was entitled to claim the privilege at any stage of the inquiry, and that no answer forced from him by the presiding judge after he had claimed such privilege could afterwards be given in evidence against him.[1]

§ 311. Whether Refusal to Answer is Evidence against Witness. — It has been held that the refusal of a *party to a civil suit*, when testifying as a witness, to answer a material question on the ground of self-crimination, is a circumstance which may be considered against him in such civil suit.[2] The rule is otherwise where the witness is not a party.[3] But in a *criminal case* where the accused, testifying as a witness, claims his privilege on the ground of self-crimination, this cannot be shown as a circumstance against him on a subsequent trial for the same offense.[4]

§ 312. Whether Court bound to Instruct the Witness. — It has been held that the court is bound to instruct the witness whether, as matter of law, his answer would tend to criminate him.[5] But, while this is proper, it would seem to be rather a matter of discretion. It is not error to refuse to instruct a witness that, if he would avail himself of his privilege, he must make the objection before answering anything upon the subject.[6]

[1] Reg. *v.* Garbett, 2 Car. & Ker. 474.
[2] Andrews *v.* Frye, 104 Mass. 234.
[3] Rose *v.* Blakemore, Ry. & M. 383.
[4] State *v.* Bailey, 54 Ia. 414.
[5] Lea *v.* Henderson, 1 Coldw. (Tenn.) 146. Compare Rutherford *v.* Com., 2 Metc. (Ky.) 387; Pointdexter *v.* Davis, 6 Gratt. (Va.) 481.
[6] Com. *v.* Howe, 13 Gray (Mass.), 26.

CHAPTER XIII.

PRELIMINARY QUESTIONS OF FACT FOR THE JUDGE.

SECTION

318. Judge must Decide all Questions of Fact Preliminary to the Admission or Exclusion of Evidence.
319. What if the Decision of the Preliminary Question would Decide the Main Issue.
320. [Illustration.] Admissibility of Copy of Instrument Sued on, Existence of Original in Dispute.
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322. Judge must be Satisfied by Competent Proof.
323. [Illustration.] Competency of Witnesses.
324. Competency of Documentary Evidence.
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327. Dying Declarations.
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329. Evidence of Similar Acts.
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333. [Continued.] Instances in the Cases of Forgery and Uttering Forged Paper.
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335. [Continued.] Other Instances where such Evidence has been Admitted.
336. Usage of Trade or Business.
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§ 318. Judge must decide all Questions of Fact preliminary to the Admission or Exclusion of Evidence. — "Whether there be any evidence or not, is a question for the judge; whether it is sufficient evidence, is a question for the jury."[1] It is the ex-

[1] 1 Greenl. on Ev. § 49; Buller, J., in Company of Carpenters *v.* Hayward, Dougl. 360; Campbell, J., in Chandler *v.* Von Roeder, 24 How. (U. S.) 227; Witkowsky *v.* Wasson, 71 N. C. 451.

clusive province and duty of the court to decide upon the admissibility of evidence, and it is none the less so where, in order to make such determination, the court is obliged to examine and pass upon questions of fact.[1] In all cases, whether civil or criminal, where objection is made to the competency of evidence offered, and the question depends upon facts which may be proved or disproved, it is the duty of the judge to hear all proper evidence offered on either side touching the question of competency, before letting the challenged evidence go to the jury; and it is error to do otherwise.[2]

§ 319. What if the Decision of the Preliminary Question would decide the Main Issue.— An exception, sometimes admitted to this rule is, that the judge is not bound to decide the preliminary question of fact where the state of the case is such that, for the judge to decide this question would be equivalent to deciding the main issue.[3] Embarrassments surround the situation of the judge where the question is thus presented, as will be seen by the observations of Lord Penzance in a case where he took the course of admitting the evidence upon a *prima facie* showing, although his conclusion did decide the main issue,— at the same time cautioning the jury that his ruling was a preliminary ruling upon imperfect evidence, and was not in the least degree to influence their verdict. The question at issue was whether Murhall Daniels, through whom the defendants claimed, was legitimate. The defendants, after producing *prima facie* evidence of the legitimacy of Murhall Daniels, tendered his declarations in evidence. The plaintiffs objected to the admissi-

[1] Robinson *v.* Ferry, 11 Conn. 460; Carter *v.* Bennett, 6 Fla. 214; Scott *v.* Coxe, 20 Ala. 294; Gorton *v.* Hadsell, 9 Cush. (Mass.) 508; Claytor *v.* Anthony, 6 Rand. (Va.) 285; Carrico *v.* McGee, 1 Dana (Ky.), 6. So, in Massachusetts, where a jury is impaneled by an officer, in pursuance of statutes respecting the laying out of a highway, it is the province of the officer, and not that of the jury, to determine as to the admissibility of testimony. Merrill *v.* Berkshire, 11 Pick. (Mass.) 269.

[2] Bartlett *v.* Smith, 11 Mees. & W. 483. See also Reg. *v.* Garner, 2 Carr. & K. 920, and note.

[3] Stowe *v.* Querner, L. R. 5 Exch. 155; *s. c.* 39 L. J. (Exch.) 60.

bility of these declarations, and tendered evidence on the *voir dire*, for the purpose of showing that the declarant was not a member of the family. Lord Penzance, being of opinion that the defendants had made out a *prima facie* case of the declarant's legitimacy, admitted the evidence of the declarations, and rejected the evidence on the *voir dire* tendered by the plaintiffs. His lordship gave an interesting opinion, pointing out the inconvenience of hearing the whole of the evidence on both sides, touching the question of legitimacy, before admitting the declarations; and added, evidently with the view of admonishing the jury, that his decision, based upon imperfect evidence, would not have the slightest effect upon their verdict.[1] In an action of ejectment, where this question was reserved for the judgment of the Court of Queen's Bench, it was similarly decided. The ultimate question for the decision of the jury was whether Elizabeth Stephens was legitimate. A certificate of the marriage of her alleged father, J. D., to her mother was produced by a witness, who said he received it from the said Elizabeth. The question was then put, whether Elizabeth made at that time any statement respecting her mother's marriage. The admissibility of this statement, if any, depended, as in the previous case, upon the question whether she was a member of the family,— that is the question called for a declaration concerning pedigree. It was held, on the authority of a leading case already cited,[2] that this question was for the judge, and that it made no difference that the fact which the judge was thus called upon to decide was identical with the issue on which the opinion of the jury would be ultimately taken. Lord Denman, C. J., who delivered the opinion of the court after an advisement, said: "It was the duty of the judge to decide whether it was *proved to him*, and he decided that it was. There are conditions precedent which are required to be fulfilled before evidence is admissible for the jury. Thus, an oath, or its equivalent, and competency, are conditions precedent to admitting *viva voce* evidence; an apprehension of immediate death, to admitting

[1] Hitchins *v.* Eardley, L. R. 2 Prob. & Div. 248; *s. c.* 40 L. J. (Prob. & Mat.) 70.

[2] Bartlett *v.* Smith, 11 Mees. & W. 483.

evidence of dying declarations; a search, to secondary evidence of lost writings; a stamp, to certain written instruments: and so is consanguinity or affinity in the declarant, to declarations of deceased relatives. The judge alone has to decide whether the condition has been fulfilled. If the proof is by witnesses, he must decide on their credibility. If counter evidence is offered, he must receive it before he decides; and he has no right to ask the opinion of a jury on the fact as a condition precedent." [1]

§ 320. [Illustration.] **Admissibility of Copy of Instrument sued on, Existence of Original in Dispute.** — This exception to the rule is well illustrated by a case in the English Exchequer, where the action was upon a policy of insurance and the defendant had pleaded (*inter alia*) that the defendant did not become an insurer as alleged, which, it is perceived, was equivalent to a plea of *non est factum* in respect of the policy sued on. The plaintiffs, pursuant to notice to produce, called on the defendant to produce the original policy. He declined, and they, thereupon, with the view of proving that it had been duly executed, offered in evidence a document which purported to be a copy of the policy which they had received from the defendant's broker. To this the defendant objected, and requested the judge to hear evidence to show that no original policy was, or ever had been, in existence. The objection was overruled, and the alleged copy was admitted. Later in the trial, the defendant gave evidence tending to prove that in fact there had never been any duly stamped policy, or indeed any policy at all executed; and the judge left it to the jury to say whether there had or had not been executed a duly stamped policy by the defendant. The jury having found in the affirmative, it was held that the question was rightly left to them, inasmuch as if the judge had himself decided it, he would in fact have decided the main issue between the parties. Baron Bramwell, in the course of his opinion, said: "If the objection on the part of the defendant had been that there was a policy, but that it was not stamped, it would,

[1] Jenkins *v.* Davies, 10 Ad. & El. (N. S.) 314, 323.

perhaps, have been well founded. But here it was objected that there was no policy executed at all, an objection which goes to the entire ground of action, and one which, if it had prevailed, might have left the jury nothing to decide. For, suppose the judge had ruled that the copy was inadmissible on the ground that there was no original ever in existence, the plaintiffs would in fact have had no case left, and the judge would himself have decided the whole of it. * * * Put an illustration analogous to the present. Suppose an action to be brought for libel, and a copy of a letter which is destroyed, but which contained the libel complained of, is produced and tendered in evidence. Could the defendant say 'stop; I will show that no letter was in point of fact ever written, and I call upon you, the judge, to hear evidence upon this point, and if I satisfy you that no such letter ever existed, you ought not to admit the copy?' Surely not; for that would be getting the judge to decide what is peculiarly within the province of the jury. The distinction is really this: Where the objection to the reading of a copy concedes that there was primary evidence of some sort in existence, but defective in some collateral matter, as, for instance, where the objection is a pure stamp objection, the judge must, before he admits the copy, hear and determine whether the objection is well founded. But where the objection goes to show that the very substratum and foundation of the cause of action is wanting, the judge must not decide upon the matter, but receive the copy, and leave the main question to the jury."[1] Barons Martin, Pigott and Cleasby concurred.

§ 321. Error to submit these Preliminary Questions of Fact to the Jury. — Although Prof. Greenleaf states that the judge may, if he chooses, take the opinion of the jury upon these preliminary questions of fact,[2] and although this doctrine has been admitted in a few cases,[3] yet the general conclusion is that

[1] Stowe *v.* Querner, L. R. 5 Exch. 155, 158; *s. c.* 39 L. J. (Exch.) 60.

[2] 1 Greenl. Ev., § 49.

[3] Egan *v.* Larkin, Arm. M. & O. (Irish Exch.) 403; Bartlett *v.* Hoyt, 33 N. H. 151, 165; Scott *v.* Coxe, 20 Ala. 294. In Bartlett *v.* Hoyt, the preliminary question whether a statement of a party offered in evidence was intended as an admission of a fact, or merely as an offer to compromise, was regarded as one which the court might,

it is error to submit such questions to the jury.[1] If, upon such examination of facts, the judge decides to admit the evidence, it is for the jury to weigh and apply it; but if the judge rejects it, the jury has no right even to know that it was offered.[2]

§ 322. **Judge must be satisfied by Competent Proof.** — In determining any preliminary fact essential to the admissibility of evidence, the rule is the same as to the weight of the testimony, as in the case of issues tried by juries: it is not sufficient that there may be evidence tending to establish the particular fact, but the judge must be satisfied of it by competent proof.[3] But it was early held in Pennsylvania that if, when a witness is offered, it is *perfectly clear* from the testimony given in relation to him, that he is *interested*, the court may reject him as incompetent; but if his interest be *in the least degree doubtful*, the court should permit him to be sworn, instructing the jury, that if, in their opinion, he is interested, they are to pay no regard whatever to his testimony.[4] But this view seems to have been grounded upon the disfavor with which the court, even at that early day, viewed the rule of law which excluded witnesses on the ground of interest, rather than upon a general principle applicable to all cases.

§ 323. [**Illustration.**] **Competency of Witnesses.** — Whether a witness is qualified to be sworn as such is always a question for the court; but it is for the jury to determine whether they will believe his evidence.[5] Thus, whether a witness is incompe-

in its discretion, submit to the jury, — the view being that there is a distinction between such a question and that of the interest of a witness and other questions which illustrate the rule we are considering; but the view which the court there took is plainly untenable.

[1] Bartlett *v.* Smith, 11 Mees. & W. 483; Hart *v.* Heilner, 3 Rawle (Pa.), 407, 411; Stowe *v.* Querner, L. R. 5 Exch. 155; *s. c.* 39 L. J. (Exch.) 60; Dickinson *v.* Ferry, 11 Conn. 460; Ratliff *v.* Huntly, 5 Ired. L. (N. C.) 545; Thomason *v.* Odum, 31 Ala. 108; Degraffenreid *v.* Thomas, 14 Ala. 681.

[2] Scovell *v.* Kingsley, 7 Conn. 284.

[3] Degraffenreid *v.* Thomas, 14 Ala. 681, 687.

[4] Hart *v.* Heilner, 3 Rawle (Pa.), 407, 411.

[5] Com. *v.* Lynes (Mass.), 3 New Eng. Rep. 89, 91; *s. c.* North E. Rep. 408; *s. c.* 142 Mass. 577; Reg. *v.* Hill, 5 Cox C. C. 259; Kendall *v.* May, 10 Allen (Mass.), 64.

tent (where the old rule prevails) by reason of *interest*,[1] or by reason of a want of *religious belief;*[2] or whether or not a witness is an *expert* so as to render him competent to express an *opinion* upon the question in issue,[3] — are questions for the judge.

§ **324 Competency of Documentary Evidence.** — In like manner, the judge must determine all questions of fact which are necessary to the decision of the question whether writings which are offered in evidence are admissible. Thus, in an action of ejectment, the court must decide upon the competency of *title papers*, and the right to use them: and, as an incident to this, under what title the party entered.[4] So, it is for the judge to decide, where a document is offered in evidence and objected to on the ground that it has not come from the *proper custody*, whether it has come from the proper custody or not; and an appellate court will not interfere with his decision, unless it appears to be clearly wrong.[5] Upon like grounds, evidence of the loss or destruction of an instrument upon which suit is brought, is not to go to the jury, but is addressed to the court, for the purpose of establishing the right of the party to introduce secondary evidence of the contents of the *lost instrument*, and it is error to refer such a question to the jury.[6] So, where a *bill of*

[1] Cook *v.* Mix, 11 Conn. 432.

[2] Wakefield *v.* Ross, 5 Mason (U. S.), 16, 18; People *v.* Matteson, 2 Cow. (N. Y.) 433, 572; Jackson *v.* Gridley, 18 Johns. (N. Y.) 99.

[3] State *v.* Cole, 94 N. C. 959; Flynt *v.* Bodenhamer, 80 N. C. 205. Compare State *v.* Sanders, 84 N. C. 728; State *v.* Efler, 85 N. C. 585; State *v.* Burgwyn, 87 N. C. 572; Fairbanks *v.* Hughson, 58 Cal. 314; Jones *v.* Tucker, 41 N. H. 546; Ives *v.* Leonard, 50 Mich. 183.

[4] Carrico *v.* McGee, 1 Dana (Ky.), 6; Hamilton *v.* Taylor, Littell's Sel. Cas. (Ky.) 444.

[5] Shrewsbury *v.* Keeling, 11 Ad. & El. (N. S.) 884, 889; Reese *v.* Walters, 3 Mees. & W. 527, 531, per Parke, B.; Jacobs *v.* Phillips, 8 Ad. & El. (N. S.) 158. See the opinion of the judges to the Lords, given by Tindal, C. J., in the case of the Bishop of Meath *v.* Marquis of Winchester, 3 Bing. N. C. 183, 196, 198. Compare Reg. *v.* Kenilworth, 7 Ad. & El. (N. S.) 642.

[6] Loewe *v.* Reismann, 8 Bradw. (Ill.) 525; Dormandy *v.* State Bank, 3 *Id.* 236; Tayloe *v.* Riggs, 1 Pet. (U. S.) 591; Ratliff *v.* Huntly, 5 Ired. L. (N. C.) 545; Graff *v.* Pittsburgh &c. R. Co., 31 Pa. St. 489; Witter *v.* Latham, 12 Conn. 392; Donelson *v.* Taylor, 8 Pick. (Mass.) 390. *Contra*, Coleman *v.* Wolcott, 4 Day (Conn.), 388. And this question is not afterwards to be considered by the jury. Witter *v* Latham, *supra.*

exchange, purporting to be a foreign bill and stamped accordingly, was offered in evidence, and objected to, on the ground that, although it purported to have been drawn abroad, it was in fact an inland bill, drawn in London, and therefore required a higher *stamp*, it was held that the judge ought to have received the evidence in that stage of the case, and ought to have decided upon the admissibility of the instrument, instead of receiving the evidence afterwards, as a part of the defendant's case, and submitting it to the jury; and for this error a new trial was ordered.[1] Applying the same principle, it has been ruled that, where the question is whether a *check* was *post-dated*, and this question arises upon an objection to its admissibility in evidence, it is for the judge to try and determine the question as a collateral issue, and not for the jury.[2]

§ 325. Witness' Inability to Attend so as to Admit his Deposition. — Where the deposition of a witness is made by a statute,[3] inadmissible in evidence, unless it shall appear to the satisfaction of the judge that the deponent is unable, from permanent sickness or other permanent infirmity, to attend the trial, — it is for the judge to satisfy himself of the deponent's inability to attend, by such evidence as he shall think fit; and although his decision is subject to review, yet it will not be disturbed by a reviewing court, unless it be shown that he has been misled by false evidence, or that injustice has resulted from the course pursued at the trial.[4]

§ 326. Privilege. — Where the question is whether the evidence of a witness is to be excluded on the ground of privilege, as where the witness is an attorney and the evidence called for is a confidential communication of his client, — this, on like grounds, is a question for the court, and not for the jury.[5] So,

[1] Bartlett *v.* Smith, 11 Mees. & W. 483.

[2] Dumsford *v.* Curlewis, 1 Fost. & Fin. 702.

[3] In this case, the Stat. 1 Wm. IV., c. 22, § 10

[4] Duke of Beaufort *v.* Crawshay, L. R. 1 C. P. 699; *s. c.* 35 L. J. C. P. 342.

[5] Hull *v.* Lyon, 27 Mo. 570, 576.

whether an instrument of writing, offered in evidence, is protected on the ground of its being a privileged communication ,is a preliminary question of fact to be decided by the judge,[1] though his decision is subject to review in a court of error.[2]

§ 327. **Dying Declarations.** — So, upon the question whether a declaration by a deceased person is competent as a dying declaration on the trial of an indictment for murder, it is the duty of the court to hear evidence tendered by both parties as to the circumstances under which the declaration was made, and thereupon to determine whether evidence of it is admissible or not.[3]

§ 328. **Threats or Promises which will Exclude Confessions.** — What amounts to such threats or promises as will exclude evidence of the confessions of the defendant in a criminal case, is a question of law, which may be reviewed on exceptions by an appellate court.[4] But, whether the evidence, if true, proves these facts, and whether the witnesses giving the testimony in regard to the facts are credible or not, and, in a case presenting a conflict of testimony, which witnesses shall be believed by the court, are all questions of fact to be decided by the trial court, the decision of which cannot be reviewed on appeal.[5] Where objection is made to the competency of evidence offered to prove confessions made by the defendant in a criminal case, upon the ground that such confessions were made under the influence of fear produced by threats, and evidence is offered to prove such threats, it is the duty of the court to hear

[1] Cleave *v.* Jones, 7 Exch. 421.

[2] Wright *v.* Tatham, 7 Ad. & El. 313.

[3] State *v.* Elliott, 45 Ia. 486; *s. c.* 2 Am. Crim. Rep. 322; State *v.* Molisse, 36 La. Ann. 920. "This point," said Lord Ellenborough "was considered by the judges here, on a question proposed to them by the judges in Ireland, who entertained doubts upon the subject, and this was their unanimous opinion," — that is, that it was a question for the judge, and not for the jury. Rex. *v.* Hucks, 1 Stark. N. P. 523. In this view of the law the ruling of Lord Eyre, C. B., in Rex *v.* Woodcock (2 Leach Cr. C. 563), was plainly erroneous.

[4] State *v.* Andrew, Phil. L. (N. C.) 205; State *v.* Burgwyn, 87 N. C. 572.

[5] State *v.* Burgwyn, *supra*. To the same effect are State *v.* Vann, 82 N. C. 631; and State *v.* Efler, 85 N. C. 585.

such evidence, to determine therefrom the competency of the evidence offered to prove the confession, and not to submit the question to the jury.[1]

§ **329. Evidence of Similar Acts.** — "Where evidence is offered of acts done in places other than the place in dispute, it is for the judge to decide, in the first instance, whether there is such a unity of character in the different parts, as to render evidence affecting a part not in dispute, admissible with reference to the part in dispute, and whether the acts relied on amount to evidence of ownership." Accordingly, where the question was, whether a slip of land between some old enclosures and the highway, vested in the lord of the manor or in the owner of the adjoining freehold, — it was held that evidence might be received of acts of ownership by the lord of the manor on similar slips of land not adjoining his own freehold, in various parts of the manor.[2]

§ 330. [CONTINUED.] ADMISSIBILITY OF EVIDENCE OF OTHER CRIMINAL ACTS. — The general rule is that it is not competent, on a criminal trial, to give evidence tending to show that the defendant has been guilty of other acts of a criminal nature.[3] Upon the same view it has been held that it is not competent to show that the defendant had a *tendency to commit* the offense with which he was charged.[4] A better statement of the rule is that evidence of other criminal acts of the prisoner cannot be given by the prosecution, unless such acts are so connected by circumstances with the particular crime in issue, that proof of one act, with its attending circumstances, has a tendency to make it probable that the accused committed the crime with which he stands charged.[5] It has been reasoned that such evidence should have a peculiar and intimate, if not also an inseparable connection with and tendency to explain and characterize the act in issue against the prisoner, and that it is only admissible on the question of intent.[6] The objection to such evidence was thus forcibly stated by Allen, J.: "The

[1] Brown *v.* State, 71 Ind. 470; Com. *v.* Culver, 126 Mass. 464.

[2] Barrett *v.* Kemp, 7 Bing. 332, 336, per Bosanquet, J.

[3] Com. *v.* Campbell, 7 Allen (Mass.), 542.

[4] State *v.* Renton, 15 N. H. 174.

[5] State *v.* Lepage, 57 N. H. 245.

[6] Com. *v.* Tuckerman, 10 Gray (Mass.), 198; State *v.* Lepage, 57 N. H. 245, 302, 304.

general rule is against receiving evidence of another offense. A person cannot be convicted of one offense upon proof that he committed another, however persuasive in a moral point of view such evidence may be. It would be easier to believe a person guilty of one crime, if it was known that he had committed another of a similar character, or indeed, of any character; but the injustice of such a rule in courts of justice is apparent. It would lead to convictions upon the particular charge made, by proof of other acts in no way connected with it, and to uniting evidence of several offenses to produce conviction for a single one." [1] So, in a leading case in New Hampshire it was said by Smith, J.: "It is always competent for the government to introduce evidence of any facts tending directly to show an evil intent, or from which such evil intent may be justly and reasonably inferred; but all proof in relation to transactions not intimately and directly connected with the particular case against the defendant, or with the evidence, or in necessary explanation of the evidence introduced in support of the charge contained in the indictment, is irrelevant and inadmissible." [2]

§ 331. [Continued.] Instances under this View of the Law. — Thus, where the action was against the owner of a dog for damages in consequence of the killing of plaintiff's sheep by the dog, it was said in the Supreme Court of New Hampshire, by Perley, C. J.: "We are not acquainted with any rule of evidence which will allow the character of the dog, or the fact that he had killed or worried sheep before, to be admitted as evidence that he did the damage complained of in this suit. To show that he did this mischief, it is not competent to prove that he had done similar mischief before, more than it would be to prove that the defendant, sued for an assault and battery, had beaten other men before, or the same man." [3] So, where the indictment was for keeping a gaming house, and the allegation in the second count was confined to a single day, it was held that the government could not, for the purpose of charging the defendant on that count, prove that the crime was committed on more than one day, although evidence covering a longer time would be admissible for the purpose of showing what character the house had on the particular day when it was sought to prove that the offense was committed. [4] On the other hand, on the trial

[1] Coleman *v.* People, 55 N. Y. 81, 90.

[2] State *v.* Lepage, 57 N. H. 245 302.

[3] East Kingston *v.* Towle, 48 N. H. 57, 65.

[4] State *v.* Prescott, 33 N. H. 212

of an indictment for murder, proof of other crimes than that alleged in the indictment, but connected with it by unity of plot and design and influenced by a similar motive, has been held admissible.[1] So, evidence of the commission of a previous crime is admissible where it will furnish a motive for the commission of the crime charged. As where A. is indicted for the murder of B., and evidence is admitted to show an adulterous intercourse between A. and the wife of B.[2]

§ 332. [CONTINUED.] SUCH EVIDENCE ADMISSIBLE TO SHOW GUILTY PURPOSE, PLAN, SYSTEM, ETC. — Where evidence is admissible as bearing upon the question of *intent*, it is not rendered inadmissible by the fact that it tends to prove the commission of another distinct and separate offense.[3] "The principle is, that all the evidence admitted must be pertinent to the point in issue; but if it be pertinent to this point, and tends to prove the crime charged, it is not to be rejected, though it also tends to prove the commission of other crimes, or to establish collateral facts."[4] This rule applies where *intent*, *system*, or *scienter* may be involved, as illustrated in successive cheats or forgeries, or passing counterfeit money to different persons, and the like.[5] "Another act of fraud is admissible to prove the fraud charged, whenever there is evidence that the two are parts of one scheme or plan of fraud, committed in pursuance of a common purpose."[6]

§ 333. [CONTINUED.] INSTANCES IN THE CASE OF FORGERY AND UTTERING FORGED PAPER. — Numerous instances of the application of this principle could be cited where the trial was for forgery or the uttering of forged paper. Proof of the commission of other forgeries, or the having in possession other forged paper, is generally admissible in such cases, as bearing upon the question of intent.[7] Thus, where the in-

[1] People *v.* Wood, 3 Park. Cr. (N. Y.) 681.

[2] Com. *v.* Ferrigan, 44 Pa. St. 386.

[3] Reg. *v.* Weeks, Leigh & Cave C. C. 18, 21; Kirkwood's Case, 1 Lewin C. C. 103; Com. *v.* Stearns, 10 Metc. 257; Mason *v.* State, 42 Ala. 532.

[4] Com. *v.* Choate, 105 Mass. 451, 458.

[5] See State *v.* Bridgman, 49 Vt. 202; Thayer *v.* Thayer, 101 Mass. 111; Com. *v.* Nichols, 114 Mass. 285; Whart. Crim. Ev. (8th ed.), § 31 *et seq.*; 1 Greenl. Ev. (13th ed.), §§ 53, 451, 454; Whart. Crim. Law (8th ed.), § 1733; Bish. Stat. Crime, § 682; 2 Bish. Mar. & Div. (6th ed.), § 625.

[6] Jordan *v.* Osgood, 109 Mass. 457, 461; approved and applied in Berkey *v.* Judd, 22 Minn. 287, 298.

[7] Reg. *v.* Foster, Dearsley C. C. 456; Reg. *v.* Nisbett, 6 Cox C. C. 320; Reg. *v.* Salt, 3 Fost. & F. 834; Com. *v.* Price, 10 Gray, 473.

dictment was for forging and uttering a note of the Kingdom of Poland, on September 1st, 1835, evidence was received to show that the defendant, on August 24th, 1835, agreed to forge a thousand Austrian notes, and that in September, 1834, he had in his possession plates for printing Polish notes different from that which was the subject of the indictment, and had caused 500 notes to be printed from those plates.[1] So, where the charge was that the defendant had in his possession a counterfeit bank bill with intent to pass it, it was held that evidence was admissible to show that he had passed a different kind of counterfeit money at various times and places, and that he had made statements to a witness which were tantamount to an admission that he was a dealer in counterfeit money.[2] So, on the trial of an indictment for forging and delivering bank notes, after proof of the fact of forging a large quantity and the delivery of one note had been given, it was held that parol evidence of the contents of a *letter* from the defendant to an *accomplice* on the subject of counterfeit notes, for which the accomplice could not account and had not searched, but which he believed to be lost, might be admitted.[3]

§ 334. [CONTINUED.] INSTANCES IN THE CASE OF SEXUAL CRIMES. — Upon the same principle, on an indictment for *adultery*, evidence of previous improper familiarities is competent.[4] But it is said that the reception of such evidence is to be controlled largely by the judge who tries the cause, and that it is to be submitted to the jury with proper explanation of its purpose and effect.[5] So, on an indictment for *seduction*, it is competent for the defendant to give evidence of previous acts of carnal intercourse between the prosecutrix and himself, not for the purpose of impeaching her character for chastity, but for the purpose of showing that the criminal act charged was not committed under a promise of marriage.[6] So, on an indictment for *rape*, evidence that the defendant had made previous attempts to have sexual intercourse with the prosecutrix has been held admissible.[7] But where the defend-

[1] Rex *v.* Balls, 1 Moody C. C. 470; *s. c.* 7 Carr. & P. 429.

[2] Com. *v.* Edgerly, 10 Allen (Mass.), 184, 186, 187.

[3] United States *v.* Doebler, 1 Baldw. (U. S.) 519.

[4] State *v.* Wallace, 9 N. H. 515; State *v.* Marvin, 35 N. H. 22; Com. *v.* Merriam, 14 Pick. (Mass.) 518; Thayer *v.* Thayer, 101 Mass. 111; (overruling Com. *v.* Horton, 2 Gray (Mass.), 354, and Com. *v.* Thrasher, 11 Gray (Mass.), 450).

[5] State *v.* Witham, 72 Me. 531, 535.

[6] Bowers *v.* State, 29 Oh. St. 542.

[7] Williams *v.* State, 8 Humph. (Tenn.) 585; State *v.* Knapp, 45 N. H. 148, 156, 157.

ant was charged in the indictment with the *murder* of a woman, perpetrated in attempting to commit *rape* upon her, and the evidence of *another woman* was admitted, detailing the fact that, four years before, the defendant had committed a rape upon the witness in Canada, giving in full the circumstances of the outrage,— it was held that, for the admission of this evidence, a new trial must be had.[1]

§ 335. [CONTINUED.] OTHER INSTANCES WHERE SUCH EVIDENCE HAS BEEN ADMITTED. — In the leading case on this subject in New Hampshire,[2] the court had the advantage of an exhaustive printed argument by the attorney-general, Lewis W. Clark (with whom were W. W. Flanders, solicitor, and C. P. Sanborn). In this argument the following instances were given of cases where evidence of other criminal acts has been admitted. They have been re-examined and verified by the present writer: — On the trial of an indictment for shooting with intent to kill, evidence that the defendant shot at the same person at another time was held by all the judges admissible, for the purpose of showing that the shooting charged was not accidental.[3] - - - - Where the charge was against a wife for murdering her husband by poison, evidence that three of her sons had been subsequently poisoned was received, as tending to show that the husband had died of poison, and that his death was not accidental.[4] - - - - Where the charge was against a mother for murdering her child by poison, evidence was held admissible that two other children of the mother and a lodger in the house had previously died of the same poison.[5] - - - - Where the charge was that the defendant had murdered his mother by poison, and the defendant's wife had lived in his family as a servant when his former wife died, evidence was received to show that his first wife had died of poison, and also to show the circumstances of her death.[6] - - - - Where the charge was against a mother for murdering her infant by suffocating it in bed, evidence was received to show the previous deaths of her other chil-

[1] State *v.* Lepage, 57 N. H. 245. The Ohio statute with reference to *seduction* (Oh. Act of April 4th, 1859, S. & C. 452) extends its protection to all females under the age of 18 years who are "of good repute for chastity;" and therefore on the trial of an indictment under the statute, it is not competent for the defendant to prove specific acts of carnal intercourse by the prosecutrix with other persons, but he must attack her character, if at all, by proof of her reputation. Bowers *v.* State, 29 Oh. St. 542.

[2] State *v.* Lepage, 57 N. H. 245.

[3] Rex *v.* Voke, Russ. & Ry. 531.

[4] Reg. *v.* Geering, 18 L. J. (Mag. Cas.) 215.

[5] Reg. *v.* Cotton, 12 Cox C. C. 400.

[6] Reg. *v.* Garner, 3 F. & F. 681.

dren at early ages.[1] - - - - Where the indictment was for the murder of H., evidence was received to show that H. had been employed by the defendant to murder P.[2] - - - - Where the charge was that the defendant had murdered his wife, evidence was received to show that he had lived in adulterous intercourse with another woman for some months prior to his wife's death.[3] - - - - So, on a trial for murder, evidence was received to show an adulterous intercourse between the defendant and the wife of the deceased.[4] - - - - On the charge of administering sulphuric acid to eight horses with intent to kill them, evidence that the defendant had administered the same chemical at different times, was received to show his intent.[5] - - - - On a charge of setting fire to a rick by firing a gun close to it, on the 29th of March, evidence that the rick was also on fire on the 28th of March, and that the prisoner was then close to it, having a gun in his hand, was received to show that the fire of the 29th was not accidental.[6] - - - - On the charge of setting fire to the defendant's house with intent to defraud an insurance company, evidence that the defendant had insured in other offices two other houses in which he had lived, which other houses were burned and that he received the insurance money from the other companies, has been held relevant as tending to show that the fire in question was intentional and not accidental.[7] - - - - On an indictment for arson, evidence of two previous unsuccessful attempts to set fire to the same premises was admitted to show that the last fire was not accidental, although there was no evidence that the two former attempts were made by the defendant.[8] - - - - Where the charge was embezzlement by the defendant, as a clerk, who had made false entries in his book of the amounts by him received, it was held that the book was evidence, and that generally not only the false entries bearing directly upon the issue, but also other similar false entries might be shown thereby.[9] - - - - Where the charge was that of embezzlement against a clerk who made out weekly accounts of his payments, it was shown that on three occasions within six months he had entered the payments correctly, but that in adding them up he had made the totals £2 greater than they were,

[1] Reg. *v.* Roder, 12 Cox C. C. 630.

[2] Rex *v.* Clewes, 4 Carr. & P. 221.

[3] State *v.* Watkins, 9 Conn. 47; Johnson *v.* State, 17 Ala. 618; Hall *v.* State, 40 Ala. 698; People *v.* Stout, 4 Park. Cr. (N. Y.) 71.

[4] Com. *v.* Ferrigan, 44 Pa. St. 386.

[5] Rex *v.* Mogg, 4 Carr. & P. 364.

[6] Reg. *v.* Dossett, 2 Carr. & K. 306.

[7] Reg. *v.* Gray, 4 Fost. & F. 1102.

[8] Reg. *v.* Bailey, 2 Cox C. C. 311.

[9] Reg. *v.* Proud, Leigh & Cave C. C. 97, 101.

and had taken credit for the larger amounts. These were the cases on which the indictments were founded. Evidence was admitted that, on several occasions before and afterwards, precisely similar errors had been made and similar advantage taken of them by him, as tending to show that the errors which were the foundation of the indictment were intentional and fraudulent, and not accidental.[1] - - - - In another case, where the charge was embezzlement, evidence of another act of embezzlement by the defendant during the same week was held competent on the question of intent.[2] - - - - Where the defendants were indicted for obtaining goods of certain persons by false pretenses, evidence of the purchase of other goods from other persons by similar pretenses was held competent on the question of criminal intent.[3] - - - - So, where the indictment was for obtaining money by false pretense, and the pretense charged was that a chain which the defendant pledged to a pawn broker was silver, evidence that the defendant, a few days afterwards, offered a similar chain to another pawn broker, was held admissible.[4] - - - - Where, on an indictment for robbery, evidence was adduced to the effect that the prosecutor was induced, by defendant's advice, to give money to a mob who had come to his house for the purpose of getting rid of them and preventing mischief, it was competent to show that the same mob had demanded money at other houses when some of the defendants were present, — for the purpose of showing that the advice was fraudulent and a mere mode of effecting the robbery.[5] - - - - Where the defendant was indicted for robbery and found guilty of larceny of the prosecutor's watch, upon evidence that he had obtained it under the pretense of a bet, evidence was held competent to show that the defendant had attempted to practice the same artifice on other persons and on other occasions.[6] - - - - Where the question at issue was whether the purchase of property from one person was fraudulent, evidence was held admissible to show that the purchasers had fraudulently bought other property of other persons.[7] - - - - Where the charge was the stealing of coal, it was held competent to prove that the defendant was the

[1] Reg. *v.* Richardson, 2 Fost. & F. 343.

[2] Com. *v.* Shepherd, 1 Allen (Mass.), 575, 581.

[3] Com. *v.* Eastman, 1 Cush. (Mass.) 189, 216.

[4] Reg. *v.* Roebuck, Dearsly & B. C. C. 24.

[5] Rex *v.* Winkworth, 4 Carr. & P. 444.

[6] Defrese *v.* State, 3 Heisk. (Tenn.) 53, 62.

[7] Bradley *v.* Obear, 10 N. H. 477, 480; Hovey *v.* Grant, 52 N. H. 569. See also State *v.* Johnson, 33 N. H. 441, 456, 457.

lessee of a coal mine, and that he had from the shaft of the leased mine wrongfully cut into adjoining premises and taken coal, during a period of more than four years, from the coal fields of thirty or forty different owners, — the evidence bearing upon the question of felonious intent.[1] - - - - So, on an indictment for burglary, it is competent to show that the defendant entered the building with a felonious intent, by proof of a felony committed by him in the adjoining building.[2] - - - - So, it was held competent on an indictment of two persons for burglary, to show that they had committed other burglaries, for the purpose of showing privity and community of design.[3] - - - - So, on an indictment for kidnaping a negro boy, evidence that the defendants made a similar attempt to kidnap another boy on the day previous, was held competent as bearing upon the question of intent.[4] - - - - So, on a charge of keeping liquor for sale contrary to law, evidence that the defendant had previously sold other liquor, or kept other liquor for sale, or was a liquor-dealer, has been held admissible on the question of intent.[5] - - - - So, where the prisoner was indicted for placing obstructions upon a railroad track, it was held competent to prove that he had placed other obstructions than those for which the indictment was found, upon the same railroad track, the court reasoning that the acts were so connected that they might be regarded as being the continuation of the same transaction.[6]

§ **336. Usage of Trade or Business.** — So, where the question at issue is the practice or usage with reference to a particular trade or business, it is for the judge to decide, as a preliminary question, whether the evidence tendered upon the question is evidence of the fact of a general usage or practice prevailing in the particular trade or business, or merely the judgment or opinion of the witness. If the latter, he must reject it, as that furnishes no safe guide for interpretation.[7]

[1] Reg. *v.* Bleasdale, 2 Carr. & K. 765.

[2] Osborne *v.* People, 2 Park. Cr. (N. Y.) 583; Phillips *v.* People, 57 Barb. (N. Y.) 356.

[3] Mason *v.* State, 42 Ala. 532, 539.

[4] Com. *v.* Turner, 3 Metc. (Mass.) 19, 24, 25.

[5] State *v.* Plunkett, 64 Me. 534; Com. *v.* Stochr, 109 Mass. 365; Com. *v.* Dearborn, 109 Mass. 368.

[6] State *v.* Wentworth, 37 N. H. 197.

[7] Lewis *v.* Marshall, 7 Man. & G. 729, 743.

§ 337. **Leading Questions.** — On the same principle the judge must determine the facts which form the necessary premises for a conclusion whether or not *leading questions* ought to be allowed to be put to a witness.[1]

§ 338. **Further Illustrations.** — On the same principle it is for the judge, and not for the jury, to decide whether one person sustains such a relation to another, that the *declarations* of the former are admissible in evidence against the latter;[2] whether evidence shall be heard to show that a debt, absolute on its face, was merely intended by the parties as a mortgage;[3] and whether a combination has been established such as renders competent unsworn declarations of a person, *dum fervet opus*, in furtherance of the common design.[4]

[1] Bundy *v.* Hyde, 50 N. H. 116, 120; *post*, § 357, *et seq.*

[2] Cliquot's Champagne, 3 Wall. (U. S.) 114, 140; Claytor *v.* Anthony, 6 Rand. (Va.) 285.

[3] De France *v.* De France, 34 Pa. St. 385.

[4] Claytor *v.* Anthony, 6 Rand. (Va.) 285.

CHAPTER XIV.

CONTROL OF THE COURT OVER THE EXAMINATION OF WITNESSES.

SECTION

343. Extent of the Discretion of the Court.
344. Order of Proof.
345. Anticipating the Defense.
346. Allowing the Plaintiff to Introduce Evidence not in Rebuttal after the Defendant has Rested.
347. Defendant's Right of Reply or Sur-rebuttal.
348. Reopening the Case to admit Additional Evidence.
349. Recalling Witnesses for further Examination.
350. Allowing Witnesses to Correct their Testimony.
351. Admitting Irrelevant Testimony upon a Promise of subsequently Showing Relevancy.
352. Limiting Time—Stopping Repetitions and Irrelevant Examinations.
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355. Right of Judge to put Questions.
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358. [Continued.] What Questions are Leading and what not.
359. [Continued.] Where the Witness is manifestly Hostile.
360. [Continued.] Other Circumstances where Allowed.
361. Effect of Admissions upon offers of Evidence.

§ 343. Extent of the Discretion of the Court. — It is best to consider at the outset the extent of the discretionary power which is possessed by the trial judge in the matter of the examination of the witnesses and the deraignment of the evidence. As it may be necessary to appeal to this discretion to help the party out of the consequences of omissions or mistakes, it is necessary for counsel to have as clear a view as possible of the extent to which the law requires them to proceed according to strict rules, and the extent to which they may secure a possible relaxation of such rules through an exercise of the discretion of the court.

§ **344. Order of Proof.** — Where the plaintiff sustains the burden of proof, "the rule of practice in the introduction of testimony is, that the plaintiff shall first bring forward all the testimony that goes to establish his claim; the defendant shall then introduce his proof upon matters of defense and his testimony rebutting the proof adduced by the plaintiff; then the plaintiff by his proof rebutting that of the defendant. And after the plaintiff has introduced his proof establishing his case, and the testimony of the defendant has been heard, the plaintiff is not entitled, as a matter of right, to introduce additional proof in chief."[1] In strict practice the party holding the affirmative of the issue, is bound to give all his evidence in support of the issue, in the first instance; he can only give such evidence in reply, as tends to answer the new matter introduced by the adversary.[2] But the order in which testimony, competent and relevant to the issues, is admitted, is largely within the *discretion* of the trial court, and the exercise of this discretion is not assignable for error except in cases of manifest abuse.[3] The reason and policy of this rule were thus well stated by Poland, J.: "Although there are certain established rules, which have obtained in the process of try-

[1] Walker *v.* Walker, 14 Ga. 242, 250. See also Macullar *v.* Wall, 6 Gray (Mass.), 507; Hathaway *v.* Hemingway, 20 Conn. 195; Gilpins *v.* Consequa, 3 Wash. C. C. (U. S.) 184; *s. c.* Pet. C. C. 85; Pettibone *v.* Derringer, 4 Wash. C. C. (U. S.) 215; Braydon *v.* Goulman, 1 Monr. (Ky.) 115; Abb. Tr. Brief, 42.

[2] Graham *v.* Davis, 4 Oh. St. 362.

[3] Graham *v.* Davis, *supra;* Blake *v.* Powell, 26 Kan. 320, 327; Rheinhart *v.* State, 14 Kan. 322. Bourreseau *v.* Detroit Evening Journal Co. (Mich.), 6 West. Rep. 151; Butterfield *v.* Gilchrist (Mich.), 5 West. Rep. 744; Hastings *v.* Palmer, 20 Wend. (N. Y.) 225; Ford *v.* Niles, 1 Hill (N. Y.), 300; Marshall *v.* Davies, 78 N. Y. 414, 420; Agate *v.* Morrison, 84 N. Y. 672; Braydon *v.* Goulman, 1 Monr. (Ky.) 115; State *v.* Alford, 31 Conn. 40; State *v.* Fox, 25 N. J. L. 566; Dane *v.* Treat, 35 Me. 198; Pierce *v.* Wood, 23 N. H. 519. Especially where the case is tried before the court, without a jury. Goodman *v.* Kennedy, 10 Neb. 271, 274. Walker *v.* Walker, *supra.* It is said that: "Only in an extreme case will it be held that the manner or order of presenting competent testimony violates a substantial right of either party." Blake *v.* Powell, *supra,* opinion by Brewer, J. The remedy for an abuse of such a discretion is a *motion for a new trial;* and if reviewable at all on error, it is only when, taken in connection with all the evidence in the case, it is shown to have prevented the party from having a fair trial. Webb *v.* State, 29 Oh. St. 351.

ing causes before a jury, and in the order of introducing the evidence of witnesses, yet these rules, for the most part, are but rules of practice, and are considered as under the control of the court, and subject to be varied, in the exercise of a sound judicial discretion; so that a departure from the ordinary rules, in the course of a trial, or a refusal to grant such indulgence to a party on request, cannot properly be made a ground of error. Of this class are the rules as to the order of introducing the evidence, and also as to the mode of examining witnesses. Indeed, the constantly varying circumstances under which cases arise, and the haste and confusion which must frequently be expected in jury trials (without permitting the exercise of the discretion of the court), would often lead to most unjust results and disastrous consequences." [1]

§ **345. Anticipating the Defense.** — Thus, while the plaintiff is not bound to anticipate the defense of his opponent, and to introduce evidence in rebuttal of it,[2] yet, where the materiality of evidence in rebuttal is foreshadowed by the line of defense, it is within the discretion of the trial court to admit it in advance of the evidence which it is intended to rebut.[3] It has been laid down that it is not an objectionable practice to allow the plaintiff, after submitting sufficient evidence to make a *prima facie* case within his complaint, to rest and see what the defendant will make out by way of affirmative proof, reserving the balance of his evidence for purposes of rebuttal, — thereby not exhausting all his ammunition at the first fire.[4]

[1] Goss *v.* Turner, 21 Vt. 437, 439. The learned judge cited Clayes *v.* Ferris, 10 Vt. 112; Hopkinson *v.* Steel, 12 Vt. 582. See also Pingry *v.* Washburn, 1 Aik. (Vt.) 264; *s. c.* 15 Am. Dec. 676. See under Tex. Statute, Bostick *v.* State, 11 Tex. App. 126; Cohea *v.* State, *Id.* 153.

[2] Dodge *v.* Dunham, 41 Ind. 187, 192; Bancroft *v.* Sheehan, 21 Hun (N. Y.), 550.

[3] Dimick *v.* Downs, 82 Ill. 570; York *v.* Pease, 2 Gray (Mass.), 282; Williams *v.* DeWitt, 12 Ind. 309; Dunn *v.* People, 29 N. Y. 523; Bancroft *v.* Sheehan, 21 Hun (N. Y.), 550.

[4] Dean *v.* Corbett, 51 N. Y. Super. (19 J. & S.) 103. And see Bedell *v.* Carll, 33 N. Y. 581. But if the plaintiff takes this course, he is not, in strict right, entitled to give in rebuttal further evidence on the same point. Holbrook *v.* McBride, 4 Gray (Mass.), 215; York *v.* Pease, 2 *Id.* 282; Gilpins *v.* Consequa, 3 Wash. C. C. (U. S.) 184.

§ 346. Allowing Plaintiff to introduce Evidence not in Rebuttal after Defendant has rested. — The admission or exclusion of evidence not strictly in rebuttal is a matter resting in the *discretion* of the trial court, the exercise of which discretion is not subject to review except in cases of gross abuse.[1] The proper rule for the exercise of this discretion is, that material testimony should not be excluded because offered by the plaintiff after the defendant has rested, although not in rebuttal, unless it has been kept back by a trick, and for the purpose of deceiving the defendant and affecting his case injuriously.[2] On this subject, the following observation has been made: "It is a settled rule of practice that, whilst the plaintiff is entitled to rest, on making out a *prima facie* case, and afterwards to adduce additional as well as rebutting testimony, the defendant is in general required to go through his proofs before resting. In ordinary cases, a departure from this course is matter of indulgence and discretion with the court, and a refusal to permit it is, therefore, no ground of error. The rule supposes, however, that the case as first made by the plaintiff shall be calculated to apprize the defendant of the ground on which the right of recovery is finally to be supported. If a new case is made in the close, without any previous notice to the defendant, he should be allowed to go into evidence in answer to it."[3] But the plaintiff is not entitled to this grace. The strict rule is that he must try his case out when he commences.[4] He cannot in strictness (though he can in discretion) be allowed to prove again the facts which he proved, in making out his *prima facie* case.[5] The better view, however, is

[1] Farmers' Mutual Fire Insurance Co. *v.* Bair, 87 Pa. St. 124; Vandike *v.* Townsend, 6 Week. Notes Cas. (Pa.) 55; Marshall *v.* Davies, 78 N. Y. 414; *s. c.* 58 How. Pr. (N. Y.) 231; reversing *s. c.* 16 Hun (N. Y.), 606; Huntsman *v.* Nichols, 116 Mass. 521; Dozier *v.* Jerman, 30 Mo. 216, 220; Walker *v.* Walker, 14 Ga. 242; Gaines *v.* Com., 50 Pa. St. 319; Morse *v.* Potter, 4 Gray (Mass.), 292; Day *v.* Moore, 13 *Id.* 522; Clinton *v.* McKenzie, 5 Strobh. (S. C.) 36; Finlay *v.* Stewart, 56 Pa. St. 183; Dailey *v.* Grimes, 27 Md. 440; McCoy *v.* Phillips, 4 Rich. (S. C.) 463.

[2] Richardson *v.* Lessee &c., 4 Binn. (Pa.) 198; Rucker *v.* Eddings, 7 Mo. 115, 118; Dozier *v.* Jerman, 30 Mo. 216, 220.

[3] Clayes *v.* Ferris, 10 Vt. 112.

[4] Rowe *v.* Brenton, 3 Man. & Ry. 133, 139.

[5] Union Water Co. *v.* Crary, 25 Cal. 504; Kohler *v.* Wells, 60 Cal. 606.

that where the plaintiff 's *prima facie* case is vigorously assailed, he should be allowed to introduce in rebuttal additional *corroborating evidence*.[1] This discretion cannot be exercised so as to abridge the plaintiff 's *right of rebuttal*, — which is, his right to introduce evidence which tends to meet and overthrow the *affirmative case* set up by the defendant in his testimony.[2] It is no ground of exception to such evidence that, in addition to rebutting the defendant's new matter, it also tends to *corroborate* the case made by the plaintiff in chief;[3] nor that it may necessitate allowing the defendant to give evidence in sur-rebuttal.[4]

§ 347. Defendant's Right of Reply or Sur-rebuttal.— Moreover, this discretion cannot properly be exercised so as to cut off the defendant's right of reply to any new matter which the plaintiff may thus be allowed to introduce in rebuttal, provided the defendant has not had the opportunity of introducing the same evidence in his case in chief,[5] — and this, in the view of one court, though his evidence in reply is merely cumulative.[6]

§ 348. Reopening the Case to Admit Additional Evidence. — So, it is within the *discretion* of the trial court, both in civil and criminal trials, to reopen the case at the request of a party, for the purpose of allowing him to introduce additional evidence.[7] The court may allow a party to introduce further evi-

[1] Bryan *v.* Walton, 20 Ga. 480; Davidson *v.* Overhulser, 3 Ia. 196.

[2] Bancroft *v.* Sheehan, 21 Hun (N. Y.), 550.

[3] Chadbourn *v.* Franklin, 5 Gray (Mass.), 312.

[4] Abb. Tr. Brief, 43; citing Scott *v.* Woodward, 2 McCord (S. C.). 161.

[5] Asay *v.* Hay, 89 Pa. St. 77; Kent *v.* Lincoln, 32 Vt. 591; (compare as to Vermont rule Thayer *v.* Davis, 38 Vt. 163).

[6] Walker *v.* Fields, 28 Ga. 237.

[7] Com. *v.* Ricketson, 5 Metc. Mass.) 412, 428; Taylor *v.* Shemwell, 4 B. Mon. (Ky.) 575; Fleet *v.* Hoelenkemp, 13 B. Mon. (Ky.) 219; Larman *v.* Huey, 13 B. Mon. (Ky.) 436; McDowell *v.* Crawford, 11 Gratt. (Va.) 377, 408; Eggspieller *v.* Knockles, 58 Iowa, 649; McKinney *v.* Jones, 55 Wis. 39; State *v.* Coleman, 27 La. Ann. 691; Johnston *v.* Mason, 27 Mo. 511; State *v.* Porter, 26 Mo. 201, 209; Couch *v.* Charlotte &c. R. Co., 22 S. C. 557; State *v.* Rose, 33 La. Ann. 932; Darlend *v.* Rosencrans, 56 Iowa, 122; Williams *v.* Hayes, 20 N. Y. 58; Caldwell *v.* New Jersey Steamboat Co., 47 N. Y. 282, 295; People *v.* Rector, 19 Wend. (N. Y.) 569.

dence after the testimony has closed on both sides,[1] after a demurrer to the evidence has been made,[2] after the argument has commenced,[3] and even after the argument has closed.[4] The court may allow the prosecution in a criminal trial, to reopen its case and introduce further evidence in chief, even after the examination of witnesses for the defense has commenced,[5] and after the State has closed and the defendant has announced that he will introduce no evidence;[6] though it has been elsewhere said that this discretion should be exercised with the utmost caution.[7] This discretion will not be exercised where it would work a fraud on the opposite party, or where the withholding of the evidence was a manifest trick;[8] and if the introduction of such additional evidence takes the adverse party by surprise, he should be allowed time and opportunity, if desired, to meet it with further evidence on his side.[9] It is scarcely necessary to add that it is not an abuse of discretion for the trial court to refuse to open a case to admit further defenses after the trial, where the defendant, *knowing* of the existence of the defenses, neglected to assert them in his pleading in the first instance, and gives no satisfactory reason for the neglect.[10] But where

[1] Taylor *v.* Shemwell, 4 B. Mon. (Ky.) 577; Hess *v.* Wilcox, 58 Iowa, 380.

[2] Tierney *v.* Spiva, 76 Mo. 279.

[3] Ruggles *v.* Coffin, 70 Me. 468; George *v.* Pilcher, 28 Gratt. (Va.) 299, 310.

[4] Breedlove *v.* Bundy, 96 Ind. 319.

[5] State *v.* Clyburn, 16 S. C. 375.

[6] State *v.* Rose, 33 La. Ann. 932.

[7] Clough *v.* State, 7 Neb. 323, 341, 342. See also Kalle *v.* People, 4 Park. Cr. R. (N. Y.) 591. This must be allowed under Tex. Code Crim., art. 661 (which is mandatory), at any time before the conclusion of the arguments. Donahoe *v.* State, 12 Tex. App. 297.

[8] Breedlove *v.* Bundy, 96 Ind. 319.

[9] George *v.* Pilcher, 28 Gratt. (Va.) 299, 310.

[10] Kirschbon *v.* Bonsel (Wis.), 29 N. W. Rep. 907; *s. c.* 67 Wis. 178. And see Foster *v.* Newbrough, 66 Barb. (N. Y.) 645, where it was held that it was proper to refuse to allow the defendant, after the plaintiff had closed in rebuttal, to offer witnesses to sustain his testimony on the defense and to contradict the plaintiff's evidence in rebuttal. In a case in Georgia it was said by Lumpkin, J.: "I must say that so much averse am I to withholding testimony, that I can hardly conceive of a case so gross and palpable that I should feel constrained to control the discretion of the circuit judge from receiving at any time additional affirmatory, cumulative and corroborative evidence of facts previously proved, or which tends to strengthen and add force or probability to such

the plaintiff has inadvertently omitted to introduce a formal though necessary document, until after the close of his evidence, it will be an abuse of discretion, for which the judgment will be reversed, to refuse his application to be allowed to introduce it then.[1] So, where a material witness failed to arrive in time through no fault of his own, it was held error to refuse to allow him to testify, after the argument had commenced, but before the case had been finally submitted to the jury.[2] If, after the defense is closed, the plaintiff introduces new evidence, the defendant will have the right to explain.[3] Thus, where, after the plaintiff had rested, the defendants moved for a non-suit, on the ground that there was already on the records of the court a judgment against them, the plaintiff, it was held, must be allowed to introduce a docket entry showing that it has been set aside.[4] If the court exercises this *discretion unsoundly*,[5] — as by refusing to let in evidence which has been omitted in its regular order by an oversight, the judgment will be reversed.[6]

§ 349. Recalling Witnesses for Further Examination. — So, it is within the *discretion* of the trial court to grant[7] or to

evidence. Walker *v.* Walker, 14 Ga. 242, 250. It has even been held no error, in a suit on a promissory note, to admit evidence of a reasonable attorney's fee (allowed by statute), after motions for new trial and in arrest have been overruled. Maynard *v.* Shorb, 85 Ind. 501.

[1] Meacham *v.* Moore, 59 Miss. 561.

[2] Smith *v.* State Ins. Co., 58 Ia. 478.

[3] Asay *v.* Hay, 89 Pa. St. 77.

[4] Gillette *v.* Morrison, 7 Neb. 395.

[5] Meyer *v.* Cullen, 54 N. Y. 392; Meacham *v.* Moore, 59 Miss. 561.

[6] Owen *v.* O'Reilly, 20 Mo. 603.

[7] State *v.* Coleman, 27 La. Ann. 691; Johnston *v.* Mason, 27 Mo. 511. State *v.* Porter, 26 Mo. 201, 209; Samuels *v.* Griffith, 13 Ia. 103; Morningstar *v.* State, 59 Ala. 30; Rucker *v.* Eddings, 7 Mo. 115; Brown *v.* Burrus, 8 Mo. 26; Gavan *v.* Elsworth, 45 Ga. 283; Cothran *v.* Forsyth, 68 Ga. 560; De Lorne *v.* Pease, 19 Ga. 220; Jesse *v.* State, 20 Ga. 156, 164; Jones *v.* Smith, 64 N. Y. 180. See also Curran *v.* Connery, 5 Binn. (Pa.) 488. By statute in *Texas*, "the court shall allow testimony to be introduced at any time before argument of a cause is concluded, if it appear that it is necessary to a due administration of justice." Pasc. Dig. Tex. Stat., art. 3046; see Sherwood *v.* State, 42 Tex. 498. The construction of this statute is that the discretion thus confided to the court is not subject to revision, except in cases where it has been so abused as to defeat the ends of justice (Kemp *v.* State, 38 Tex. 111; Roach *v.* State, 41 Tex. 262; Treadway *v.* State, 1 Tex. App. 668); and

refuse[1] an application to recall a witness, who has been examined and dismissed from the stand, for further examination. A witness may be thus recalled after cross-examination, for further examination in chief,[2] or for further cross-examination.[3] But when permitted to be recalled, the court is entitled to exercise a large discretion as to the manner in which, and the extent to which the favor granted shall be made use of.[4]

§ **350. Allowing Witness to correct his Testimony.** — The trial court will always allow a witness to explain an error, mistake or oversight in his testimony, when he requests the privilege of doing so before leaving the stand.[5] But whether it will allow a witness to be *recalled* for the purpose of correcting his testimony after he has left the stand, is a matter which rests in the *discretion* of the court.[6] This will always be allowed unless there is reason to believe that the witness desires to substitute an untruthful statement for a truthful one, — especially in view of

that it would be difficult to conceive of such a case, where the discretion has been exercised by permitting the re-examination. Treadway *v.* State, 1 Tex. App. 668. See also Harris *v.* State, 44 Tex. 146; Meredith *v.* State, 40 Tex. 483. A witness thus recalled does not necessarily become the witness of the party recalling him. Treadway *v.* State, 1 Tex. App. 668, 670. Recalling to lay foundation for impeachment: *Ibid.* Recalling to restate testimony, under Texas statute (Pasch. Dig. Tex. Stat., art. 3080; Tex. Code. Cr. Proc., art. 615) where jury disagree as to the statements of the witnesses: Edmondson *v.* State, 7 Tex. App. 116; Campbell *v.* State, 42 Tex. 591; Tarver *v.* State, 43 Tex. 564.

[1] People *v.* Mather, 4 Wend. (N. Y.) 229, 249; Beaulieu *v.* Parsons, 2 Minn. 37; Treadwell *v.* Goodwin, 6 Bosw (N. Y.) 180. It has been held that the fact that, in a criminal trial after the prosecuting witness has left the stand, another witness for the prosecution gives a different account of the occurrence from that given by the prosecutor, does not give the defendant a right further to cross-examine the prosecutor. People *v.* Parton, 49 Cal. 632. It is scarcely necessary to say that a witness cannot thus be recalled without *special leave* of the court, whether in a case at law or in equity. Girault *v.* Adams, 61 Md. 1, 9; Heise's Case, 44 Md. 453.

[2] Brown *v.* Burrus, 8 Mo. 26, 30.

[3] Cummings *v.* Taylor, 24 Minn. 429.

[4] *Ibid.* Rule of court restricting this discretion not valid: De Lorne *v.* Pease, 19 Ga. 220, 227.

[5] Oberfelder *v.* Kavanaugh (Neb.), 32 N. W. Rep. 296; *s. c.* 21 Neb. 483.

[6] Miller *v.* Hartford Ins. Co. (Iowa), 29 N. W. Rep. 411; *s. c.* 70 Ia. 704.

the fact that the witness has delivered his testimony under the risk of an indictment for *perjury*, and if he has testified erroneously he is under a moral, if not a legal obligation, of tendering the proper correction.[1] But *amended swearing* is a thing which justice suspects and abhors; and where a witness has demeaned himself unfavorably on the stand, has been manifestly prejudiced or uncandid, it will be no abuse of discretion to deny him the privilege of returning to the stand for the alleged purpose of correcting a statement, if there is reason to believe that the correction will not be in furtherance of truth and justice.[2] It is not error for the court to allow the testimony of witnesses, taken down in writing, to be *read over* to them in the presence of the jury, for the purpose of correcting errors which may have been committed in writing it down. It is impossible that a party can be injured by having the testimony twice impressed on the minds of the jury, if it is taken down correctly; and it can do him no injustice to have errors, if any, corrected.[3]

§ 351. Admitting Irrelevant Testimony upon a promise of subsequently showing Relevancy.— It is laid down by Professor Greenleaf that it is not necessary that the relevancy of testimony "should appear at the time when it is offered, it being the usual course to receive, at any proper and convenient stage of the trial, in the *discretion* of the judge, any evidence which the counsel shows will be rendered material by other evidence which he undertakes to produce. If it is not subsequently thus connected

[1] Upon this point it was said by Lumpkin, J.: "A witness, through forgetfulness or inadvertence, misstates a fact: upon reflection he discovers the mistake and seeks to rectify it. Would it not be monstrous to deny him the privilege? Is it not due to him, apart from any other consideration? Should he fail to make the explanation so soon as he detects the error, he would be guilty undoubtedly of moral, if not of legal perjury. And for the court to refuse him the permission to make a correction would be to transfer the guilt from his conscience to theirs." Walker *v.* Walker, 14 Ga. 242, 251.

[2] A witness who had just sworn that certain property was worth $2,000, was not allowed to be recalled for the purpose of proving that, at the same time referred to in his testimony, the property was worth but $300. State *v.* Nauert, 6 Mo. App. 596.

[3] Cobb *v.* State, 27 Ga. 648. See also Crawford *v.* State, 12 Ga. 145.

with the issue, it is laid out of the case.[1] This is regarded by many courts as merely a branch of the general rule already treated of,[2] that the order of proof is a matter within the discretion of the trial court. Thus, it has been held that a judgment will not be reversed because the court admitted *declarations of a conspirator* against his co-conspirator, before proof of the connection of the latter with the conspiracy had been made, provided the proof was afterwards made. If the proof is not afterwards made, the rule is to withdraw the testimony from the jury.[3] It is conceded, however, that the better rule is not to admit evidence of the declarations of a co-conspirator or accomplice, until a *prima facie* case has been made, establishing the fact of the conspiracy.[4] And, in general, it is an objectionable practice, to admit evidence which may be prejudicial, with the understanding that it may be *excluded* from the jury *by an instruction*, unless the party tendering it produces other evidence which makes it competent,[5] for which in some cases judgments have been reversed.[6] In a criminal case where this was done it was said: "It must be apparent that such testimony, having once gone to the jury, its impression would necessarily, to some extent, remain in their minds, though they were ordered to discard it; and in a case of circumstantial evidence, it is next to impossible to say how far that impression exercised its influence in supplying any defect which might have arisen, or in solving any doubt in their minds on the general state of the evidence. A prosecuting officer in behalf of the State, in his zeal for a conviction, should never overlook the fact that the interests

[1] 1 Greenl. Ev., § 51 *a*. Compare Follansbee *v.* Johnson, 28 Minn. 311; People *v.* Bragle, 10 Abb. New Cas. (N. Y.) 300; *s. c.* 26 Hun (N. Y.), 378.

[2] *Ante*, § 344.

[3] Miller *v.* Barber, (N. Y. Ct. of App.) 4 Cent. Law. Journ. 177. See Page *v.* Parker, 40 N. H. 62; Sweat *v.* Rogers, 6 Heisk. (Tenn.) 118; Page *v.* Parker, 43 N. H. 363.

[4] Sweat *v.* Rogers, *supra;* Pearson *v.* South, 61 Iowa, 232.

[5] Insurance Co. *v.* Rubin, 79 Ill. 402; Howe Machine Co. *v.* Rosine, 87 Ill. 105. *Post*, §§ 723, 2415.

[6] State *v.* Mix, 15 Mo. 153; State *v.* Wolff, 15 Mo. 168; State *v.* Schneider, 35 Mo. 536; State *v.* Marshall, 36 Mo. 400; State *v.* Danhart, 42 Mo. 242; Gulf &c. R. Co. *v.* Levy, 59 Tex. 542; *s. c.* 46 Am. Rep. 269; Cobb *v.* Griffith &c. Co., 12 Mo. App. 130; Railroad Co. *v.* Winslow, 66 Ill. 219. Compare Tucker *v.* Hamlin, 60 Tex. 171.

of society and the vindication of the law require at his hands as much the protection of the innocent as the conviction of the guilty. Evidence of this character, in cases involving life, should never be proposed by him, unless he is morally certain that he can make good his promise of connecting the defendant with the matter; there should be no room for doubt, where, as in this case, he could have ascertained in advance the existence or non-existence of defendant's connection with the proposed evidence."[1] On the other hand, there is considerable authority to the effect that the admission of improper evidence, which is subsequently withdrawn from the jury, presents no available error.[2] In any view, counsel cannot claim the privilege of thus putting evidence before laying the foundation, without stating in advance *what he expects to prove*, and in such a case it will be no error to refuse it.[3]

§ 352. Limiting Time, Stopping Repetitions and Irrelevant Examinations. — In like manner, the *discretion* of the trial court extends to the stopping of repetitions, to the placing of a reasonable limit upon the time which shall be allowed for the examination or cross-examination of a witness, and to preventing the consuming of the public time by an examination into irrelevant matters. It is discretionary with the trial court to allow a subject to be gone into again, in examining a witness, after he has been fully examined upon it.[4] So, it has been laid

[1] Marshal *v.* State, 5 Tex. App. 273, 291.

[2] Blizzard *v.* Applegate, 77 Ind. 516; Hopt *v.* People, 7 U. S. Sup. Ct. Rep. 614; Specht *v.* Howard, 16 Wall. 564; Davis *v.* Peveler, 65 Mo. 189; State *v.* May, 4 Dev. L. (N. C.) 330; Goodnow *v.* Hill, 125 Mass. 589; Smith *v.* Whitman, 6 Allen (Mass.), 562; Hawes *v.* Gustin, 2 Allen (Mass.), 125; Dillin *v.* People, 8 Mich. 369.

[3] Abb. Tr. Brief, 52; citing Mechelke *v.* Bremar, 59 Wis. 57; *s. c.* 17 N. W. Rep. 682; Piper *v.* White, 56 Pa. St. 90; Hall *v.* Patterson, 51 *Id.* 289; Bilberry *v.* Mobley, 21 Ala. 277; Van Buren *v.* Wells, 19 Wend. (N. Y.) 202; Abbey *v.* Kingsland, 10 Ala. 355; *s. c.* 44 Am. Dec. 491; Carnes *v.* Pratt, 15 Abb. Pr. (N. S.) 337; *s. c.* 36 N. Y. Super. 361; *s. c.* affirmed, 59 N. Y. 405.

[4] Joslin *v.* Grand Rapids Ice & Coal Co., 53 Mich. 323; Crow *v.* Marshall, 15 Mo. 499. Where a witness has already testified that he cannot swear to a certain fact, *e.g.*, that certain persons were at a certain time intoxicated, — no error is committed in allowing the same question to be repeated in substance to the witness. Aurora *v.* Hillman, 90 Ill. 62.

down, generally, that where, in the progress of a trial, it appears obvious that a party, either in the examination of his witnesses or in his argument, is consuming time unnecessarily, the court may, in its discretion, arrest the examination; and the exercise of this discretion will not be reviewed unless its abuse manifestly appears.[1] So, it is the obvious duty of the judge to interpose of his own motion, when a useless and irrelevant examination of the witness is going on, and prevent a waste of time and the distraction of the attention of the jury from the real issues.[2]

§ 353. **Limiting Number of Witnesses.** — So, a reasonable limitation of the *number of witnesses* who shall testify to a particular fact is within the discretion of the trial court; and it has been held that the limitation of the number to *seven* is not an abuse of discretion in a criminal prosecution for a *nuisance*, where the court gives notice in advance of the limitation.[3] So, the court may limit the number of *expert* witnesses to be called at the trial.[4] So, the court may make and enforce a rule limiting the number of witnesses who shall be allowed to testify upon the question of the *credibility* of the plaintiff.[5] So, the court may, in its discretion, notify the parties that not more than *eleven* witnesses on each side will be heard upon the question of the *value* of the property in controversy, and may enforce the order.[6] So, in an action against a railway company to recover damages for taking the plaintiff's land for the defendant's use, it has been held no abuse of discretion for the court to limit the number of witnesses who should be allowed to testify as to the value of the land, to *five*.[7]

[1] It was so held where, in a civil action to recover a quantity of goods, the plaintiff, after having examined sixteen witnesses in rebuttal, was ordered by the court to stop; and the defendant declining to argue, the court restricted the plaintiff's counsel to ninety minutes. Rosser *v.* McColly, 9 Ind. 587. See also Priddy *v.* Dodd, 4 Ind. 84; Lynch *v.* State, 9 Ind. 541.

[2] State *v.* McGee, 36 La. Ann. 206, 209.

[3] Mergentheim *v.* State (Ind.), 8 N. East. Rep. 568; *s. c.* 107 Ind. 567.

[4] Hilliard *v.* Beattie, 59 N. H. 462.

[5] Bays *v.* Hunt, 60 Iowa, 251.

[6] Union &c. R. Co. *v.* Moore, 80 Ind. 458.

[7] Everett *v.* Union Pacific R. Co., 59 Iowa, 243 (Beck and Adams, JJ., dissenting).

§ 354. Control as to the Mode of Examination. — The manner of examining a witness is largely within the discretion of the court before whom the witness is produced, and that discretion must be governed, in a great measure, by a knowledge of the character of the witness, and from his demeanor during his examination.[1] While the regular practice is to allow the examination to proceed by *questions and answers*, so that the opposing counsel shall have fair opportunity for interposing seasonable objections — yet it is within the discretion of the trial court to allow a witness to give his testimony without being questioned at all; and it is said that cases undoubtedly occur which justify such an indulgence.[2] So, it is discretionary and proper for the court to act as a moderator over the course of the examination, and to interpose, when necessary, to prevent the unreasonable interruption of a witness, or to allow the witness to complete a statement or to give his version of a fact or circumstance.[3] It is the obvious duty of the trial judge to see that all witnesses are treated with respect, and that *aged and feeble witnesses* are treated with indulgence, especially when testifying under circumstances which necessarily call forth great emotion.[4] It has been held that a witness cannot be required to put a question to *a person in court*, for the purpose of eliciting information concerning which the witness is interrogated, — as for instance, the full name of a person of which the witness professes to be ig-

[1] Brown *v.* Burrus, 8 Mo. 26, 30, per Scott, J.

[2] Clark *v.* Field, 42 Mich. 342, 344.

[3] State *v.* Scott, 80 N. C. 365.

[4] Thus, on the trial of an indictment for rape, the mother of the prosecutrix, while testifying before the jury, held down her head seemingly much affected, and spoke in a low voice. The prisoner's counsel thereupon requested the court to instruct her to hold up her head and speak louder. The court declined to compel the witness to hold up her head, but said that she would be required to speak loud enough to be heard, at the same time remarking to counsel that, "some allowance must be made for the woman, as she is overcome with emotion." It was held that the prisoner could not claim a new trial on the ground that this remark might have had an unfair influence with the jury, nor was it objectionable in view of the statute (N. C. C. C. P., § 237; same code 1883, § 413), which forbids the judge in giving a charge to the jury "to give an opinion whether a fact is fully or sufficiently proved, such matter being the true office and province of the jury." State *v.* Laxton, 78 N. C. 564.

norant.[1] Where a witness states that he is *not able to answer* a question, the discretion of the court is not abused in excluding it.[2]

§ 355. Right of a Judge to put Questions to a Witness.— A judge presiding upon the trial of a cause is more than a mere moderator between contending parties; he is charged with the grave duty of maintaining truth and preventing wrong, and, to this end, has a large *discretion*, which, if exercised without abuse, will not be error. He may in the exercise of this discretion propound questions to witnesses with a view to elicit the facts;[3] and if they be *leading questions*, it is not available error.[4] It is said to be the *duty* of the judge, both in civil and criminal cases, to give strict attention to the evidence, and to propound to the witness such questions as he may deem necessary to elicit any relevant or material evidence, without regard to its effect upon the interests of either party.[5] But it is also said that the questions which a judge or a juror may properly put to a witness should be such as are suggested by the evidence given on the trial.[6] To this end the judge may propound to *unwilling witnesses* all such proper questions as may throw light upon their statements, and especially upon the motives which actuate them.[7]

§ 356. Indecent Questions. — The fact that evidence is indecent is no objection to its being received, where it is necessary to justice.[8] But it is proper for the trial court to refuse to per-

[1] Wehrkamp *v.* Willet, 4 Abb. App. Dec. (N. Y.) 548.

[2] Teese *v.* Huntingdon, 23 How. (U. S.) 2.

[3] Ferguson *v.* Hirsch, 54 Ind. 337; Blizzard *v.* Applegate, 77 Ind. 516; Lefever *v.* Johnson, 79 Ind. 554.

[4] Huffman *v.* Cauble, 86 Ind. 591, 596.

[5] Sparks *v.* State, 59 Ala. 82.

[6] *Ibid.* 87.

[7] Lockhart *v.* State, 92 Ind. 452. In this case the judge was upheld in propounding to the prosecutrix in an indictment for rape, who had been brought in by attachment, questions which elicited answers showing that the mother of the defendant had given her a sum of money to induce her not to appear against the defendant. But see the Queen's Case, 2 Brod. & B. 284.

[8] Da Costa *v.* Jones, Cowp. 729. Compare Anon. *v.* Anon., 23 Beav. 273; *s. c.* 22 Beav. 481.

mit indecent questions to be put to *children* on the witness stand;[1] nor will the court commit error in refusing to compel a *female witness*, testifying upon an indelicate subject, to couch her answers in indecent language, although, if so expressed, her answers would be more direct, though not necessarily more intelligible.[2]

[1] People *v.* White, 53 Mich. 537, 540.

[2] Thus, on the trial of an indictment for rape, the prosecutrix, while testifying as to the circumstances of the crime, hesitated and wept, whereupon the court directed her to proceed, saying: "I will not require you to use language that will shock your modesty." The witness then said: "He had his will with me." It was held that there was no error in this; but the report showed that no objection was made by the prisoner's counsel at the time. State *v.* Laxton, 78 N. C. 564. A recent case in Indiana strikingly illustrates the extent to which the discretionary power of the court in this regard extends in the absence of an appearance of prejudice in the record. On the trial of an indictment for an *assault upon a deaf-mute*, with intent to commit rape, a question was propounded through an interpreter to the prosecuting witness which shocked her modesty to such an extent that she fled precipitately into an adjoining room. She was there followed by another deaf and dumb woman, whom the court had appointed as an interpreter, without any objection from the court or on the part of the prisoner. In the seclusion of that room, the interpreting witness succeeded in pacifying her and in getting her to answer the question. In about a minute they returned together into the court, and there, in the presence of the court, the jury, the witness and defendant, the interpreting witness, without having repeated the question to the witness, communicated the witness' answer thereto to another interpreter, who was not deaf and dumb, who gave such answer orally to the court and jury. This proceeding was vigorously assailed on appeal by the prisoner's counsel, as being intolerable in a court of justice and a palpable violation of his constitutional right to be brought face to face with a witness testifying against him. The Supreme Court nevertheless held that the proceeding was not fairly open to any of the criticisms or objurgations of the prisoner's counsel. Howk, C. J., said: "In some particulars the case is an anomalous one; for, to the credit of human nature, it is not often that a man is charged with an attempt even to gratify his passions upon the person of an unfortunate woman, forcibly and against her will, who is deprived of the sense of hearing and the power of speech. When the case occurs, however, as it must be sustained, in the nature of things, by the woman's evidence in relation to the offense charged, the proceedings to obtain her evidence will also be anomalous to some extent. If it be conceded that the proceedings of which appellant complains were irregular or even erroneous, there is nothing in the record to show that the appellant was in any manner injured thereby. The record fails to show what the question was which shocked the modesty of the prosecuting witness, or what was her answer thereto, which she communicated to Miss Coons, the interpreting

§ 357. **Leading Questions.** — As a general rule, a party will not be allowed to put leading questions to his own witnesses,[1] though he will be allowed to put such questions to the witnesses of his adversary on *cross-examination*.[2] But this rule is one which yields to the sound *discretion* of the trial court,[3] which discretion will not be reviewed on error or appeal except in cases of manifest abuse.[4] In some jurisdictions it is held that this discretion is unlimited, and that the exercise of it is not subject to revision, even upon a case reserved.[5] In others, *e.g.*, in New Hampshire, the propriety of admitting or excluding a leading question is deemed a matter most conveniently and satisfactorily determined at the trial, upon personal examination of the witness, and in view of all the circumstances of the case. At the

deaf-mute, out of the presence of the court and jury. In this state of the record, we cannot say that the error under consideration was materially, or in any wise, injurious to the appellant." Skaggs *v.* State (Ind.), 6 West. Rep. 261; *s. c.* 108 Ind. 53.

[1] Klock *v.* State, 60 Wis. 574, 576. It is said in *Pennsylvania* by Mr. Justice Paxon: "While there are instances in the books where judgments have been reversed for the refusal to allow leading questions where the party was entitled to them, I know of no reversal in Pennsylvania for allowing a leading question." Farmers' Mutual Fire Ins. Co. *v.* Bair, 87 Pa. St. 124, 128. In *Texas*, the rule seems to be that the action of the trial court in a criminal case, in permitting a leading question to be put by the State's attorney, may be *assigned for error*, and is ground of reversing a conviction. Rangel *v.* State (Tex.), 3 S. W. Rep. 788; *s. c.* 22 Tex. App. 642; Mathis *v.* Buford, 17 Tex. 152; Tinsley *v.* Carey, 26 Tex. 350; Kennedy *v.* State, 19 Tex. App. 620. Thus, on the trial of an indictment for *theft*, under the Texas statute, while a witness was testifying, the district attorney handed him a paper purporting to be a certificate of the brand of the company whose steer the defendant was charged with stealing, a representation of the brand being therein contained. After the witness had examined it, the district attorney, for the purpose of identifying this brand with the one on the stolen animal, asked the witness, "Is this the brand that was on the animal killed?" It was held that the court erred in overruling an objection to this question on the ground that it was leading. Rangel *v.* State (Tex.), 3 S. W. Rep. 788; *s. c.* 22 Tex. App. 642.

[2] Phares *v.* Barber, 61 Ill. 272. *Post*, § 443 *et seq.*

[3] 1 Greenl. Ev., § 435.

[4] Cade *v.* Hatcher, 72 Ga. 359; Farmers' Mutual Fire Ins. Co. *v.* Bair, 87 Pa. St. 124; Hopkinson *v.* Steel, 12 Vt. 582; Donnell *v.* Jones, 13 Ala. 490; Walker *v.* Dunspaugh, 20 N. Y. 170; Addison *v.* State, 48 Ala. 478; Lawson *v.* Glass, 6 Colo. 134; 1 Greenl. Ev., § 435.

[5] State *v.* Lull, 37 Me. 246; Parsons *v.* Huff, 38 Me. 137; Moody *v.* Rowell, 17 Pick. (Mass.) 498.

same time it is held to be quite proper at any time, and certainly expedient in cases of doubt and difficulty, for the presiding judge to reserve the question of discretion for the revision of the whole court; but when it is not reserved, it will always be presumed that the discretion has been properly exercised.[1]

§ 358. [Continued.] **What Questions are Leading and what not.** — A leading question is one which may be answered by Yes or No, or which suggests the desired answer.[2] It is a question which puts the answer into the mouth of the witness.[3] All questions put to a witness, which assume the existence of facts material to the issue which have not been proved, are said to fall within the definition of leading questions.[4] But a question which merely directs the attention of the witness to the fact in controversy, about which his testimony is desired, is not leading.[5]

[1] Bundy *v.* Hyde, 50 N. H. 116, 120; Severance *v.* Carr, 43 N. H. 65; Steer *v.* Little, 44 N. H. 613; Kendall *v.* Brownson, 47 N. H. 186.

[2] 1 Whart. Ev. (2d ed.), § 499; Rangel *v.* State (Tex.), 3 S. W. Rep. 788; *s. c.* 22 Tex. App. 642. Accordingly, it is not proper, on the direct examination of a witness who does not need the aid of a *memorandum to refresh his memory*, to read to him paragraphs from an *affidavit* made by him on a previous occasion, and to ask him if those statements are true. This is in effect putting in evidence the affidavit of the witness and his declarations made previous to the trial, in place of his direct oral statements to the jury on his present recollection of the facts. Hubbell *v.* Bowe, 17 Jones & Sp. (40 N. Y. Super.) 131.

[3] Harvey *v.* Osborn, 55 Ind. 535, 547.

[4] Klock *v.* State, 60 Wis. 574, 576; 1 Greenl. Ev., § 434; 1 Stark. Ev. (9th ed.) 197; Turney *v.* State, 8 Smed. & M. (Miss.) 104.

[5] Thus, the following question has been held not leading: "Do you know anything of the money transactions between the same parties? If so, state their nature and the time, as near as you may remember." Harvey *v.* Osborn, 55 Ind. 535, 547. So, the following question has been held not leading: "State what you may know, if anything, of the purchase of land, by your brother William, from Harvey or Harvey's wife, shares or shares of the estate, when it was, and what land it was, and what, if anything, did Harvey ever say to you on the subject." *Ibid.* So, the following question has been held not leading: "State what you may know, if anything, about any indebtedness by Squire Harvey, one of the defendants in the case, to William Osborn, the other defendant." *Ibid.* 548. So, of the following question: "In speaking of a balance of his wife in the homestead,

§ 359. [Continued.] Where the Witness is manifestly Hostile to the Party calling him. — The discretion of the trial court is well exercised in allowing leading questions to be put, where it appears, from the previous answers or conduct of the witness, that he is an *unwilling witness*,[1] or *manifestly hostile* to the party calling him.[2]

§ 360. [Continued.] Other Circumstances where allowed. — An exception to the rule which disallows leading questions to one's own witness, is that such questions may be put for the purpose of *introducing* matter or leading or directing the attention of the witness to the subject upon which his testimony is desired.[3] So, a party may put leading questions to his own witness where an omission in the testimony of the witness is evidently caused by a failure of recollection, which a suggestion may assist.[4] So, it has been held that, where a witness is called to contradict a former witness, who has stated that certain expressions were used, the proper practice is to ask whether such expressions were used, without putting the question in the general form of inquiring what was said.[5] In general, it is not within the inhibition of the rule against leading questions, to ask a witness questions calling for an affirmative or negative answer, which, from the nature of the case, could not well be put in any other way. "Some discretion," says Campbell, C. J., "must be used on the subject, and every nicety is not conducive to either convenience or justice."[6] According to a learned and accurate

was reference had to a share purchased by William Osborn of the wife of Harvey, as child and heir at law of James D. Osborn, or was it some other and different claim?" This question naturally arose from the witness' answer to a preceding question, and was therefore held not leading. *Ibid.*

[1] Hopkinson *v.* Steel, 12 Vt. 582; Bradshaw *v.* Combs, 102 Ill. 429; Baker *v.* State (Wis.), 33 N. W. Rep. 52; *s. c.* 69 Wis. 32.

[2] Williams *v.* Jarrot, 6 Ill. 120; McBride *v.* Wallace (Mich.), 29 N. W. Rep. 75; Klock *v.* State, 60 Wis. 574, 576.

[3] Williams *v.* Jarrot, 6 Ill. 120.

[4] Shultz *v.* State, 5 Tex. App. 390; 1 Greenl. Ev., §§ 434, 435.

[5] Farmers' Mutual Fire Ins. Co. *v.* Bair, 87 Pa. St. 124; explaining Susquehanna Coal Co. *v.* Quick, 61 Pa. St. 328.

[6] McKeown *v.* Harvey, 40 Mich. 226.

writer, "the judge may, in his discretion, allow leading questions to be put, on direct or re-direct examination, where the witness is hostile or reluctant, or is in the interest of the other party, or so youthful, ignorant, or infirm as to require the attention to be led; or where his memory has been exhausted without stating some particular, such as a name, which cannot be significantly pointed out by a general inquiry." [1]

§ 361. **Effect of Admissions upon Offers of Evidence.** — On principles already stated,[2] stipulations made between counsel in court,[3] dispensing with witnesses or with evidence, will be enforced by the court, at least when in writing,[4] or when acted on by one of the parties,[5] or even where, though not in writing,[6] it would work a fraud to allow them to be disregarded.[7] Nor will such stipulations be set aside on the ground of *mistake*, where the evidence touching the mistake is conflicting and doubtful; [8]

[1] Abb. Tr. Brief, 96; citing 14 Abb. N. C. (N. Y.) 470, note; Moody *v.* Rowell, 17 Pick. 490, 498; Metropolitan Bank *v.* Hale, 28 Hun (N. Y.), 341; Cheney *v.* Arnold, 18 Barb. (N. Y.) 434 (witness old and blind); Stratford *v.* Sandford, 9 Conn. 274, 284; Snyder *v.* Snyder, 50 Ind. 492.

[2] *Ante*, § 193.

[3] Not enforced when made out of and not entered of record, though made pending the trial. Commercial Bank *v.* Clark, 28 Vt. 325.

[4] See, as to the necessity of stipulations being in writing, *ante*, § 200; also Huff *v.* State, 29 Ga. 424.

[5] Johnson *v.* Wright, 19 Ga. 509.

[6] Henderson *v.* Merritt, 38 Ga. 232.

[7] Heilner *v.* Battin, 27 Pa. St. 517. See as to various stipulations touching evidence, — their validity and interpretation, — Sidener *v.* Essex, 22 Ind. 201; Shields *v.* Guffey, 9 Iowa, 322; Curl *v.* Watson, 25 Iowa, 35; Bryan *v.* Coursey, 3 Md. 61; Booth *v.* Hall, 6 Md. 1 (interpretation of an agreement waiving errors in pleading); Farmers' Bank *v.* Sprigg, 11 Md. 389 (effect of agreement that judgment shall be entered for the plaintiff, as evidence on a *future trial*); State *v.* Norwood, 12 Md. 177 (waiving formality of pleading); Boardman *v.* Kibbe, 10 Cush. (Mass.) 545 (waiving proof of execution of papers); White *v.* Harlow, 5 Gray (Mass.), 563; Leonard *v.* White, 5 Allen (Mass.), 177 (agreement to defend on a particular ground only); Bingham *v.* Supervisors, 8 Minn. 441 (restricting the evidence to a particular question); Seawell *v.* Cohn, 2 Nev. 308 (to enter judgment and stay of execution); Neil *v.* Tarin, 9 Tex. 256 (final determination of controversy); Unis *v.* Charlton, 12 Gratt. (Va.) 484 (evidence taken in one of several cases to be read in all); Douglass *v.* Rogers, 4 Wis. 304 (that certain depositions be admitted, reserving objections to matters of substance only).

[8] Charles *v.* Miller, 36 Ala. 141 (affidavit against affidavit).

or where entered into by one party under a mistaken belief touching a fact which did not change the legal rights of the parties;[1] or because of *newly discovered evidence*.[2] Agreements touching instruments of evidence, when not otherwise confined in their meaning, are applicable to *any future trial* of the cause.[3] A frequent stipulation, entered into to avoid a continuance, relates to what an *absent witness* would testify to, if present. On plain grounds, this does not preclude objections to the reading of any portion of the admission, founded on reasons which would have been good against the like testimony of the witness, if personally present;[4] nor prevent the State from showing that the absent witness has made contradictory statements.[5] There are statutes which enable the State's attorney to avoid a continuance by admitting that an absent witness of the accused would, if present, swear to the facts which the accused, in his affidavit for a continuance, states that he expects to prove by him; in which case the affidavit and the admission are read to the jury in the place of the testimony of the absent witness. It is obvious that the statements thus read to them will not have the same realistic effect on their minds as would the testimony of the witness delivered in their presence; and on this ground doubts have been felt as to whether such a statute does not violate the constitutional rights of the accused.[6] On a similar view, it has been reasoned in civil cases, that the admission of a fact by the opposing counsel will not necessarily preclude the party from proving it;[7] since "it would be absurd to hold that any party by his bald admissions on a trial, could shut out legal evidence.[8] But this reasoning seems to go too far. Carried to its logical extent, it would destroy the conclusive effect of the admissions in the

[1] Chapman *v.* Coates, 26 Iowa, 288.

[2] Franklin *v.* National Ins. Co., 43 Mo. 491.

[3] Central &c. Corp. *v.* Lowell, 15 Gray (Mass.), 106; Carroll *v.* Paul, 19 Mo. 102.

[4] Scaggs *v.* Baltimore &c. R. Co., 10 Md. 268.

[5] State *v.* Miller, 67 Mo. 604; State *v.* Hatfield, 72 Mo. 518; State *v.* Jennings, 81 Mo. 585; State *v.* Henson, 81 Mo. 384.

[6] State *v.* Underwood, 75 Mo. 230, 234.

[7] Hancock Mut. Life Ins. Co. *v.* Moore, 34 Mich. 41.

[8] Kimball &c. Man. Co. *v.* Vroman, 35 Mich. 310.

pleadings. The better view is that a formal admission of a fact precludes, in the *discretion* of the court, the offer of any further evidence of such fact,[1] unless the admission is not co-extensive with the offer;[2] though it will not be *error* to admit it.[3]

[1] Dorr *v.* Tremont Bank, 128 Mass. 349; Ainsworth *v.* Hutchins, 52 Vt. 554; Butterworth *v.* Pecare, 8 Bosw. (N. Y.) 671.

[2] Abb. Tr. Brief, 45; citing Priest *v.* Groton, 103 Mass. 540; Brown *v.* Perkins, 1 Allen (Mass.), 89, 96.

[3] Hancock Mut. Life Ins. Co. *v.* Moore, 34 Mich. 41; Bannister *v.* Alderman, 111 Mass. 261.

CHAPTER XV.

INCIDENTS OF THE DIRECT EXAMINATION.

SECTION
364. Examination on the *voir dire*.
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383. Testimony as to Intent, Belief or Motive.
384. Rule where the Concurrence of Intent of two Parties is Material.
385. Fullness of Witness' Statements.
386. Sufficient that the Evidence tends to Prove.
387. Substance of Conversation or Admission.
388. Rule where the Witness remembers a Part only of the Conversation.
389. Source of Information or Belief must be given.
390. Compound Questions when not Admissible.
391. Negative Testimony when too remote.
392. Putting the Testimony of two Witnesses together.
393. Rule as to the Declarations of Conspirators.

§ **364. Examination on the Voir Dire.** — Where the witness is objected to on the ground of incompetency, what is called his examination on the *voir dire* precedes, in strict practice, his examination as a witness.[1] But this strictness does not obtain in

[1] Dewdney *v.* Palmer, 4 Mees. & W. 664.

modern practice; and, where the objection is grounded on interest, it is now entirely a matter of *discretion* with the court whether the preliminary oath as to interest, or the oath in chief shall be administered; and it has been said that the better practice is to swear the witness in chief, and to bring out the facts showing his interest, either by direct or by cross-examination.[1] Under the former practice, the examination on the *voir dire* related only to the question of the interest of the witness in the subject-matter of the suit;[2] but the term is now generally employed to designate the preliminary examination of the witness touching any other ground of qualification as to which he may be interrogated.[3] He is first sworn to make true answers to such questions as shall be put to him touching his competency as a witness. He is then examined in chief by the objecting party, after which the party calling him has the right of cross-examination.[4] The question of his competency is decided by the court, and not by the jury.[5] Where, under the old system, the witness was objected to on the ground of interest, two methods of proving him incompetent were open to the objecting party: 1. By examining him on his *voir dire*. 2. By the introduction of independent evidence. The resort to one method was in general a waiver of the other.[6] The rule that the contents of a *written instrument* cannot be proved by *parol* where the instrument itself can be produced, does not ap-

[1] Seeley *v.* Engel, 17 Barb. (N. Y.) 530.

[2] 1 Greenl. Ev., § 424.

[3] Rapalje on Witnesses, § 232.

[4] Beach *v.* Covillaud, 2 Cal. 237; Succession of Weigel, 18 La. Ann. 49.

[5] *Ante*, § 323, *et seq.*; Reynolds *v.* Lounsbury, 6 Hill (N. Y.), 534; Chouteau *v.* Searcy, 8 Mo. 733; Cook *v.* Mix, 11 Conn. 432; Amory *v.* Fellows, 5 Mass. 219, 229; Tucker *v.* Welsh, 17 *Id.* 160; Dole *v.* Thurlow, 12 Metc. (Mass.) 157; Commercial Bank *v.* Hughes, 17 Wend. (N. Y.) 94; Stall *v.* Catskill Bank, 18 *Id.* 466; Rohrer *v.* Morningstar, 18 Oh. St 579; City Council *v.* Haywood, 2 Nott & McC. (S. C.) 308.

[6] Butler *v.* Butler, 3 Day (Conn.), 214; The Watchman, 1 Ware (U. S.), 232; Waughop *v.* Weeks, 22 Ill. 350; Diversy *v.* Will, 28 Ill. 216; Walker *v.* Collier, 37 Ill. 362; Welden *v.* Buck, Anthon. (N. Y.) 15; Mitllin *v.* Bingham, 1 Dall. (U. S.) 294; Mallet *v.* Mallet, 1 Root (Conn.), 501; McAllister *v.* Williams, 1 Tenn. (Overt.) 107, 119; Bridge *v.* Wellington, 1 Mass. 219; Chance *v.* Hine, 6 Conn. 231.

ply to the examination of a witness on a *voir dire;* since the examining party cannot be supposed to know beforehand what the witness will state, or what papers affecting his competency are in existence.[1]

§ 365. **Of the Oath or Affirmation.**— It is the duty of the party calling the witness to see that he is sworn;[2] though if the oath is inadvertently omitted, the objection will not be good after verdict.[3] The objection must be made as soon as it is discovered, or it will be deemed waived.[4] The oath, as we have inherited it from England, is generally administered by handing to the witness a copy of the *New Testament*, on the external cover of which is imprinted a *cross*. The clerk of the court, at the same time retaining hold of the book, recites an oath like the following: "You do solemnly swear, on the holy Evangelists of Almighty God, that the evidence you shall give in the cause now in hearing, wherein A. B. is plaintiff and C. D. is defendant (or otherwise describing the parties, or omitting the description altogether), shall be the truth, the whole truth, and nothing but the truth: so help you God." The witness nods assent and kisses the book. In many American jurisdictions this form of administering the oath is changed, and in its place is substituted an oath administered by the *uplifted hand*.[5] The clerk of the court rises and holds up his right hand, and so does the witness. The clerk then recites an oath like the following: "You solemnly swear that the evidence you shall give in the cause now in hearing shall be the truth, the whole truth, and nothing but the truth; so help you God." The witness bows, or adds the words "I do." In the case of non-christians, the judge will substitute an oath which conforms to the custom of the witness' country or to his religious

[1] 1 Greenl. Ev., § 95; Herndon *v.* Givens, 16 Ala. 261.

[2] Rap. Wit., § 235; Davis *v.* Melvin, 1 Ind. 136; White Water Valley Canal Co. *v.* Dow, *Id.* 141; Hawks *v.* Baker, 6 Me. 72.

[3] Nesbit *v.* Dallam, 7 Gill & J. (Md.) 494; Cady *v.* Norton, 14 Pick. (Mass.) 236; Sells *v.* Hoare, 7 J. B. Moore, 36; *s. c.* 3 Brod. & Bing. 232.

[4] Slauter *v.* Whitelock, 12 Ind. 338.

[5] That such an oath is good see Gill *v.* Caldwell, 1 Ill. (Breese) 28; Doss *v.* Birks, 11 Humph. (Tenn.) 431; McKinney *v.* People, 7 Ill. 540.

belief or scruples;[1] or where he is conscientiously opposed to taking an oath, he will allow the clerk to administer to him an affirmation,[2] which may run thus: "You do solemnly, sincerely, and truly declare and affirm," etc.[3] Thus, Jews may be sworn on the Pentateuch with covered head,[4] Gentoos, by touching the feet of a Brahmin;[5] Chinese, by the ceremony of killing a cock, or breaking a saucer;[6] a member of the Scottish Kirk, by holding up the hand without kissing the book;[7] a Methodist on the Old Testament, if he prefers;[8] Quakers and others of like scruples, by taking a solemn asseveration that their testimony shall be true;[9] and in whatever way the oath is administered, if the witness knowingly testifies falsely, he will be guilty of perjury.[10] The fact that the oath is more comprehensive than the statute requires does not, of course, affect its validity.[11] The meaning of the clause in the oath, "to tell the whole truth," is that the witness obligates himself to tell so much of the truth as may be *competent* evidence and as may not *criminate* himself.[12] An oath administered to the witness suffices for the whole trial.[13] Although the witness is sworn before arraignment in a criminal case, but after the prisoner has announced his readiness to pro-

[1] By the principles of the common law, no particular form of oath is necessary, so that it binds his conscience. Atcheson *v.* Everitt, Cowp. 389; Rex *v.* Gilham, 1 Esp. 285; *s. c.* 6 T. R. 265; The Queen's Case, 2 Brod. & B. 284.

[2] See United States *v.* Coolidge, 2 Gall. (U. S.) 364; *ante*, § 188. If the witness does not object to be sworn he cannot be allowed to affirm. Williamson *v.* Carroll, 16 N. Y. 217.

[3] N. Y. Code Civ. Proc., § 847. Or, "I solemnly promise and declare that the evidence given by me to the court shall be the truth, the whole truth, and nothing but the truth." Stat. 32 & 33 Vict. ch. 68, § 4. For an earlier form, see Stat. 17 & 18 Vict., ch. 125, § 20.

[4] Ormychund *v.* Barker, 1 Atk. 21, 40, 42; *s. c.* Wiles, 543.

[5] *Ibid.*

[6] *Ibid.*

[7] Mildrone's Case, 1 Leach C. C. 459.

[8] Edmonds *v.* Rowe, Ryl. & M. 77.

[9] United States *v.* Coolidge, 2 Gal. (U. S.) 364; Stat. 9 Geo. 4, ch. 32; 3 & 4 Will. 4, ch. 49; *Id.*, ch. 82; Reg. *v.* Doran, Lewin C. C. 27; Stat. 1 & 2 Vict., ch. 77; and many American statutes.

[10] Sells *v.* Hoare, 3 Brod. & B. 232. See further 1 Greenl. Ev., § 371; Rap. Wit., § 235, and cases cited.

[11] Ballance *v.* Underhill, 4 Ill. 453.

[12] Rap. Wit., § 235, citing Com. *v.* Reid, 1 Leg. Gaz. Rep. (Pa.) 182.

[13] Bullock *v.* Coon, 9 Cow. (N. Y.) 30.

ceed with the trial, it is unnecessary to reswear him.[1] Where the witness is competent in chief he must be sworn generally, although his examination is confined to a particular fact.[2]

§ 366. **Of Sworn Interpreters.** — Where the witness does not understand the English language, the court may swear an interpreter to translate his answers.[3] This is generally provided for by statute; but where there is no statute, it will be presumed on appeal, in the absence of a contrary showing in the record, that the parties agreed upon the appointment of an interpreter.[4] "The interpreter," says Mr. Rapalje, "is *sworn* truly to interpret between the court, the jury and the witness; the oath is then administered to the witness in English, and interpreted to him by the sworn interpreter, as it is pronounced by the clerk."[5] He should be *instructed* to interpret and report every statement made by the witness.[6] He may, it has been ruled, take advantage of the suggestions of others who are not sworn, with regard to the proper interpretation of the testimony, stating the result to the court as his own interpretation.[7] Of course, a party is not *bound* by the interpretation, but may show that the interpreter has given an *erroneous translation* of a word or phrase.[8]

[1] State *v.* Weber, 22 Mo. 321.

[2] Jackson *v.* Parkhurst, 4 Wend. (N. Y.) 369. A civil action for damages will not lie against a witness who swears falsely. Amey *v.* Long, 9 East. 473; *s. c.* 6 Esp. 116; *s. c.* 1 Camp. 16; Collins *v.* Cave, 9 Jur. (N. S.) 297; *s. c.* 4 Hurl. & N. 225; 28 L. J. (Exch.) 204.

[3] See Norberg's Case, 4 Mass. 81; Amory *v.* Fellows, 5 Mass. 219, 226; Rap. Wit., § 236. Where the witness is at the moment physically incapable of speaking aloud, his testimony may be reported by some suitable person appointed by the court. Conner *v.* State, 25 Ga. 515.

[4] Leetch *v.* Atlantic Mutual Ins. Co., 4 Daly (N. Y.), 518.

[5] Rap. Wit., § 236; Norberg's Case, 4 Mass. 81.

[6] People *v.* Wong Ah Bang (Cal.), 3 West. Coast Rep. 58.

[7] United States *v.* Gibert, 2 Sumn. (U. S.) 19. Mr. Rapalje regards this as a dangerous doctrine. Rap. Wit., § 236.

[8] Schnier *v.* People, 23 Ill. 17. A witness may translate to the jury documents written by himself in a foreign language, without being sworn as an interpreter. Kuhlman *v.* Medlinka, 29 Tex. 385.

§ **367. Examination of Deaf and Dumb Witnesses.** — A deaf and dumb witness is examined by a *sworn interpreter*, upon principles similar to those which govern the examination of witnesses who cannot understand and speak the language in which the trial is conducted. It has been held that such an interpreter need not be an adept in the sign language used by deaf and dumb persons, but that it is sufficient if he understands the language so as to be able to interpret, as well the questions that might be propounded to the deaf and dumb witness as the answers thereto.[1] It should be added that in this, as in other cases, where an interpreter is employed, the accuracy of the interpretation may be impeached and is ultimately to be determined by the jury.[2] If he can *write* sufficiently well, he may be required to give his testimony in that way;[3] but he may be allowed to communicate by *signs*, although he can write imperfectly.[4]

§ **368. Introductory Statements.**— It is usual at the outset to ask a witness such questions concerning himself as are suffi-

[1] Skaggs *v.* State (Ind.), 6 West Rep. 261; *s. c.* 108 Ind. 53.

[2] *Ibid.* As to this general principle see Whart. Crim. Ev., § 449; United States *v.* Gibert, 2 Sumn. (U. S.) 19; Schnier *v.* People, 23 Ill. 17. As to the *competency* of such witnesses, see Rap. Wit., § 6; Ruston's Case, 1 Leach C. C. 458; Snyder *v.* Nations, 5 Blackf. (Ind.) 295.

[3] Morrison *v.* Lennard, 3 Car. & P. 127.

[4] State *v.* De Wolf, 8 Conn. 93; Com. *v.* Hill, 14 Mass. 207; Snyder *v.* Nations, *supra*. In a trial in Indiana for assaulting a deaf and dumb woman with intent to ravish her, an interpreter was appointed to put the questions to and interpret the answers of the prosecuting witness. The court appointed another deaf and dumb woman to assist in the interpretation. It was held that there was no error in so doing. Howk, C. J., said: "The object of the examination of the prosecuting witness was to get the facts of the case within her personal knowledge, before the court and jury; and the court had the power undoubtedly to appoint as many interpreters as to it seemed necessary to the accomplishment of that object. The manner in which such an examination could be conducted was a matter to be regulated and controlled by the trial court, in its *discretion*, and will not be reviewed by this court, in the absence of a showing that appellant was in some way injured thereby." Skaggs *v.* State (Ind.), 6 West. Rep. 261; *s. c.* 108 Ind. 53. As to the admissibility of *declarations*, communicated by *signs*, of a deaf and dumb female, alleged to have been ravished, see People *v.* McGee, 1 Denio (N. Y.), 19, 24; Reg. *v.* Guttridge, 9 Car. & P. 471; Reg. *v.* Megson, *Id.* 420.

cient to inform the jury who he is; and the examination usually begins by asking him his *name*. But this question may be put to him by the *clerk* of the court at the time when he is called and sworn, in which case it will not be a good assignment of error that the name of the witness was not proved.[1] So, a witness may be permitted to state that he is a *public officer* without producing his *commission*.[2] A witness may be permitted to *tell in his own language* what may be necessary to tell by way of *introduction*, to make his narrative intelligible, provided his statements are properly restricted, or he reaches the material facts of his testimony,—that is, those portions that bear upon the issues involved in the case about which he is called to testify.[3]

§ **369. Assuming Material Facts in Issue.**— It is said by an able judge: "The rules of law which govern in the examination of witnesses as effectually prohibit counsel from assuming, in their questions, any facts which are material to the point of the inquiry, but which are to be ultimately found by the jury, as other rules of law forbid the presiding judge from assuming such facts in his instructions to the jury. In the former case, the reason of such rules does not rest merely upon the consideration that such assumption of facts might mislead the witnesses, but upon the liability of such assumption or assertion of facts by counsel becoming a substitute in the minds of the jurors for evidence, and thus calculated to mislead them. In the latter case the reason is the same, with the further reason that the assumption by the court, in its instructions to the jury, of material facts to be found by them, is regarded as an invasion by the court of the peculiar province of the jury. The rules in the former case are so rigidly maintained that they will not permit counsel, even upon cross-examination and when leading questions may be put, to assume any material facts in issue and which are to be found by the jury, or to assume that particular answers have been

[1] People *v.* Winters, 49 Cal. 383.

[2] Moody *v.* Keener, 7 Port. (Ala.) 218.

[3] Shultz *v.* State, 5 Tex. App. 390, 392.

given contrary to the fact."[1] Such a practice has also been regarded as subject to the objection that it tends to *lead* the witness; and where it was resorted to by the State's counsel in a criminal case, against the objection of the defendant, it was held that the ruling might be assigned for error.[2] Accordingly, counsel have no right to put a question to a witness which assumes that the witness has said something which he denies having said.[3] But it is no objection to a question that it assumes facts which are *not disputed;*[4] nor as hereafter seen, that the question is *hypothetically* framed, when designed to elicit the opinion of an *expert* witness.[5] Nor is it always available error that *introductory questions*, designed to draw the mind of the witness to the *scene* or *fact* of the controversy, are put in such a manner as to assume the existence of a fact. Thus, in a criminal trial it was held that a witness might be asked whether "he had examined the place designated by H. as the place where he was shot,"—the object being merely to introduce further questions.[6]

§ 370. **Detailing Collateral Facts to Assist Recollection.**—The rule under this head is that it is not necessary that the witness should have a positive or full recollection of the facts to which he testifies, or that he should speak with such certainty as to exclude all doubt in his mind.[7] "He may," says Willie, C. J., "detail circumstances which satisfy his mind of the existence of the fact, and they should go to the jury, so that they may draw from them such conclusion as they may deem just and reasonable. If the deduction drawn by the witness from these circumstances is unwarrantable, then the evidence may be excluded; but if they may or may not, under the facts, warrant

[1] Haish *v.* Munday, 12 Bradw. (Ill.) 539, 545, opinion by McAllister, J.; citing People *v.* Mather, 4 Wend. (N. Y.) 229, 249; People *v.* Graham, 21 Cal. 261; Carpenter *v.* Ambrosan, 20 Ill. 170; Baltimore &c. R. Co. *v.* Thompson, 10 Md. 76; 1 Greenl. Ev., § 434.

[2] Klock *v.* State 69 Wis. 574. The court cite Turney *v.* State, 8 Smed. & M. (Miss.) 104, 120; Gunter *v.* Watson, 4 Jones L. (N. C.) 455.

[3] Sanderlin *v.* Sanderlin, 24 Ga. 583.

[4] Willey *v.* Portsmouth, 35 N. H. 303.

[5] *Ibid.*, *post*, ch. 22.

[6] Magee *v.* State, 32 Ala. 5

[7] 1 Greenl. Ev., § 440.

the conclusion derived from them by the witness, we think that they should be allowed to go to the jury. When resort is had to circumstantial proof, 'any fact may be submitted to the jury, provided it can be established by competent means, which affords any fair presumption or inference as to the question in dispute.' [1] The particular fact connected with an old transaction as to which a witness' testimony is sought, may have faded from his memory, but other and surrounding or collateral facts, which are remembered, may be so intimately associated with the fact inquired about, as to satisfy the witness that it did exist. In such cases it is entirely proper that all these facts should be laid before the jury, together with the deduction drawn from them by the witness, and let them determine as to the sufficiency of the circumstances to establish the main fact. It is more a matter of the sufficiency than of the competency of the evidence." [2]

§ 371. [ILLUSTRATION.] MARKING THE BOUNDARIES OF THE PARISHES IN LONDON. — A good illustration of the value of the principle above stated, that the witness may be allowed to appeal to collateral facts in order to assist his memory, is found in a custom which still prevails in London, of perpetuating the memory of the corners of the different parishes of the city. As stated to the writer by an English barrister, the beadle of each parish goes around at stated periods with a number of boys with hazel switches and marks the corners of the parish by calling the attention of the lads to it; and it was stated to the writer by a gentleman who had long lived in London, that in one known instance the point where several parishes "cornered" was immediately under the seat of one of the judges of one of the judicial courts, and that when the beadle and the boys came around to perform this ceremony, the judge would vacate his seat for the purpose. The custom originated in the practice of taking one or more boys to the parish corner and there *flogging them soundly* with hazel switches, which circumstance would ever afterwards fix the particular spot in their recollections, and in that way a perpetual memorial of the place was preserved in the memories of living witnesses.

[1] Citing Wells *v.* Fairbanks, 5 Tex. 585.

[2] Davie *v.* Terrill, 63 Tex. 105.

§ 372. Evidence of Undisputed Date to fix a Disputed Date. — It has been held within the discretion of the trial court to admit evidence of a transaction having an undisputed date, for the purpose of fixing in the mind of the witness a date which was in dispute. Loomis, J., said: "If the dates to be shown were material and in dispute, they could be shown by the date of some other date not in dispute, upon the same principle that 'the qualities of an object in dispute may be shown by comparison with the known qualities of some object not in dispute.'" [1]

§ 373. Reason for Remembering. — "A witness," says Mr. Abbott, "may be asked why he is confident he is correct; for a reason for the positiveness of relevant knowledge is relevant." [2] Evidence which will assist in showing which party speaks the truth is relevant;[3] therefore a party may aid the memory of his own witness by directing his mind to any circumstance which will help him to recollect more clearly the fact sought to be proved.[4] The rule that a witness may state collateral facts which fixed the subject about which he is being interrogated in his recollection has been applied so as to allow a witness, testifying to a material fact in the case, to state as a reason for his accurate recollection that he had a *conversation about it* with a third person at a stated time; but the details of the conversation are not relevant or admissible. Somerville, J., speaking for the court, said: "It is always competent for a witness to state that he had a conversation with a third person on a certain subject germane to the issue in dispute, and at a time specified, as a reason for his accurate recollection of the fact to which he has testified. The rules of evidence are those of common sense and human experience; and both of these teach us that the retentiveness of a witness' memory,[1] as to a particular fact or incident, is greatly im-

[1] Harris *v.* Rosenberg, 43 Conn. 227, 231; citing Isbell *v.* New York &c. R. Co., 25 Conn. 556.

[2] Abb. Pr. Brief, 99; citing Blackwell *v.* Hamilton, 47 Ala. 472; Angell *v.* Rosenburg, 12 Mich. 241, 256.

[3] Platner *v.* Platner, 78 N. Y. 90.

[4] O'Hagan *v.* Dillon, 76 N. Y. 170. Compare Sawyer *v.* Orr, 140 Mass. 234.

proved where, after seeing or hearing of it, he subsequently converses about it.'

§ 374. Questions as to Contemporaneous Circumstances.— It has been held that a party ought to be allowed to put a question to his own witness relating to a contemporaneous circumstance, for the purpose of bringing to his recollection the fact desired to be brought out. It is said by the New York Court of Appeals: "While a party cannot cross-examine his own witnesses, and is in general bound by the answers made, it is not objectionable, after the witness has given an ambiguous answer, to inquire as to any circumstance or fact tending to enable him to recollect the fact sought to be proved more clearly or certainly." [2]

§ 375. Right to Contradict a Fact from which a Witness infers Another Fact. — In a recent case in Massachusetts it is ruled that, where a witness swears to a fact only as an inference from the existence of another fact, the question whether the fact from which the main fact is inferred is true, becomes material, and may be contradicted by the witnesses of the opposite party. Thus, in an action against a railway company for a negligent injury received by the plaintiff, a passenger, in alighting at the defendant's station in the night time, it became a material inquiry whether the premises were lighted at the time. The defendant's witnesses swore to the fact that they were lighted, but based their statement solely upon the ground that it was the uniform practice to light it. It was held competent for the plaintiff to show in rebuttal that there was no such uniform practice.[3]

§ 376. Strength of Recollection — "Impressions" of the Witness. — In general, it may be said that the impressions of a witness are not evidence, unless it be made to appear that what are called impressions are derived from *recollection*,

[1] Adams *v.* Robinson, 65 Ala. 587, 591.

[2] O'Hagan *v.* Dillon, 76 N. Y. 170, 173.

[3] Wentworth *v.* Eastern R. Co., 3 New Eng. Rep. 355; *s. c.* 143 Mass. 248.

and not from the information of others;[1] and not then when the so-called impressions are in substance the *conclusions* of the witness, under the rule hereafter stated.[2] Thus, on the trial of an issue of *devisavit vel non*, several witnesses were asked: "From the acts and declarations of S. (the deceased) by you related and testified, and as you observed, what impressions did it make on your mind as to his mental condition?" It was held that the question called for an *opinion* which the witnesses were not competent to give.[3] So, a witness called to authenticate a paper cannot be asked whether, to the best of his *impression*, it is in the handwriting of the party.[4]

§ 377. **Witness must state Facts, not Conclusions.** — It is for the jury, and not for the witnesses, to draw *inferences* from facts; and therefore it is a general rule that witnesses who are not testifying as experts are not permitted to state their *opinions*, *conclusions* or *deductions* from facts, but they must be confined to the communication of facts, simply.[5] Again, it is for the court, and not for the witnesses, to draw *conclusions of law*, and

[1] Clark *v.* Bigelow, 16 Me. 246; Boyd *v.* Bank, 25 Iowa, 255. Following this principle, it has been held in one of the appellate courts of Illinois, that it is not competent to allow a witness to answer, "My impression is that they did; I could not swear positively." Rounds *v.* McCormick, 11 Bradw. (Ill.) 220. But in another jurisdiction, on the trial of a felony, which consisted of shooting and wounding, after the witness had testified that she was at her mother's gate near the scene of the injury, and saw a person run west just after the shooting, but that she could not say who it was, the court put to her this question: "At the time you saw that person running, and not from what you heard, did you think it was Dave Long (the defendant)?" To which the witness answered: "I took it to be Dave Long at the time. I could not say for certain who it was now; the man was running fast," etc. It was held after a conviction and on appeal, that it was not an available error for the court to put the question in a leading form, and that, for the purpose of testing the witness and getting at the truth, the court had the right to ask her what her impressions were at the time. Long *v.* State, 95 Ind. 481, 487. See 3 Abb. N. C. 235.

[2] Real *v.* People, 42 N. Y. 270.

[3] Sisson *v.* Conger, 1 Thomp. & C. (N. Y.) 564.

[4] Carter *v.* Connell, 1 Whart. (Pa.) 392.

[5] Morehouse *v.* Mathews, 2 N. Y. 514; Teall *v.* Barton, 40 Barb. (N. Y.) 137; National Bank *v.* Isham, 48 Vt. 590.

it is therefore a general rule that witnesses must not be permitted to state such conclusions.[1] The dividing line between matter which involves the opinion, deduction, or conclusion of the witness, and the recital of a state of the facts, will often be difficult to be drawn; but several illustrations may be given of the rule. Where a witness ended his answer to a question by saying that he considered that certain property belonged to the plaintiff, it was held that this part of his answer should be excluded, it being the statement of a conclusion of law.[2] A question which embraces the *whole merits* of the controversy is ordinarily subject to the objection that it calls for a conclusion on the part of the witness, although it may not be so in particular cases.[3] Where, on a criminal trial, a witness persisted in stating, against the objection of the defendant's counsel, his *suspicions* and conclusions as to the defendant's *guilt*, and the court failed to confine his examination to statements of fact, a conviction was reversed.[4] So, a witness, in an action against a guarantor of a promissory note, in proving the defendant's indorsements, of which there are two, — one above and one below a written guaranty, — should not be allowed to testify that "the second signature was put on to guarantee the payment of the paper."[5] So, in a summary proceeding by motion against a tax collector and his sureties for failing to pay over public moneys, it has been held error to allow the chairman of the county court, as a witness, to state orally the result of his *statement* of the collector's *account*, without producing the papers on which it is based.[6]

§ 378. [CONTINUED.] FURTHER ILLUSTRATIONS. — Applying this rule, it has been held inadmissible, in an action by a bank on a promissory note, the entire consideration of which had failed, to ask the president

[1] Tomlin *v.* Hilyard, 43 Ill. 300.

[2] Rosenthal *v.* Middlebrook, 63 Tex. 334.

[3] Caspar *v.* O'Brien, 15 Abb. Pr. (N. S.) (N. Y.) 402; Conner *v.* Stanley, 67 Cal. 315. Compare Orr *v.* State, 15 Ark. 540.

[4] Harrison *v.* State, 16 Tex. App. 325, 329.

[5] Johnson *v.* Glover, 10 North E. Rep. (Ill.) 214; *s. c.* 121 Ill. 283.

[6] Shepherd *v.* Hamilton County, 8 Heisk. (Tenn.) 380.

of the bank whether the bank discounted and received the note in the *ordinary course of business* and in *good faith*.[1] So, the following question has been held improper, as calling for a conclusion of law: "Was the judgment obtained for the purchase-money of the land in controversy?"[2] So, it is improper to ask a witness what it would cost to do certain work "according to the contract testified to by the plaintiff," because it is for the *court*, and not for the witness to construe the contract.[3] So, it is improper to ask the witness what the defendant *meant* by an expression which, according to the testimony of the witnesses, the defendant had used,[4] — the interpretation of verbal speech being for the jury.[5] So the question "was a certain deed delivered to take effect?" — is inadmissible, as calling for a legal conclusion.[6] So, in an action for damages for flowing land, a witness cannot be asked whether the flowage injured the plaintiff.[7] In like manner, it is not competent for a witness to testify as to the *knowledge* of a person other than himself. He may state declarations, acts or circumstances tending to show such knowledge, but beyond that his statement is merely that of a conclusion, which is inadmissible. The following question was, under this rule, properly rejected: "Did the plaintiff know you had nothing to do with the labor on the building after October last?"[8] For a somewhat different reason, it is not competent to ask a witness whether or not a certain instrument is a *warranty deed*. The reason is that the contents of a writing cannot be proved by parol, unless the absence of the writing has been sufficiently accounted for. Where the contents are shown, it is a question of law, for the court to decide, upon which the opinion of a witness is incompetent.[9] So, in an action on a *building contract*, it has been held proper not to allow the architect, testifying as a witness, to state whether certain extra work, which had been ordered, was of such a character as to render it impossible for the plaintiff to complete the building by the date named.[10] What the witness *understands* or *thinks* falls within the rule which prohibits witnesses from stating their conclusions. Accordingly, the following testimony was properly excluded from the jury: "My understanding was, at the

[1] National Bank *v.* Isham, 48 Vt. 590. See also Clough *v.* Patrick, 37 Vt. 421.

[2] Tomlin *v.* Hilyard, 43 Ill. 300.

[3] McClay *v.* Hedge, 18 Iowa, 66.

[4] Whitman *v.* Freese, 23 Me. 185.

[5] *Post*, § 1115.

[6] Braman *v.* Bingham, 26 N. Y. 483.

[7] Reagan *v.* Grim, 13 Pa. St. 508.

[8] Major *v.* Spies, 66 Barb. (N. Y.) 577.

[9] Jackson *v.* Benson, 54 Ia. 654.

[10] Campbell *v.* Russell, 139 Mass. 278.

time, and still is, that the mortgage was given to release the securities and secure the payment of the note. I think Barber (the payee) understood it in that way also." [1] But a witness may be asked whether a person, *e.g.*, the cashier of a bank, had *authority* to do a particular act.[2] And in an action for damages and for an injunction against miners, who had cut away the dam above the plaintiff's mill, it has been held proper to ask a witness what *effect* did the running of the slum, etc., by defendants and other miners above, have upon the plaintiff's race.[3]

§ **379. Appearances.** — An exception to the foregoing rule is that a witness may frequently state a conclusion of fact from appearances. Thus, it has been held not error, in a trial for murder, to allow witnesses for the State to testify that the prisoner "appeared to be *drinking*," [4] or was *intoxicated* at the time of the alleged offense.[5] So, witnesses other than experts may give their opinions as to *sanity* or *insanity*, provided such opinions be accompanied with statements of facts upon which they are founded.[6] So, it has been held proper to ask, "What did persons in the crowd say, tending to show a *common design* and feeling among several persons, to resist an officer in the execution of his duty?" [7] So, on a trial for murder occurring in an affray, a witness, who was present, may be asked whether, when deceased rushed upon defendant, there was *time enough* for the latter to escape and get out of the way.[8] But where the issue is whether the deceased person was possessed of testamentary capacity, it will not be competent to ask a witness, "From what you saw, what was his mental capacity?" — since this would devolve upon him the office of court and jury, and require him to decide the whole case.[9]

§ **380. Opinions as to Value.** — An exception to the rule which excludes the conclusions of witnesses is found in another rule which admits their opinions as to value, provided a *founda-*

[1] Phares *v.* Barber, 61 Ill. 272.
[2] Robinson *v.* Bealle, 20 Ga. 275.
[3] Bell *v.* Shutz, 18 Cal. 449.
[4] Choice *v.* State, 31 Ga. 424.
[5] People *v.* Eastwood, 14 N. Y. 562.
[6] Choice *v.* State, 31 Ga. 424.
[7] Main *v.* McCarty, 15 Ill. 441.
[8] Stewart *v.* State, 19 Oh. 312.
[9] White *v.* Bailey, 10 Mich. 155.

tion is first laid by showing that the witness is acquainted with the value of the thing, the value of which is in dispute, and is therefore competent to give an opinion upon that subject.[1] This rule is subject to the qualification that the opinions of witnesses as to value are not binding upon the jury, but persuasive merely. If they are of a different opinion, they may find according to their own opinion; though a wide discrepancy between their verdict and the opinions of the witnesses might be ground of setting the verdict aside.[2] Thus, where *land* is taken for the building of a railroad, a witness acquainted with the land and its value may state his opinion as to its value, immediately before the taking and immediately after, and the amount of damage done to the land by such taking.[3] So, a witness acquainted with the land and its value may state his opinion as to the amount of damage done by hauling logs over it, in an action of trespass *quare clasum fregit*.[4] These decisions proceed upon the ground that opinions of witnesses derived from observation are generally admissible in evidence when, from the nature of the subject under investigation, no better evidence can be obtained.[5] So, in an action on a policy for *fire insurance*, where it was necessary to show the value of articles destroyed by the fire, it was held that a daughter of the plaintiff who had bought many of the articles insured, and who was present when others were bought, was a competent witness to testify concerning their value.[6] It is competent for a witness to testify as to the *actual cost* of property at a particular place, such evidence being relevant on the question of value.[7] So, a witness may testify to a knowledge of the *market price* of cattle at a particular time and place derived from the *newspapers*.[8] Obviously, a witness cannot be asked a question which calls upon him, not to give his own opinion as to value, but which requires him, from what he knows and from the testimony

[1] Clark *v.* Field, 42 Mich. 342.

[2] Winkler *v.* Railroad Co., 21 Mo. App. 109.

[3] Curtis *v.* R. R. Co., 20 Minn. 28; Sherwood *v.* R. R. Co., 21 Minn. 127.

[4] Carter *v.* Thurston, 58 N. H. 105, 108.

[5] Hardy *v.* Merrill, 56 N. H. 227, 241.

[6] Continental Insurance Co. *v.* Horton, 28 Mich. 173.

[7] Whipple *v.* Walpole, 10 N. H. 130.

[8] Cleveland &c. R. Co. *v.* Perkins, 17 Mich. 296.

of the witnesses which he has heard, to give his opinion as to the amount of damages which ought to be awarded, — since this devolves upon him the functions of the jury.[1]

§ 381. Opinion of the Plaintiff as to his own Damages. — The rule of the preceding section does not extend so far as to allow a plaintiff in an action, where the quantum of damages is not determined by the value of real or personal property, to give an opinion on the witness stand, as to the extent to which he has been damaged.[2] Such evidence falls within the rule of a preceding section,[3] which excludes statements of witnesses which involve conclusions merely, and especially conclusions which go to the entire merits of the controversy.[4] Thus, in an action for maliciously suing out an *attachment*, where injury to the plaintiff's *credit* is assigned as an element of damages, he will not be permitted to testify what his credit was worth to him prior to the doing of the wrong.[5]

§ 382. Questions depending on the Experience of Witnesses. — Witnesses may properly testify in regard to matters derived partly from their own experience in a particular business, although their information comes through others in the course of such business, — as, for instance, where the question concerns the course of such business in a particular trade.[6] So, it has been held competent to ask a witness who professes to know the number of slaves, mules, etc., employed on a plantation, how much corn per month it would require to supply the wants of the plantation.[7] This opens up the question of *expert testimony*, which is too extensive a subject for full treatment here.[8]

[1] Shepherd *v.* Willis, 19 Oh. 142. Compare White *v.* Bailey, 10 Mich. 155.

[2] Kennedy *v.* Holladay, 25 Mo. App. 503, 514; Smith *v.* Young, 26 Mo. App. 575, 578.

[3] *Ante*, § 377.

[4] White *v.* Stoner, 18 Mo. App. 540, 547; Belch *v.* Railroad Co., *Id.* 80.

[5] Kauffman *v.* Babcock, 2 S. W. Rep. (Tex.) 878; *s. c.* 66 Tex. 241. The court cite Clardi *v.* Calicoat, 24 Tex. 170, 173; Gabel *v.* Weisensee, 49 Tex. 131, 142; Turner *v.* Strange, 56 Tex. 142; 1 Greenl. Ev., § 440. The same ruling was made at the same time in Hernsheim *v.* Babcock (Tex.) 2 S. W. Rep. 880.

[6] King *v.* Woodbridge, 34 Vt. 565.

[7] Rembert *v.* Brown, 14 Ala. 36.

[8] As to the manner of examining, expert witnesses, see *post*, chap. XXII.

§ 383. **Testimony as to Intent, Belief or Motive.** — It is a general rule that the intent or purpose with which an act is done is not material in civil cases, when the doing of the act is called in question; since parties are held to the natural and legal consequences of their acts, and the law cannot investigate their psychological conditions with accuracy.[1] But where the intention of a party becomes material, it may, of course be shown in evidence. Before parties were made competent by statute to testify as witnesses, the intent of a party to a litigation, when material, necessarily had to be proved by his acts or declarations, or by surrounding circumstances. But since the passage of statutes rendering parties competent to testify as witnesses, it is settled by a preponderance of authority, that it is competent for a party, testifying in his own behalf, to state his intent with regard to the transaction in question, where such intent is material.[2] Thus, in a civil action for wantonly and maliciously destroying property, the defendant may testify as to his *motive*, for the purpose of disproving *malice*.[3] So, it has been held, on the

[1] Hale *v.* Taylor, 45 N. H. 405; Gale *v.* Belknap Ins. Co., 41 N. H. 170; Wadleigh *v.* Janvrin, 41 N. H. 512; Snedeker *v.* Warring, 12 N. Y. 170; Farmers &c. Bank *v.* Champlain Co., 23 Vt. 186; Hayward *v.* Bath, 38 N. H. 182. See also as bearing on this subject, Gates *v.* Lounsbury, 20 Johns. (N. Y.) 427; Lawrence *v.* Ocean Co., 11 Johns. (N. Y.) 241; N. Y. Firemen's Co. *v.* Lawrence, 14 Johns. (N. Y.) 46; Palmer *v.* Pinkham, 33 Me. 35.

[2] Shockey *v.* Mills, 71 Ind. 288; Thurston *v.* Cornell, 38 N. Y. 281; Miner *v.* Phillips, 42 Ill. 123; Bloch *v.* Price, 24 Mo. App. 14; Fish *v.* Chester, 8 Gray (Mass.), 506; Hulett *v.* Hulett, 37 Vt. 581, 586; Graves *v.* Graves, 45 N. H. 323; Homans *v.* Corning, 60 N. H. 418; Sweet *v.* Tuttle, 14 N. Y. 465; Hale *v.* Taylor, 45 N. H. 405; Gale *v.* Belknap Ins. Co., 41 N. H. 170, 175; Norris *v.* Morrill, 40 N. H. 395; Edwards *v.* Currier, 43 Me. 474; Wheelden *v.* Wilson, 44 Me. 11; Corinna *v.* Exeter, 13 Me. 328; French *v.* Marstin, 24 N. H. 440, 450; Conway *v.* Clinton, 1 Utah T. 215, 221; McKown *v.* Hunter, 30 N. Y. 625; White *v.* Tucker, 16 Oh. St. 468; Berkey *v.* Judd, 22 Minn. 287, 297 (overruling *dictum* in Hathaway *v.* Brown, 18 Minn. 414; distinguishing People *v.* Saxton, 22 N. Y. 309); Watkin *v.* Wallace, 19 Mich. 57; Seymour *v.* Wilson, 14 N. Y. 567; Forbes *v.* Waller, 25 N. Y. 430; Cortland County *v.* Herkimer County, 44 N. Y. 22. See also as bearing on the question, Jones *v.* Howland, 8 Metc. (Mass.) 377; Blodgett *v.* Farmer, 41 N. H. 403; Fiedler *v.* Darm, 50 N. Y. 437; Lawyer *v.* Loomis, 1 Thomp. & C. (N. Y.) 393.

[3] Conway *v.* Clinton, 1 Utah T. 215, 221.

trial of an indictment for an assault and battery with intent to commit a *rape*, that the accused might testify as to what his intention was in the commission of the assault and battery.[1] So, on the trial of an indictment for *larceny*, it is competent for the defendant to testify as to what his intention was at the time the goods came into his possession.[2] So, where the question concerns the intent with which an *assignment* of property has been made, it is competent for the assignor to testify what his intentions were.[3] So, where the validity of a *deed*,[4] or of an *official* act,[5] is in question, it is competent for the grantor to testify that he executed it *in good faith*. And in general, it may be stated that, where the intent is an essential element in the charge of *crime*, the prisoner has the right to testify as to intent in doing the act.[6] Nor is it necessary to the operation of the rule that the witness should be a *party* to the action. More broadly, the rule is, that where the *motive of the witness*, in performing a particular act or making a particular declaration, becomes a material issue in the case, or reflects important light upon such issue, he may himself be sworn in regard to it, notwithstanding the difficulty of furnishing contradictory evidence, and notwithstanding the diminished credit to which his testimony may be entitled as coming from the mouth of an interested party.[7] Some courts, however, hold that, where a party takes the stand as a witness in his own behalf in civil and criminal cases, it is incompetent for him to testify as to an uncommunicated opinion, belief or motive on which he acted.[8] It is clear that "a party cannot be allowed to testify to his *undis-*

[1] Greer *v.* State, 53 Ind. 420.

[2] White *v.* State, 53 Ind. 595.

[3] Watkins *v.* Wallace, 19 Mich. 57, 76.

[4] Thacher *v.* Phinney, 7 Allen (Mass.), 146.

[5] Cortlandt Co. *v.* Herkimer Co., 44 N.Y. 22.

[6] Kerrains *v.* People, 60 N. Y. 221; People *v.* Baker, 96 N. Y. 340.

[7] Seymour *v.* Wilson, 14 N. Y. 567; Kerrains *v.* People, *supra;* Homans *v.* Corning, 60 N. H. 418; McKown *v.* Hunter, 30 N. Y. 625; Starin *v.* Kelly, 88 N. Y. 318; Griffin *v.* Marquardt, 21 N. Y. 121; Forbes *v.* Waller, 25 N. Y. 430; also, City of Columbus *v.* Dahn, 36 Ind. 330, where some authorities on this point were quoted, but the point left undecided.

[8] Whizenant *v.* State, 71 Ala. 383; Ford *v.* State, *Id.* 385; McCormick *v.* Joseph, 77 Ala. 236; Stewart *v.* State, 78 Ala. 436; Ball *v.* Farley, 1 South. Rep.

closed intent, in order to alter the effect of that which was matter of *contract*, *representation*, or *estoppel*, on which the other party had a right to rely." [1]

§ **384. Rule where the Concurrence of Intent of two Parties is Material.** — It is said that, where it is material to show the concurrence of two parties in the same intent, evidence of the intent of one party alone cannot prevail.[2] But this will not necessarily render it improper to prove the intent of each party.[3] Thus, upon the question of the delivery and acceptance of chattels under a contract of sale, the intent characterizes the act, and the intention with which the act is done becomes material; [4] and therefore, under the above rule, each party may testify to his intention in doing what was done.[5] This rule is not inconsistent with another rule, which conclusively ascribes a certain intent to a given act, which the law does in many cases, in which case the party will be precluded from asserting, at least in civil cases, an intent contrary to the act which he did.[6] Where the concurring intent of two parties must be shown, — as in an illegal agreement, — the intent of each may be shown by independent evidence, and evidence which shows the intent of one is not *incompetent* because it does not also show the intent of the other.[7]

§ **385. Fullness of Witness' Statement.** — Either party is entitled, if he insists upon it, to have the witnesses state fully all

(Ala.) 253, 259; *s. c.* 81 Ala. 288; Ballard *v.* Lockwood, 1 Daly (N. Y.), 158; Oxford Iron Co. *v.* Spradley, 51 Ala. 172; Baker *v.* Trotter, 73 Ala. 277, 281; Sledge *v.* Scott, 56 Ala. 202. In Georgia the doctrine obtains that, although the intention with which an act was done or a contract made may be a material subject of inquiry, it is not competent for a witness to testify as to what the intention was. Green *v.* Akers, 55 Ga. 159.

[1] Abb. Tr. Brief, 93; citing Dillon *v.* Anderson, 43 N. Y. 231; Craighead *v.* Peterson, 72 N. Y. 279; *s. c.* 28 Am. Rep. 150; Ballard *v.* Lockwood 1 Daly (N. Y.), 158; Waugh *v.* Fielding, 48 N. Y. 681.

[2] Hale *v.* Taylor, 45 N. H. 405; Murray *v.* Bethune, 1 Wend. (N. Y.) 191; compare Rich *v.* Jackway, 18 Barb. (N. Y.) 357.

[3] Hale *v.* Taylor, *supra;* Blake *v.* White, 13 N. H. 272.

[4] Kelsea *v.* Haines, 41 N. H. 246, 253.

[5] Hale *v.* Taylor, 45 N. H. 405.

[6] 1 Smith L. C. 531. Compare Hibbard *v.* Russell, 16 N. H. 410, 417.

[7] Abb. Tr. Ev. 739 *n.* 5; Yerkes *v.* Saloman, 11 Hun (N. Y.), 47.

the details in respect of which he is interrogated. The court cannot properly limit the direct examination to a general statement, — such as, whether the witness has heard the testimony of a preceding witness and concurs therein.[1] But the party calling the witness is not obliged to enter into the details. He may ask his witness a general question and elicit a general answer thereto, and then leave his opponent to supply the details, if he shall desire, by a cross-examination.[2] So, in a criminal trial, if there is no objection, it is not an abuse of discretion for the judge to allow a witness to answer the general question, whether the witness has seen the defendant play at a game charged in the indictment at any time within twelve months, etc.[3] It has been held that a witness cannot be asked whether the facts stated in a particular paper are true: he should be interrogated as to those facts particularly.[4]

§ **386. Sufficient that the Evidence tends to Prove.** — It is sufficient, in order to make a question relevant, that the answer which it seeks to elicit will tend in some sensible degree to prove or disprove the fact in issue. It is not necessary that the answer, if believed, should in itself afford complete proof. It may be *corroborative* testimony merely, or a single *link* in a *chain* of circumstances, or a single *fact* in a *collection* of facts, neither of which is sufficient in itself, but all of which, when taken collectively, may be of sufficient probative force to carry conviction to the minds of the jurors. If, therefore, the answer to a question may *tend* to prove, or may form *part* of the proof of the matters alleged, though not wholly sufficient to prove them, the question may be asked.[5] In technical strictness the word "*issue*," when used with reference to pleadings, signifies the disputed point or question.[6] It is said that by the term "*relevancy*," we do not mean that the evidence shall be addressed

[1] Eames *v.* Eames, 41 N. H. 177.

[2] Ayrault *v.* Chamberlain, 33 Barb. (N. Y.) 229.

[3] Orr *v.* State, 15 Ark. 540.

[4] Richardson *v.* Golden, 3 Wash (U. S.) 109.

[5] Schuchardt *v.* Allens, 1 Wall. (U. S.) 359.

[6] Steph. Pl. 25.

with *positive directness* to the disputed point, but we mean evidence which, according to the common course of events, "either taken by itself or in connection with the testimony, proves, or renders probable the past, present or future existence or non-existence of the other.[1] "It is not necessary," continue the Indiana court, "that the fact offered in evidence should bear immediately and directly on the main issue; for, again to quote from Stephen, 'facts which, though not in issue are so connected with a fact in issue as to form part of the same transaction or subject matter, are relevant to the fact with which they are so connected.' "[2] Dr. Wharton defines relevancy as being that which conduces to the proof of a pertinent hypothesis.[3]

§ 387. **Substance of Conversation or Admission.** — While a witness testifying to declarations, conversations or admissions, should give, if possible, the exact words used, yet a general answer embodying the substance or purport of the declarations, conversations or admissions, is not objectionable where that is all that the witness can remember.[4] But it has been held that the rule is not satisfied with a statement of anything else than the substance of the language which was employed, and does not permit the witness to state merely his conclusion from the testimony. Thus, where, eight years after an alleged conversation, a witness in a case in chancery testified concerning the party, "that he fully admitted his liability on the note," — it was held that this was a mere conclusion, and hence inadmissible.[5] On the other hand, it has been held that, where a witness is unable to state what a conversation was, it is improper to refuse to allow him to state the *impression* which the conversation made on his mind.[6]

[1] Steph. Ev., art. 1; Bent. Ev. 257, *n;* Seller *v.* Jenkins, 97 Ind. 430, 438.

[2] Seller *v.* Jenkins, 97 Ind. 430, 438; citing Stephen's Ev., art. 3.

[3] 1 Whart. Ev., § 20.

[4] Chambers *v.* Hill, 34 Mich. 523; Kittredge *v.* Russell, 114 Mass. 67.

[5] Helm *v.* Cantrell, 59 Ill. 525, 531.

[6] Wilder *v.* Peabody, 21 Hun (N. Y.) 376; *ante*, § 376. But see Miles *v.* Roberts, 34 N. H. 245, which supports the view that a witness may state what he *understood* to be the *effect* of a conversation.

§ 388. Rule where a Witness Remembers a Part only of the Conversation. — The fact that the witness remembers only a part of the conversation does not render the rest incompetent. Although it is a rule of evidence that, where testimony of a confession of the accused person is given the whole of what he said must be detailed, and the State will not be allowed to extract a part of it and detail that to the jury only;[1] yet where there is no attempt on the part of the State to violate this rule, the fact that the State's witness is not able to remember all the conversation between himself and the prisoner, but details it so far as he can remember it, does not afford ground for striking out and excluding what he does remember and detail.[2]

§ 389. Source of Information or Belief must be given. — Where a question calls for the knowledge of the witness with reference to a particular fact or transaction, and the witness, instead of answering the question directly, details that he found out certain facts, his answer is correctly excluded, unless he gives the source of his information.[3]

§ 390. Compound Questions when not Admissible.— Where a compound question is propounded to a witness, part of which is admissible and part inadmissible, it is rightfully excluded as a whole.[4]

§ 391. Negative Testimony when too Remote. — A witness cannot, on principle, be allowed to testify that he was not cognizant of a fact, unless he lays a *foundation* for so testifying, by saying that he was in a position in which he would have been cognizant of the fact if it had taken place. Thus, a witness having testified to a material conversation in the family of a deceased person, it was held not competent, for the purpose of contradicting him, to call a neighbor to testify merely that he had never

[1] 1 Greenl. Ev., § 218; Coon *v.* State, 13 Smed. & M. (Miss.) 246, 250; Brown's Case, 9 Leigh (Va.), 634.

[2] Wright *v.* State, 35 Ark. 640, 654.

[3] Rosenthal *v.* Middlebrook, 63 Tex. 334, 336.

[4] Wyman *v.* Gould, 47 Me. 159; George *v.* Norris, 23 Ark. 121; Whiteford *v.* Burckmeyer, 1 Gill (Md.), 127.

heard such a conversation in the family. Such negative testimony has no legal value.[1]

§ 392. **Putting the Testimony of two Witnesses together.**— There is authority for the conclusion that a fact may be proved by putting the testimony of two witnesses together. Thus, if one witness knew the fact at the time and told it to the other, and then forgot it, but the other remembers it as the former told it, and the former is able to testify that he told it correctly, the latter may detail it to the jury as the former told it to him.[2] In like manner, where the plaintiff testified that he made *entries* in accordance with statements made to him by other witnesses, the latter testified that such statements were true,—the evidence was held to be admissible.[3]

§ 393. **Rule as to the Declarations of Conspirators.** — It is a well established rule that, where several persons are proved to have combined together for the same illegal or fraudulent purpose, any act done by one of the party in pursuance of the original concerted plan, and with reference to the common object, is, in contemplation of law, the act of the whole party. It follows as a corollary from this rule, that any acts or verbal expressions, being acts in themselves, or accompanying and explaining other acts, in furtherance of the common design, and for this reason part of the *res gestæ*, which are brought home to one conspirator, are evidence against the other conspirators, provided it sufficiently appear that they were made and used in furtherance of the common purposes of the conspiracy. But, on obvious grounds, before one party can be bound by the declarations of

[1] Chambers *v.* Hill, 34 Mich. 523.

[2] Thus, on the trial of an action for breach of a contract in reference to gathering hay, the question in issue was the number of loads of hay which had been delivered at a particular time. A witness stated that he could not remember the number, but that he knew it at the time and then told it to the plaintiff. The plaintiff was then called and allowed, against objection, to state that the number of loads given him by the previous witness was fourteen. It was held that the evidence was admissible. Shear *v.* Van Dyke, 10 Hun (N. Y.), 528.

[3] Payne *v.* Hodge, 7 Hun (N. Y.), 612.

another party on the ground that the two are co-conspirators, the *fact* of the conspiracy must be shown, and then the declarations must appear to have been made in furtherance of the common design. Regularly, proof of the plot or combination must *precede* the proof of the declarations; but this is a matter which yields to the sound *discretion* of the trial court. In order to make such evidence admissible, it must be shown that the conspiracy or combination was entered into before the declaration was made, though the conduct, acts and declarations of the separate individuals, in the planning or the execution of the joint scheme, may be shown as evidence of the common design. If admissible, the acts and declarations must be those only which were done and made during the pendency of the wrongful enterprise, shown to have been undertaken jointly and in furtherance of its objects.[1] The preliminary question of the existence of such a common purpose must be passed on by the court, for the purpose of deciding on the admissibility of the evidence of such acts and declarations. The question of the probative value of the acts and declarations is ultimately to be decided by the jury.[2]

[1] Page *v.* Parker, 40 N. H. 47, 62. See also People *v.* Parish, 4 Denio (N. Y.), 153; Williamson *v.* Com., 4 Gratt. (Va.) 547; State *v.* Simons, 4 Strobh. L. (S. C.) 266; Reg. *v.* Mears, 1. Eng. L. & Eq. 581; State *v.* Ripley, 31 Me. 386; Glory *v.* State, 13 Ark. 236; Apthorp *v.* Comstock, 2 Paige (N. Y.), 482, 488; Craige *v.* Sprague, 12 Wend. (N. Y.) 41; Willes *v.* Farley, 3 Carr. & P. 395; Patten *v.* Gurney, 17 Mass. 182; Lovell *v.* Briggs, 2 N. H. 218; Sheple *v.* Page, 12 Vt. 519; Talbot *v.* Cains, 5 Met. (Mass.) 520; Brannock *v.* Bouldin, 5 Ired. L. (N. C.) 61. But, as a general rule, a foundation must have been laid by evidence sufficient to establish the fact of the conspiracy *to the satisfaction of the court*, or at least by evidence reasonably tending to establish it, *before* such declarations can be admitted. Sometimes, however, the court may, in its *discretion*, under *peculiar* and *urgent circumstances*, let such declarations go to the jury before sufficient proof is given of the conspiracy, the State undertaking to supply such proof afterwards. Lawson *v.* State, 32 Ark. 220; 1 Greenl. Ev., § 111.

[2] Com. *v.* Brown, 14 Gray (Mass.), 419, 432.

CHAPTER XVI.

OF THE USE BY WITNESSES OF MEMORANDA TO REFRESH RECOLLECTION.

SECTION
398. Statement of the General Rule by Prof. Greenleaf.
399. By Whom Made.
400. Time when Made.
401. How Made — May Consist of what.
(1.) Stenographic Writings.
(2.) Copies.
(3.) Previous Testimony, Deposition or Affidavit of the same Witness.
(4.) Books of Account, Bills of Particulars, etc.
(5.) Newspaper Report made by Witness.
402. How Used at the Trial.
(1.) Not Necessary that the Witness Should have an Independent Recollection of the Fact.
(2.) Right of the Other Party to Inspect the Document.
(3.) Manner in which Memorandum Used by Witness.
(4.) Whether Memorandum can be Put in Evidence.

§ 398. Statement of the General Rule by Prof. Greenleaf. — Prof. Greenleaf's statement of the general rule has been so often quoted with approval by the judicial courts, that the writer takes the liberty of reproducing it here: "Though a witness can testify only to such facts as are within his own knowledge and recollection, yet he is permitted to refresh and assist his memory, by the use of a written instrument, memorandum, or entry in a book, and may be compelled to do so, if the writing is present in court. It does not seem to be necessary that the writing should have been made by the witness himself, nor that it should be an original writing, provided, after inspecting it, he can speak to the facts from his own recollection. So also where the witness recollects that he saw the paper while the facts were fresh in his memory, and remembers that he then knew that the particulars therein mentioned were correctly stated. And it is not necessary that the writing thus used to refresh the memory

should itself be admissible in evidence; for if inadmissible in itself, as for want of a stamp, it may still be referred to by the witness. But where the witness neither recollects the fact, nor remembers to have recognized the written statement as true, and the writing was not made by him, his testimony, so far as it is founded upon the written paper, is but hearsay; and a witness can no more be permitted to give evidence of his inference from what a third person has written, than from what a third person has said."[1] The rule is applicable to *criminal* as well as to civil cases. A witness called by the prosecution in a criminal case to prove statements made by the defendant, may, while on the stand, refresh his recollection by referring to a written memorandum made by him at the time of making such statements or soon after.[2]

§ **399. By Whom Made.** — In conformity with the above text of Greenleaf, the prevailing, though not universal[3] view now is, that it is not necessary that the memorandum which a witness may use to refresh his recollection, should have been made by the witness himself, provided that, after reading it he can speak to the facts from his recollection,[4] or can swear positively to them from the memorandum,[5] and provided also it is used for the sole purpose of refreshing his recollection, and not for the purpose of acquiring original information.[6] It is, therefore, scarce-

[1] 1 Greenl Ev., § 436. The following, among other authorities, are in substantial support of the text. Folsom *v.* Apple River Log Driving Co., 47 Wis. 602 (where the text is quoted with approval); Huff *v.* Bennett, 6 N. Y. 337; Howland *v.* Sheriff, 5 Sandf. (N. Y.) 219; Harrison *v.* Middleton, 11 Gratt. (Va.) 527; Talbot *v.* Cusack, 17 Ir. L. (N. S.) 216; Chicago &c. R. Co. *v.* Adler, 56 Ill. 344; Mead *v.* McGraw, 19 Oh. St. 55.

[2] People *v.* Cotta, 49 Cal. 166.

[3] See, for instance, State *v.* Rhodes, 1 Houst. (Del.) Crim. Cas. 476, 480.

[4] Berry *v.* Jourdan, 11 Rich. L. (S. C.) 67; Davis *v.* Field, 56 Vt. 426, 428; Com. *v.* Ford, 130 Mass. 64; Huff *v.* Bennett, 6 N. Y. 337; Henry *v.* Lee, 18 Eng. C. L. 273 (2 Chit. Rep. 124); 1 Whart. Ev., § 516; State *v.* Lull, 37 Me. 246.

[5] Martin *v.* Good, 14 Md. 398; Coffin *v.* Vincent, 12 Cush. (Mass.) 98; Hill *v.* State, 17 Wis. 675. Compare McCormick *v.* Mulvihill, 1 Hilt. (N. Y.) 131.

[6] Erie Preserving Co. *v.* Miller, 52 Conn. 444; Jaques *v.* Horton, 76 Ala. 239, 243.

ly necessary to say that, where a witness swears that he has a complete recollection of the facts, it makes no difference that the memoranda which he uses to refresh his memory are not his own notes.[1] Thus, a surgeon may use for this purpose the *record* of a hospital, although not made by him, provided he speaks from his own recollection.[2]

§ **400. Time When Made.** — Professor Greenleaf says: "It is most frequently said that the writing must have been made at the time of the fact in question, or recently afterwards. At the farthest it ought to have been made before such a period of time has elapsed as to render it probable that the memory of the witness might have become deficient. But the practice in this respect is governed very much by the circumstances of the particular case."[3] The memorandum must have been reduced to writing at, or shortly after, the transaction, and while the transaction must have been fresh in the memory of the witness. It must have been "presently committed to writing,"[4] "while the occurrences mentioned in it were recent and fresh in his recollection:"[5] "written contemporaneously, with the transaction,"[6] "or contemporaneously or nearly so, with the facts deposed to."[7] Where the witness uses a *copy* of his memorandum for the purpose of refreshing his memory, it is immaterial when the copy was made, if it suffie-

[1] Cameron *v.* Blackman, 39 Mich. 108.

[2] State *v.* Collins, 15 S. C. 373; *s. c.* 40 Am. Rep. 697.

[3] 1 Greenl. Ev., § 438.

[4] Lord Holt in Sandwell *v.* Sandwell, Comb. 445; *s. c.* Holt, 295.

[5] Lord Ellenborough in Burrough *v.* Martin, 2 Camp. 112.

[6] Tindal, C. J., in Steinkeller *v.* Newton, 9 Carr. & P. 313.

[7] Wilde, C. J., in Whitfield *v.* Aland, 2 Carr. & K. 1015. To the same effect see Burton *v.* Plummer, 2 Ad. & El. 341; *s. c.* 4 Nev. & Man. 315; Wood *v.* Cooper, 1 Carr. & K. 645; Morrison *v.* Chapin, 97 Mass. 72, 77; Spring Garden Ins. Co. *v.* Evans, 15 Md. 54; Nicholls *v.* Webb, 8 Wheat. (U. S.) 326, 337; Ins. Co. *v.* Weide, 9 Wall. 667 and 14 Wall. 375; Chaffee *v.* U. S., 18 Wall. 516. Instances: *Two weeks*, too long. O'Neale *v.* Walton, 1 Rich. L. (S. C.) 234. So, under circumstances, the *next day*. Ballard *v.* Ballard, 5 Rich. L. 495. So, of *sixteen months*. Swartz *v.* Chickering, 58 Md. 291, 298. So, of a memorandum made *five months* after the transaction at the request of a party. Spring &c., Ins. Co. *v.* Evans, 75 Md. 54.

iently appear that it is a correct copy.[1] It is said that in respect of the time when a memorandum was made, much must be left to the discretion of the trial court, who sees the witness and hears him testify. Accordingly, where the witness said that he made the memorandum within a month or so, but that he remembered it until he wrote it down, it was held that there was no error in allowing him to use it to refresh his recollection. The court said: "The witness having testified that he remembered the items of labor when he wrote them down, the lapse of time was not such, considering the nature of the account, as to forbid the court, in the exercise of its discretion, allowing the witness to use the account to refresh his memory."[2] "The reasons," said Mr. Justice Gray, "for limiting the time within which the memorandum must have been made are, to say the least, quite as strong when the witness, after reading it, has no recollection of the facts stated in it, but testifies to the truth of those facts only because of his confidence that he must have known them to be true when he signed the memorandum."[3]

§ **401. How Made — May Consist of What.** — (1.) *Stenographic Writings.* — It seems to be no objection that the memorandum used by a witness to refresh his memory, if written by himself, is in characters which he alone can read. This opinion was held in a case where the memorandum was written in phonographic characters peculiar to the witness.[4]

(2.) *Copies.* — It is not necessary that the writing used for this purpose should be an original writing, but a copy taken by the witness may be used, provided that, after inspecting the copy the witness can speak to the facts from his recollection.[5] "The rule is subject to the limitation, that the witness must be

[1] Lawson *v.* Glass, 6 Colo. 134.

[2] *Ibid.*

[3] Maxwell *v.* Wilkinson, 113 U. S. 656, 658; citing Halsey *v.* Sinsebaugh, 15 N. Y. 485; Marcly *v.* Shults, 29 N. Y. 346, 355; State *v.* Rawls, 2 Nott & McC. (S. C.) 331; O'Neale *v.* Walton, 1 Rich. L. (S. C.) 234.

[4] State *v.* Cardoza, 11 S. C. 195, 238.

[5] Lawson *v.* Glass, 6 Colo. 134; Jaques *v.* Horton, 76 Ala. 238, 244; Berry *v.* Jourdan, 11 Rich. L. (S. C.) 67.

able to testify that the original entry, when made, was a true statement of the facts, and the copy must be verified."[1] A clerk may also use for this purpose copies of papers on file in his office, which relate to the business which passes under his supervision.[2]

(3.) *Previous Testimony, Deposition or Affidavit of the Same Witness.* — There is a difference of opinion whether the previous deposition, testimony, or affidavit of a witness can be used by him for the purpose of refreshing his memory. In one jurisdiction the deposition of a witness, previously made by him, may be so used,[3] and it is not error to allow a witness, on a criminal trial, to refresh his memory by reference to the minutes of his testimony given before the grand jury, although the minutes are not in his handwriting.[4] In another jurisdiction, it is ruled that a witness in a criminal trial may, for the purpose of refreshing his memory as to certain dates, be permitted to read over the minutes of his testimony as given on the preliminary examination before a magistrate, where, after so refreshing his memory, he testifies from memory to the facts.[5] These rulings conform to the view above stated,[6] that it is not necessary that the memorandum should have been made by the witness himself. But, if they are sound in principle, what becomes of the rule that the memorandum should be made at, or near the time of the transaction to which the testimony relates? It is believed that they are unsound in principle, and that the true view is that taken in Pennsylvania, that a party cannot refresh the memory of his own witness by reading to him notes of testimony given by him in

[1] Calloway *v.* Varner, cited in Jaques *v.* Horton, 76 Ala. 244.

[2] Erie Preserving Co. *v.* Miller, 52 Conn. 444, 446; *s. c.* 52 Am. Rep. 607. Use of copy of *defaced* copy of *defaced* original permitted: Folsom *v.* Apple River &c. Co., 41 Wis. 602, 606.

[3] Hull *v.* Alexander, 26 Ia. 569. See Atkin *v.* State, 16 Ark. 568; Burney *v.* Ball, 24 Ga. 505; Beaubien *v.* Cicotte, 12 Mich. 459, 469.

[4] State *v.* Miller, 53 Ia. 154. Compare Com. *v.* Phelps, 11 Gray (Mass.), 73.

[5] White *v.* State, 18 Tex. App. 57, 62. See also Hubby *v.* State, 8 Tex. App. 597.

[6] *Ante*, § 399.

a former proceeding, touching the same subject-matter;[1] though in that State the rule seems to be otherwise in a case of a witness, who, since the former trial, has lost his health and memory.[2] But the mere fact that a witness fails to recollect what he had previously sworn to, where he has not, by reason of old age or otherwise, lost his memory, will not be sufficient to admit the notes of a former trial. The court said: "He probably failed to recollect what he had previously sworn to, but if this were enough to admit the notes of the former trial, we might as well abandon original testimony altogether, and supply it with previous notes and depositions. It would certainly be an excellent way to avoid the contradiction of a doubtful witness, for he could always be thus led to the exact words of his former evidence. As we are not yet prepared for an advance of this kind, we must accept the ruling of the court below as correct."[3] On the same view it has been held that an affidavit, made by the witness some three years after the occurrence of the transaction in question, and shortly before the trial, at the request of the defendant's counsel, could not be so used by the witness, since it "would be calculated to stimulate his courage rather than his veracity." The court said: "We think the practice of procuring such papers, and then using them, ostensibly for the purpose of refreshing the recollection of a witness who appears to be adverse, but really to intimidate him, ought not to be encouraged or sanctioned. The proper course is to examine the witness in the usual way, and, if his testimony be in contradiction of written statements previously made by him, to interrogate him respecting the latter, for the purpose of probing his recollection, and of obtaining an explanation of his inconsistency."[4] But where a witness is cross-examined as to his testimony in a previous deposition, there is no good reason why he should not be allowed to refresh his memory by looking at the deposition.[5]

[1] Velott *v.* Lewis, 102 Pa. St. 326. See also Brown *v.* State, 28 Ga. 199.

[2] Rothrock *v.* Gallaher, 91 Pa. 108.

[3] Velott *v.* Lewis, 102 Pa. St. 326, 333, opinion by Gordon, J.

[4] Honstine *v.* O'Donnell, 5 Hun, 472; citing Bullard *v.* Pearsall, 53 N. Y. 230. Compare Harvey *v.* State, 40 Ind. 516.

[5] George *v.* Joy, 19 N. H. 544.

(4.) *Books of Account, Bills of Particulars, etc.* — This question must be kept distinct from the question under what circumstances books of account, shown to have been correctly kept, are admissible as original evidence. On grounds already suggested, books of account kept by the witness, or known by him to be correct, may be used by him as memoranda for the purpose of refreshing his recollection.[1] Thus, an invoice book, known by the witness to be in the plaintiff 's handwriting, the witness having been present when it was made, and it being correct so far as the witness knows, has been held such a memorandum as the witness might look to, for the purpose of refreshing his memory as to the character of the goods mentioned therein and their value.[2] So, where the question relates to the nature and value of property sold at an administrator's sale, it is competent for a witness to refresh his memory from an account of the sales kept by himself, and also to read the terms of the sale as they were read just before the sale commenced.[3] So, where the question was whether or not the defendant had deposited $1,000 with the plaintiff 's bank on a given date and an offer was made to show that he had deposited the amount in another bank on that date, and that the entry had been made by the teller of such other bank in the wrong pass-book, that is to say, in the pass-book which contained the entries of the plaintiff 's bank, and the book-keeper of such other bank was prepared to testify from an inspection of his daily figuring book, made in course of business at the time, — it was held that the testimony should have been received, whether the books were admissible or not.[4] So, in a criminal trial the prisoner was time-keeper, and the witness was pay-clerk, of a colliery. The prisoner gave a time-list to a clerk, who entered

[1] White *v.* Tucker, 9 Iowa, 100; Flower *v.* Downs, 6 La. Ann. 539; Davidson *v.* Lallande, 12 La. Ann. 826; Sackett *v.* Spencer, 29 Barb. (N. Y.) 180; Columbia *v.* Harrison, 2 Treadw. (S. C.) 213; Treadwell *v.* Wells, 4 Cal. 260; Chiapella *v.* Brown, 14 La. Ann. 189; Massey *v.* Hackett, 12 *Id.* 54; Jones *v.* Johns, 2 Cranch C. C. (U. S) 426; Reed *v.* Jones, 15 Wis. 40; Schettler *v.* Jones 20 Wis. 412.

[2] Miller *v.* Jannett, 63 Tex. 82. So as to the invoices themselves, received with the goods by a *factor*. Bartlett *v.* Hoyt, 33 N. H. 151.

[3] Cowles *v.* Hayes, 71 N. C. 230.

[4] Lawrence *v.* Stiles, 16 Bradw. (Ill.) 489.

it in the time-book, and on pay-day the prisoner read from the time-book the number of days each man had worked to the witness, who paid accordingly and who saw the entries of that time. It was held that, for the purpose of proving these payments, the witness might refresh his recollection by referring to the time-book.[1] For this purpose a witness may use a book kept by another clerk, if, from his connection with the business, he knows that the entries are correct, and testifies therefrom according to his own recollection.[2] So, a plaintiff testifying in his own behalf, may refresh his recollection, where he knows the facts, by reading from his bill of particulars, when that is a duplicate of the account rendered on which he sues, even though it was kept by his clerk from entries in his book, as to which the witness cannot say, without seeing them, whether or not he made them himself.[3] So, in a suit to recover the pay for boarding a lot of workmen, the plaintiff in his testimony referred to the bill of particulars made out by another person under his direction, and testified that he knew it to be correct. He testified from recollection to the number of men boarded, the rate per week at which they were boarded, and the aggregate amount due therefor. It was held that it was proper to allow him to refer to this account, although he could not give the name of each man who boarded with him.[4] And where a bill of particulars contains many items, so that no person could be expected to remember them or to state them in detail without the aid of some memorandum made by himself or under his direction, it is discretionary to allow the witness to take the bill of particulars for the purpose of answering the question whether or not it contains a correct list.[5] It is sometimes admissible to permit a witness to refresh his memory by his books of account, although such books do not contain the original entries. The fact, however, that books of original entries have been lost or destroyed is ordinarily a suspicious circumstance proper to be considered by the jury.[6] Where the

[1] Reg. *v.* Langton, 2 Q. B. Div. 296.

[2] International &c. R. Co. *v.* Blanton, 63 Tex. 109.

[3] Hudnutt *v.* Comstock, 50 Mich. 596, 601.

[4] Chicago &c. R. Co. *v.* Liddell, 69 Ill. 639.

[5] Cool *v.* Snover, 38 Mich. 562.

[6] Murray *v.* Cunningham, 10 Neb. 167.

question was whether a party was a resident of the State at a particular date, and a witness was testifying, who made the tax-list, and who had signed and sworn to it, it was held that he might use it as a memorandum to refresh his recollection.[1] Whether the writing be used merely as an instrument for restoring the recollection of a fact, or be offered to be read as containing a true account of transactions entirely forgotten, it must, in conformity with the general principles of evidence, be the best evidence for the purpose that the case admits of.[2] When, therefore, the subject of the testimony is what took place at an interview between a person and the reporter of a newspaper, the reporter's notes of the interview, if in existence, would be the proper memoranda to be used by the witness in refreshing his recollection. But where the reporter testified that his notes of such an interview had been destroyed, and that he had read the published account of the interview printed from his minutes, had compared it mentally with his minutes and had found it to be correct, it was held that the printed article was the best evidence that the case admitted of, and that it might be used by the reporter, testifying as a witness, for the purpose of refreshing his memory as to what took place at the interview.[3] But where it is sought to introduce the newspaper article itself as evidence, and not to allow a witness to use it for the purpose of refreshing his memory, the rule is said to be that it would be material to show, as a foundation for the introduction of the article, that the original manuscript from which it had been printed had been lost.[4]

(5.) *Newspaper Report made by Witness.*— A newspaper reporter, testifying as a witness, may be permitted, for this purpose, to look at a newspaper report of the transaction made by him at the time, although the absence of his written report,

[1] Davis *v.* Field, 56 Vt. 426.

[2] 1 Stark Ev. 178.

[3] Clifford *v.* Drake, 14 Bradw. (Ill.) 75; *s. c.* affirmed, 110 Ill. 135. See also Topham *v.* McGregor, 1 Carr. & K. 320; Com. *v.* Ford, 130 Mass. 64; Railroad Co. *v.* Addler, 56 Ill. 344; Strader *v.* Snyder, 67 Ill. 404; Adams *v.* Kelly, Ry. & M. 157; Burton *v.* Plummer, 2 Ad. & El. 341.

[4] Clifford *v.* Drake, 14 Bradw. (Ill.) 75.

from which the newspaper report was printed, is not accounted for.[1]

§ 402. **How Used at the Trial.**—(1.) *Not Necessary that the Witness Should have an Independent Recollection of the Fact.*— The old idea seems to have been that the use of the memorandum by the witness was permitted strictly for the purpose of refreshing his previous recollection of the fact — revivifying it, so to speak, — and that it was for the witness then to testify, from his recollection, so refreshed, what the fact was.[2] But this idea seems to be pretty much exploded. At least, in several modern jurisdictions, it is held that all that is required is that the witness be able to swear that the memorandum is correct, although he may have forgotten the facts themselves.[3] "There seems," said Rowell, J., "to be two classes of cases on this subject: 1. Where the witness, by referring to the memorandum, has his memory quickened and refreshed thereby, so that he is enabled to swear to an actual recollection. 2. Where the witness, after referring to the memorandum, undertakes to swear to the fact, yet, not because he remembers it, but because of his confidence in the correctness of the memorandum. In both cases the oath of the witness is the primary, substantive evidence relied upon. In the former, the oath being grounded upon actual recollection, and in the latter on the faith imposed in the verity of the memorandum, in which case, in order to judge of the credibility of the oath and the reliance to be placed upon the testimony of the

[1] Com. *v.* Ford, 130 Mass. 64; *s. c.* 39 Am. Rep. 426.

[2] Redden *v.* Spruance, 4 Harr. (Del.) 217; Key *v.* Lynn, 4 Litt. (Ky.) 338; Harrison *v.* Middleton, 11 Gratt. (Va.) 527; Holmes *v.* Gayle, 1 Ala. 517; Vastbinder *v.* Metcalf, 3 Ala. 100; Bank *v.* Brown, Dudley (Ga.), 69; Huckins *v.* People's &c., Ins. Co., 31 N. H. 238; Clark *v.* State, 4 Ind. 156; Calvert *v.* Fitzgerald, Litt. Sel. Cas. (Ky.) 388; Lawrence *v.* Barker, 5 Wend. (N. Y.) 301; Owings *v.* Shannon, 1 A. K. Marsh. (Ky.) 188.

[3] Davis *v.* Field, 56 Vt. 426, 428; Downer *v.* Rowell, 24 Vt. 343; Halsey *v.* Sinesbaugh, 15 N. Y. 485; Russell *v.* Hudson &c., R. Co., 17 N. Y. 134; State *v.* Colwell, 3 R. I. 132; O'Neale *v.* Walton, 1 Rich. L. (S. C.) 234; Mattocks *v.* Lyman, 16 Vt. 113; Eby *v.* Eby, 5 Pa. St. 435; State *v.* Rawls, 2 Nott & McCord (S. C.), 331. Well illustrated, in the case of an old and feeble witness, by Cooper *v.* State, 59 Miss. 267, 272.

witness, the memorandum must be original, and contemporary, and produced in court."[1] The idea upon which many modern decisions unite is that it is sufficient if the witness is able to swear that he knows, from the memorandum, that certain facts are true, although, independently of the memorandum, he may have no present recollection of them.[2] The same idea is sometimes expressed by saying that the witness may, from his memorandum, testify to his supposition and belief of the fact which is stated in the memorandum. Thus, a witness has been allowed to testify to his supposition and belief as to the time when a transaction took place, although he had no recollection as to the time independently of the entry in his cash book.[3] So, a notary's belief that protest and notice were given, based on his entry in his books, his habit being to make such entries on the happening of the event, is evidence, though he has no recollection of the fact independently of his books.[4] The same rule is applied when a surveyor uses his field book to refresh his memory.[5] So, where a witness was shown a receipt given for the payment of money signed by himself, he was permitted to say that he had no doubt that he received the money, although he had no recollection of it, and this was held sufficient parol evidence of the payment.[6] So, in regard to an attesting witness, it is not generally necessary that he should be able to recollect the circumstances attending his attestation, or the fact that he saw the maker of the instrument sign it. It is enough, *prima facie*, if he answers to his signature, and testifies that it would not have been affixed to the instrument but for the purpose of attestation.[7] But where a witness, testifying to transactions relating

[1] Davis *v.* Field, 56 Vt. 426, 429.

[2] State *v.* Rawls, 2 Nott & McC. (S. C.) 331; Dugan *v.* Mahoney, 11 Allen (Mass.), 572; Cowles *v.* State, 50 Ala. 454; Wright *v.* Bolling, 27 Ala. 259; Stephens *v.* People, 19 N. Y. 549. See also Rex *v.* Ramsden, 2 Carr. & P. 603; Guy *v.* Mead, 22 N. Y. 462; Ins. Co. *v.* Weide, 9 Wall. (U. S.) 677; Ins. Co. *v.* Weides, 14 Wall. (U. S.) 375; Reynolds Steph. Ev., art. 136; 1 Greenl. Ev., § 437.

[3] Mattocks *v.* Lyman, 16 Vt. 113.

[4] Davis *v.* Field, 56 Vt. 426, 428, per Rowell, J.

[5] 1 Whart. Ev., § 518.

[6] Maugham *v.* Hubbard, 8 Barn. & Cres. 14.

[7] Alvord *v.* Collins, 20 Pick. 418; Burling *v.* Patterson, 9 Carr. & P. 570; 1 Whart. Ev., § 739.

to the sale and delivery of goods which were the subject of a book account, said, "I have no present recollection of the transaction, and can only speak now of the amount by what I swore on a former trial of this action," — it was held that his testimony was properly rejected;[1] the court reasoning, according to the old idea, that the witness must testify from his recollection as thus refreshed. If a document, made by the witness and containing an account of the transaction about which he is called upon to testify, is handed to him to refresh his memory, and he does not need it for that purpose, no error will be committed by allowing him to take the document. To place in his hands the memorandum, under such circumstances, is regarded as the doing of an idle thing, which does not prejudice the party against whom he testifies.[2]

(2.) *Right of the other Party to Inspect the Document.* — Where a paper is handed to a witness in order to refresh his memory, the other party has a right to inspect it for the purpose of cross-examination, and it is error to deny this right.[3] But he has only the right to inspect such parts of it as the witness consults to aid his memory, or as relate to the subject of his testimony.[4] And this rule seems to apply only in cases where the memorandum is used by the witness in court; it has been held that the memorandum itself need not be produced in court, but that notes taken from it may be used.[5] Accordingly, where the superintendent and house surgeon of a hospital, after having refreshed their memories by the records of the hospital, testified, from their own recollection, as to certain facts therein contained as to the admission of a patient into the hospital, etc., it was held that the court committed no error in receiving this testimony without the production of the books in open court.[6] A witness, it seems,

[1] Howie *v.* Rea, 75 N. C. 326.

[2] Chute *v.* State, 19 Minn. 271.

[3] Chute *v.* State, 19 Minn. 271; Rex *v.* Ramsden, 2 Carr. & P. 603; Hardy's Case, 24 How. St. Tr. 824; Merrill *v.* Ry. Co., 16 Wend. 586, 600; 1 Greenl. Ev., § 466; Tibbetts *v.* Sternberg, 66 Barb. 201; Com. *v.* Jeffs, 131 Mass. 5; Com. *v.* Haley, 13 Allen (Mass.), 587.

[4] Com. *v.* Haley, *supra*.

[5] Hamilton *v.* Rice, 15 Tex. 382; *ante*, § 401, subsec. 2.

[6] State *v.* Collins, 15 S. C. 373; *s. c.* 40 Am. Rep. 697.

may refresh his memory from memoranda made by him in books, without being required to produce the books;[1] at most, the production of them, if he has not been summoned to produce them, will be a matter within the sound discretion of the trial court.[2]

(3.) *Manner in Which Memorandum Used by Witness.* — A witness may be *required*, in the *discretion* of the trial court, to look at a memorandum or papers, for the purpose of aiding his recollection.[3] The manner in which a witness shall be allowed to refresh his recollection, by referring to a writing, must be left to some extent to the discretion of the presiding judge; a discretion to be exercised with reference to the circumstances of the case, and sometimes it is presumed, with reference to the conduct and bearing of the witness upon the stand.[4] Thus, it is within the discretion of the court to refuse to require the witness to examine all the memoranda before giving his testimony, and then to lay them aside and not to refer to them again while testifying, especially where they consist of numerous large books.[5] If the witness cannot read and write, but has nevertheless made his mark to a certain memorandum produced to refresh his recollection, it may not be read to the witness in the presence of the jury, but the witness may be permitted to withdraw, with one of the counsel on each side, and the paper may there be read over to him without comment, after which he may testify from his recollection as thus refreshed.[6]

(4.) *Whether the Memorandum can be put in Evidence.* — Upon this point it is difficult to state a uniform or satisfactory rule.

[1] Trustees *v.* Bledsoe, 5 Ind. 133; State *v.* Cheek, 13 Ired. L. (N. C.) 114. This ruling will not apply to *books of account*, which, on proof of their having been correctly kept, become, in some jurisdictions, original evidence. See Furman *v.* Peay, 2 Bail. (S. C.) 394; State *v.* Cardoza, 11 S. C. 195, 239; Bank *v.* Zorn, 14 S. C. 444.

[2] Com. *v.* Lamman, 13 Allen (Mass.), 563. *Contra*, that the books must be produced: Hall *v.* Ray, 18 N. H. 126.

[3] Chapin *v.* Lapham, 20 Pick. (Mass.) 467.

[4] Johnson *v.* Coles, 21 Minn. 108, 111.

[5] *Ibid.* It is proper to allow witnesses to refer to a book of original entries made by himself for the purpose of *fixing dates*. McCausland *v.* Ralston, 12 Nev. 195.

[6] Com. *v.* Fox, 7 Gray (Mass.), 585.

One idea admits the memorandum in evidence in connection with the testimony of the witness.[1] But the general rule seems to be, that the fact that the recollection of the witness has been refreshed by the use of a memorandum, so that he is able to testify to the fact, does not entitle either party to put the memorandum in evidence.[2] On the other hand, it is held that, "if the witness, after examining the memorandum, cannot state the facts from independent recollection, but can testify that he knew the contents of the memorandum at or about the time it was made, and knew them to be true, both the memorandum and the testimony of the witness are admissible."[3] Or, negatively, the memorandum itself is not admissible in evidence, except in cases where the witness, at the time of testifying, has no recollection of what took place, further than that he accurately reduced the whole transaction to writing.[4] In other words, the entries or memoranda of transactions made by a witness are admissible only when the memory of the witness is at fault. If he can refresh his memory by an inspection of the writing, and then testify from personal recollection, the written *data* will be excluded from evidence.[5] When, therefore, a witness had testified from his own recollection to certain transactions in which he took part, *e.g.*, interviews between himself and the defendant, it was error to admit in evidence a written memorandum of such transactions kept by him, the entries in which were made at the time of the transactions, for the purpose of corroborating his testimony.[6] As already seen,[7] it is the right of the opposite party to inspect

[1] Watson *v.* Walker, 23 N. H. 471; Webster *v.* Clark, 30 N. H. 245; Tuttle *v.* Robinson, 33 N. H. 104.

[2] Com. *v.* Jeffs., 132 Mass. 5; Field *v.* Thompson, 119 Mass. 151; Alcock *v.* Royal Exchange Ins. Co., 13 Ad. & El. (N. S.), 292; Com. *v.* Ford, 130 Mass. 64.

[3] Jaques *v.* Horton, 76 Ala. 238, 243; Acklen *v.* Hickman, 63 Ala. 494.

[4] Kent *v.* Masson, 1 Bradw. (Ill.) 466.

[5] Halsey *v.* Sinebaugh, 15 N. Y. 485; Russell *v.* Hudson River Co., 17 N. Y. 134; Guy *v.* Mead, 22 N. Y. 462; Marcly *v.* Shultz, 29 N. Y. 346; Brown *v.* Jones, 46 Barb. (N. Y.) 400; Driggs *v.* Smith, 45 How. Pr. (N. Y.) 447; Flood *v.* Mitchell, 68 N. Y. 507; Wightman *v.* Overhiser, 8 Daly (N. Y.), 282; Meacham *v.* Pell, 51 Barb. (N. Y.) 65; Butler *v.* Benson, 1 *Id.* 526.

[6] Wightman *v.* Overhiser, *supra*. Compare Folsom *v.* Apple River &c. Co., 41 Wis. 602, 607.

[7] *Supra*, subsec. 1.

the memorandum and to cross-examine the witness in regard to it; and it may be shown to the jury, not for the purpose of establishing the facts therein contained, but for the purpose of showing that it would not properly refresh the memory of the witness. But even in such a case, only those portions of the memorandum which relate to the cause on trial and the testimony of the witnesss can be put in evidence."[1] It is scarcely necessary to say that, where a witness uses a memorandum which itself is admissible in evidence, it is no objection that he reads from it to the jury, instead of its being read to the jury by counsel, according to the usual practice.[2]

[1] Com. *v.* Jeffs, 132 Mass. 5. Opinion by Endicott, J. Citing Com. *v.* Haley, 13 Allen (Mass.), 587.

[2] Raynor *v.* Norton, 31 Mich. 210.

CHAPTER XVII.

OF THE CROSS-EXAMINATION.

ARTICLE I. — IN GENERAL.
ARTICLE II. — AMERICAN RULE OF STRICT CROSS-EXAMINATION.
ARTICLE III. — QUESTIONS AFFECTING CREDIBILITY.

ARTICLE I. — IN GENERAL.

SECTION
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§ **405. Objects of Cross-examination.**—All cross-examination expends itself in three efforts: 1. To sift, explain or modify what has been said on the direct examination. 2. (Under the English rule in force in some American State courts) to develop

new matter favorable to the cross-examining party. 3. To discredit the witness.

§ **406. Right to Cross-examine.** — "The benefit of cross-examination, is an essential condition to the reception of direct testimony;" [1] that is to say, testimony is not admissible, if the party against whom it is to be used, or those in privity with him, have no opportunity of cross-examining the witness.[2] The right of cross-examination being a substantial and a very important right, it is *error to restrict it*, so far as to prevent the cross-examining party from going fully into all matters connected with the examination in chief. "The importance of the right of full cross-examination," says Scott, J., "can scarcely be overestimated. As a test of the accuracy, truthfulness and credibility of testimony, it is invaluable. It is the clear right of the cross-examining party to elicit suppressed facts, which weaken or qualify the case of the party examining in chief, or support the case of the cross-examining party.[3] In any view, the right of cross-examination extends to all matters connected with the *res gestæ*.[4] A witness may be cross-examined as to his examination in chief in all its bearings, and as to whatever goes to explain or modify what he has stated in his examination in chief," and *prejudice* will be *presumed* where this right is denied.[5] A *party*, called by his opponent as a witness, has a right to be cross-examined by his own counsel. Accordingly, where the plaintiff had examined the defendant as a witness, it was error to prevent the defendant, on cross-examination, from answering questions relevant to the matter of the examination in chief, and favorable to his side of the case.[6] It is error to refuse permission to cross-examine a witness for the prosecution, in a criminal case, for the purpose of showing hostility.[7]

[1] Heath *v.* Waters, 40 Mich. 457, 471

[2] Sperry *v.* Moore, 42 Mich. 353, 361; Buller N. P. 239, 242; 1 Stark. Ev. 61, 62, 409, 34; Best Ev. (Woods' ed.), § 496; 1 Greenl. Ev., § 163; 1 Whart. Ev., § 177.

[3] Citing Pow. Ev. 380.

[4] Citing Whart. Ev., § 529.

[5] Martin *v.* Elden, 32 Oh. St. 282, 287; citing Wilson *v.* Wagar, 26 Mich. 452.

[6] Reeve *v.* Dennett, 141 Mass. 207.

[7] People *v.* Lee Ah Chuck, 66 Cal. 662.

§ 407. Leading Questions. — Leading questions may always be put on cross-examination, whether the witness is a willing or adverse one for the party calling him; [1] except where, under the American rule of strict cross-examination, the cross-examining party transcends the limits of the direct examination, and thereby makes the witness his own.[2]

§ 408. Sifting, Modifying and Extending the Direct Examination — Making it more Explicit.—A primary object of cross-examination is to enable the opposing party to sift the statements made by the witness on his direct examination; to supply omissions, to test the accuracy of his recollection, to develop facts which diminish the probability of his statements, and to *extend* his statements as to matters touched upon in his direct examination, so as to make them more *explicit* and *complete*. Within reasonable limits, a cross-examining party has a *right* to demand *details* and *particulars* of the matters stated in general terms by the witness on his direct examination, and it is *error* to deny this right. The *reason* is that "cross-examination is important, not only as a means of getting out, in full detail, all the facts within the range of the subject matter of the direct examination, but it is also an important means of testing the memory of a witness, as well as a potent means of ascertaining the truth of his statements." [3] But this right does not extend so far as to allow the cross-examining party to put *fishing questions*, for the purpose of ascertaining facts which may assist him in his prosecution or defense, such as the names of other witnesses acquainted with the subject of the inquiry. "Litigants," said Mr. Justice Clifford, "ought to prepare their cases for trial before the jury is impaneled and sworn; and, if they do not, they cannot complain if the court excludes questions propounded merely to ascertain the names of persons whom they desire to call as witnesses to disprove the case of the opposite party." [4]

[1] Parkin *v.* Moon, 7 Carr. & P. 408.

[2] *Post*, § 433.

[3] Hyland *v.* Milner, 99 Ind. 308, 310, opinion by Elliott, J.

[4] Storm *v.* United States, 94 U. S. 76, 84.

§ 409. [CONTINUED.] ILLUSTRATIONS. — Thus where a witness who was an administrator testified to some facts touching his administration, it was held that he might be interrogated *fully* in regard thereto, — meaning so far as the matters sought to be drawn out affected his credibility or related to the issues.[1] - - - - So, a defendant who becomes a witness in his own behalf, and undertakes, on his direct examination, to state all that transpired between two points of time, may be asked on cross-examination whether he has *omitted anything* pertinent to the case; and his attention may be directed to the precise point, by asking him if some specified thing did not occur.[2] - - - - So, where the question in dispute was as to the *execution* of a *note*, and the witness for the plaintiff had testified as to such execution, it was held competent and proper to cross-examine him (under the English rule)[3] as to all the circumstances connected with it, and, among others, as to the *consideration* of the note.[4] - - - - So, a witness having testified that he managed certain property as the agent of the plaintiff, the witness' wife, — which property had been attached, at the suit of one Newman, as the property of the witness, — was asked on cross-examination: "What was the understanding between yourself and Newman, relative to attaching these cattle, just previous to the commencement of the attachment suit?" It was held that this question was proper on cross-examination, and that the court erred in excluding it.[5] - - - - So, where a witness, called by the defendant in a criminal trial, is interrogated as to the conduct and presence of the accused up to and at the *time* of the alleged commission of the crime, it is not improper to cross-examine him as to the conduct and presence of the accused *after* that date, without limiting the State's counsel to the *exact time* mentioned in the examination in chief.[6] - - - - So, on the cross-examination of the prosecuting witness on an indictment for *larceny*, who claims to have been *robbed* of a large sum of money, questions tending to elicit the fact that he was *indebted considerably* and straightened at the time of the alleged larceny, and that his stock of goods was small, and also tending to show that he had made statements on the preliminary examination of the prisoners, which made out his inventory to be very much larger than he knew it to be in fact, — were held admissible, as bearing upon the probabilities, for the purpose of testing his character and credit. The court said: "The authorities

[1] Barker *v.* Blount, 63 Ga. 424.
[2] People *v.* Russell, 46 Cal. 121.
[3] *Post*, § 430.
[4] Lemprey *v.* Munch, 21 Minn. 379.
[5] Steinberg *v.* Meany, 53 Cal. 425.
[6] Marion *v.* State (Neb.), 29 N. W. Rep. 911.

do not recognize such an inquiry as so connected with the merits as to be open to impeachment, but it is within the range of a proper cross-examination." [1] - - - - So, a witness who has testified as to *character* may, of course, be cross-examined as to details, times and places.[2]

§ 410. [FURTHER ILLUSTRATION.] CIRCUMSTANCES ATTENDING A CONSPIRACY. — On the trial of an indictment for burning a barn to defraud an insurance company, Henry Hamilton, a witness for the prosecution, gave testimony respecting what took place at a certain party or dance at Joseph Hamilton's house on the night of the fire. He was asked whether the dance was not talked of some time before it was gotten up; but the court ruled this out, under objection of the defendant. Another witness for the prosecution, named Fuller, had given an account of a plan proposed by the conspirators for burning the barn, which was in substance that, in order to prevent any suspicion, a dance should be gotten up at another person's house, and that, during the course of the the evening, one of the Hamiltons should go out for a supply of cider and take advantage of that opportunity to light a candle, which would take some time to burn down to the straw, so that they would be away at the party at the time the fire should break out, and thus escape suspicion. The Supreme Court held that the ruling of the court, in thus curtailing the cross-examination of Hamilton was error. Campbell, J., said: "If the party had been arranged and invitations given, earlier than the alleged interview with Fuller, then his whole story would be falsified. This was then a vital point in the case. It was very clearly legitimate on cross-examination, upon the strictest rules. It referred to the very dance concerning which the witness had been examined in chief, and was offered as relevant to the subject as any of the other circumstances on which he had been questioned." [3]

§ 411. [FURTHER ILLUSTRATIONS.] LENGTH AND CIRCUMSTANCES OF POSSESSION, ETC. — Applying the rule that the cross-examination may properly be carried into all the surrounding circumstances, for the purpose of testing fully the accuracy and credibility of the witness, it has been held, in an action of replevin by A. against B., a sheriff, to recover possession of goods levied upon by B. under process against C., where A., in support of his title, offered a witness who testified that, on the day of

[1] People *v.* Morrigan, 29 Mich. 5. Compare Wilbur *v.* Flood, 16 Mich. 40.

[2] Jackson *v.* State, 78 Ala. 471.

[3] Hamilton *v.* People, 29 Mich. 173, 181

the levy he, the witness, was in possession of the goods as the agent or servant of A., the court did not err in permitting the defendant to cross-examine the witness as to the time during which he had been in possession, in whose employ he had been during such time, and the manner in which he entered into the employ of the plaintiff.[1] - - - - So, in an action of replevin, brought against an attaching creditor of the plaintiff's vendor, the plaintiff having shown no title but possession merely, it was held competent for the defendant to cross-examine as to the nature and length of the possession, for the purpose of showing that it was colorable and of testing the witness' means of knowledge.[2]

§ 412. [**Further Illustrations.**] **Right to the whole of a Conversation.** — Where a conversation is called out by one party, it is the right of the other party, upon cross-examination, to develop the whole of the conversation, so far as it may bear upon the issues or affect the credibility of the witness;[3] and this rule applies equally, whether the conversation was brought out on direct examination or on cross-examination; it may, therefore, apply in respect of the re-examination.[4] So, where a witness on his direct examination testified that a witness for the opposite party had, on another trial, *testified* to certain facts, it was proper, on cross-examination, to ask the witness what *other facts* such other witness testified to on such other trial.[5]

§ 413. [**Further Illustration.**] **Reasons for Opinion as to Value.** — Where a witness has, on his examination in chief, given his opinion as to value, he may be cross-examined in full respecting his reasons for such opinion; and here the rule ap-

[1] Blake *v.* Powell, 26 Kan. 320.

[2] Thornburgh *v.* Hand, 7 Cal. 554.

[3] Addison *v.* State, 48 Ala. 478; Phares *v.* Barber, 61 Ill. 272; Sager *v.* State, 11 Tex. App. 110; Metzer *v.* State, 39 Ind. 596; Fletcher *v.* State, 49 Ind. 124; *s. c.* 19 Am. Rep. 673; Harness *v.* State, 57 Ind. 1.

[4] Roberts *v.* Roberts, 85 N. C. 9; McIntyre *v.* Thompson, 14 Bradw. (Ill.) 554; Hatch *v.* Potter, 2 Gilm. (Ill.) 725; Phares *v.* Barbour, 61 Ill. 271; 1 Greenl. Ev., § 201; 2 Whart. Ev., §§ 1108, 1109.

[5] Carey *v.* Richmond, 92 Ind. 259. Compare Harper *v.* Harper, 57 Ind. 547. But, it has been ruled that where the party's *own witness* first speaks of the conversation, although on cross-examination, the party is not thereby entitled to make all that was said evidence in his own behalf. Addison *v.* State, 48 Ala. 478.

plies that *great latitude* should be allowed in cross-examination,[1] the limits of which, where no rule of law is violated, are within the *discretion* of the presiding judge.[2] A question is proper which enables the jury to see upon *what basis* the witness has made his estimate of value, or which connects his general estimates of value with the thing in respect of which the injury is predicated.[3]

§ 414. Instances Under the Last Rule. — Where a witness testified that a horse was worth $9,000, it was not error to ask him, on cross-examination, whether he would give $3,000 for the horse; and the witness having testified that he had no money, it was not error to ask him whether he would give his note for that price.[4] - - - - A witness, called to testify as to the value of property, fixed it at $3,000. On his cross-examination, he was asked whether he had not, as an insurance agent, offered and written a policy of insurance on the same property at a valuation of $4,000. It was held error to reject this question. It was admissible, upon the principle which permits statements made by witnesses out of court, different from those which they have testified to at the trial, to be shown. Lake, C. J., said: "The value of the proposed testimony, as tending to discredit the witness, rests upon the very reasonable presumption that he would not, in the very important matter of taking an insurance risk, value the property higher than what he really believed it to be worth."[5] - - - -

[1] Mo. &c. R. Co. *v.* Haines, 10 Kan. 439; Central Branch &c. R. Co. *v.* Andrews, 30 Kan. 590; Atchison &c. R. Co. *v.* Blackshire, 10 Kan. 477, 486; Markel *v.* Moudy, 13 Neb. 323, 327.

[2] Miller *v.* Smith, 112 Mass. 470.

[3] Atchison &c. R. Co. *v.* Blackshire, 10 Kan. 477. Witnesses as to value can base their opinions on actual sales of which they have knowledge, but cannot, it has been ruled, be cross-examined as to what they have offered to sell similar property for. Thompson *v.* Moiles, 46 Mich. 42.

[4] Miller *v.* Smith, 112 Mass. 470.

[5] Markel *v.* Moudy, 13 Neb. 323, 327. It has been held that, while witnesses, called to testify as to value, have the right to give their opinion based upon actual sales known by them to have been made; yet it would be going too far to hold that the trial court errs in rejecting an offer to prove a mere proposition by the witness to sell property similar to that in dispute, for the purpose of fixing its value. Thompson *v.* Moiles, 46 Mich. 42. The proposition is not well reasoned by the court, and the conclusion is unsatisfactory. An offer to sell similar property at a different value would be, in some sense, equivalent to a statement made by the witness out of court contradicting a similar statement made by him in court, and such evidence is always admissible.

In a proceeding to condemn land for a railroad, the following questions and answers were given on cross-examination: "Q. Take plaintiff's land just as it is, and suppose the railroad ran through the valley without running through the land, what is the difference of value, compared with the value as the road now is? A. I would rather have the land without the road running through it, but don't know what the effect on the general market would be." "Q. Have you not a piece of land in the neighborhood of plaintiff which you are offering to sell, and desirous to sell, through which the railroad runs? A. Yes, I have." "Q. State whether or not these facts might not bias your judgment as to value of Mr. Blackshire's land? A. I think not." It was held that there was no error in permitting this latitude of cross-examination.[1] - - - - In another like case, on a trial before a justice, the plaintiff was examined as a witness in his own behalf. Upon his examination in chief, he testified, among other things, that he was acquainted with the value of property in his vicinity, in the neighborhood of his lots, at the time the railway was constructed in the alley-way, and it was his opinion that, immediately before the railroad was there constructed, his property was worth $10,000, and that, immediately afterwards, it was worth only $6,000, and that the depression of the value by reason of the construction of the railway was $4,000. Afterwards, upon cross-examination, he was asked the following questions: "What would be the value of a strip of ground fifteen feet wide, taken from the south end of these lots (around the east end) out to Main street; beginning at Tenth street, take a strip fifteen feet wide off; then again from the south, north on the east side out to Main street?", "What, in your opinion, would be the depreciation of the value of the remaining property, as an entirety, by reason of the taking from them fifteen feet off the south end of the lots, and fifteen feet off the side of the property to Main street?" Upon objection of the plaintiff, these questions were excluded. The plaintiff having recovered a verdict and judgment for $2,000 damages, the jury finding specially that the plaintiff's property without the alley-way was worth $5,000 and with the alley $7,000, it was held on appeal that, under the circumstances of the case, great latitude should have been allowed in the cross-examination of the witnessess, giving evidence merely as to their opinions in respect of value and damages, and that the court below erred in restricting the cross-examination of the plaintiff as a witness.[2]

[1] Atchison &c. R. Co. *v.* Blackshire, 10 Kan. 477, 486.

[2] Cent. Branch &c. R. Co. *v.* Andrews, 30 Kan. 590.

§ **415. Great Latitude allowed.** — The general rule, therefore, is that a cross-examination should be permitted as to all matters developed on the direct examination,[1] and that great latitude should be allowed in conducting the same,[2] the extent and limits of which, where no rule of law is violated, rest in the sound *discretion* of the trial court.[3] The rule, then, is that, for the purpose of testing the accuracy of the recollection of the witness or of affecting his credibility, the cross-examination may in general be extended into *all the circumstances* surrounding or affecting the transaction which he has detailed in his direct examination. "A cross-examination," said Brewer, J., "is not limited to the very day and exact fact named in the direct examination. It may extend to *other matters* which limit, qualify or explain the

[1] Shuster *v.* Stout, 30 Kan. 529; Commissioners *v.* Craft, 6 Kan. 145; Sumner *v.* Blair, 9 Kan. 521; Callison *v.* Smith, 20 Kan. 28; 1 Greenl. Ev., § 445.

[2] Atchison &c. R. Co. *v.* Blackshire, 10 Kan. 477, 487; Ingram *v.* State, 67 Ala. 67, 71. See also Stoudenmeier *v.* Williamson, 29 Ala., 558; Re Carmichael, 36 Ala. 514. On the trial of an indictment for murder, it has been said that the broadest latitude should be allowed the defendant in the cross-examination of such of the *State's witnesses* as were active partisans in the difficulty which led to the killing, and who are hostile in their feelings toward the defendant; and, on the other hand, that the examination of such witnesses by the people should be correspondingly restricted. Sutton *v.* People, 119 Ill. 250.

[3] Miller *v.* Smith, 112 Mass., 470, 476; Hathaway *v.* Crocker, 7 Metc. 262, 266; Com. *v.* Sacket, 22 Pick. (Mass.) 394; Winship *v.* Neale, 10 Gray (Mass.), 382; Swan *v.* Middlesex, 101 Mass. 173; Johnston *v.* Jones, 1 Black (U. S.), 209, 226; Fry *v.* Bennett, 2 Bosw. (N. Y.) 200; Knight *v.* Cunnington, 6 Hun (N. Y.), 100; Wallace *v.* Taunton Street Ry. Co., 119 Mass. 91; Ledford *v.* Ledford, 95 Ind. 283; Oliver *v.* Pate, 43 Ind. 132; Wachstetter *v.* State, 99 Ind. 290; *s. c.* 50 Am. Rep. 94. The Supreme Court of Kansas say: "Great latitude is and should be allowed in the cross-examination of a witness as to his interest in the suit, his friendships or hostility towards the parties, his motives and prejudices." State *v.* Collins, 33 Kan. 77, 80. The Supreme Court of Wisconsin has said: "On the cross-examination of a witness, anything which shows his friendship or enmity to either of the parties to the suit is commonly a proper subject of inquiry. So also is everything which tends to show that, in the circumstances in which he is placed, he has a strong temptation to swear falsely. It is to be remembered that the jury are the sole judges of the credibility of the witness, and that whatever tends to assist them, in the judgment which they are to form upon this subject, ought not to be withheld from them." Kellogg *v.* Nelson, 5 Wis. 125, 131.

facts stated in the direct examination, or modify the inferences deducible therefrom, provided only that such matters are directly connected with the facts testified to in chief." [1] But, while great latitude is allowed to the cross-examining counsel in putting questions having tendency to disclose the *animus* of the witness toward the parties, yet it is plain that questions may be asked under this head, which so far *exceed* the *bounds* of *courtesy* and *propriety*, that it is no error to refuse to allow the witness to answer them. It was so held, on the trial of a criminal prosecution for theft, where counsel for the defendant, on cross-examination of the prosecuting witness, asked, "Don't you love the defendant?" [2]

§ **416.** [**Continued.**] **Especially where Fraud is involved.**— "Great latitude," said Marston, J., "has always been allowed the cross-examination in this class of cases, especially where one of the *parties* to the alleged fraudulent transaction is upon the stand. In cases of fraud no definite fixed rule can be laid down; as to do so would but, in many cases, be laying down rules for the guidance of parties about to perpetrate frauds. Much must be left to the discretion of the trial judge." [3] For obvious reasons, where the question relates to the *bona fides* of a *transfer* of a merchant's stock of goods, or whether a particular conveyance was concocted for the purpose of hindering, delaying or defrauding the creditors of the vendor, the widest latitude, in the cross-examination of a *party* to the conveyance, should be allowed.[4] It is proper to extend the inquiry into *all the circumstances* of the *transfer* of the goods to the witness, which tend to show its fraudulent character and purpose, and the fraudulent nature of his possession of them.[5] But, whilst this is so, it has

[1] Blake *v.* Powell, 26 Kan., 320, 326. See to the same effect Coates *v.* Hopkins, 34 Mo. 135 Detroit &c. R. Co. *v.* Van Steinburg, 17 Mich. 99, 109; Haynes *v.* Ledyard, 33 Mich. 319; Ferguson *v.* Rutherford, 7 Nev. 385; Atchison &c. R. Co. *v.* Blackshire, 10 Kan. 477; Field *v.* Davis, 27 Kan. 400.

[2] Blunt *v.* State, 9 Tex. App. 234.

[3] Jacobson *v.* Metzger, 35 Mich. 103. So held in Anderson *v.* Walter, 34 Mich. 113.

[4] Kalk *v.* Fielding, 50 Wis. 339.

[5] Bowers *v.* Mayo, 32 Minn. 241.

been held, under the American rule,[1] that a cross-examination concerning *other transfers* not referred to in the examination in chief, is not permissible, [2] — a conclusion which may be regarded as doubtful, since the question is largely one of *intent*.[3]

§ 417. [CONTINUED.] ILLUSTRATIONS. — Thus, it appearing, from the cross-examination of a *mortgagee of a stock of merchandise*, that he and the mortgagor had an interview, shortly after the giving of the mortgage and before the attachment was levied, — it was held that the defendant should have been allowed to ask further questions adapted to elicit from the witness evidence as to whether, at such interview, the mortgagor had informed the plaintiff that he was making large sales of mortgaged goods and receiving large sums of money therefor, without accounting to the plaintiff for the same.[4] - - - - In another case, where the question in issue was the *bona fides* of a sale of a stock of goods, it appeared that the sale was made in haste, the vendor not taking an invoice or otherwise determining the amount of the goods, and leaving the country immediately, with the cash portion of the purchase price. The purchaser having testified, on direct examination, that the reason the vendor gave for the hasty sale was that he was in a scrape with a girl and was afraid of prosecution thereupon, a question was asked one of the witnesses, on cross-examination, what kind of a trouble the vendor said he was in with the girl, and one or two other questions were asked tending in the same direction, all of which were ruled out by the court. It was held that this was error. On cross-examination, the party denying the *bona fides* of the sale should have been allowed to inquire as to all that the vendor said in reference to the scrape with the girl; and this for two reasons: (1) A full cross-examination might have disclosed that the pretended reason was wholly fictitious, and so understood by the purchasers; or (2) it might have disclosed that he was seeking to evade liability in a bastardy action, for the support of an illegitimate child, and so informed the purchasers — in either of which cases the evidence would have been material; [5] since a conveyance made to avoid one's liability for the support of a bastard child is a conveyance in fraud of creditors, and void.[6]

[1] *Post*, § 432.
[2] Clark *v.* Reiniger, 66 Ia. 507.
[3] *Ante*, § 432, *et seq.*
[4] Kalk *v.* Fielding, 50 Wis. 339.
[5] Schuster *v.* Wingert, 30 Kan. 529.
[6] As held in Damon *v.* Bryant, 2 Pick. (Mass.) 411.

§ **418. Control of the Limits of Cross-examination.** — So, the limit to which a cross-examination shall be extended and the mode in which it shall be conducted, are, as we shall still further see, subject in a very large measure to the *discretionary* control of the trial court. The propriety of allowing a question on *cross-examination*, which *misrecites the testimony* of the witness, and is calculated to lead him into error, is within the discretion of the court. "On this point," say the Supreme Court of Georgia, "we simply rule this: It is the duty of the court, both to protect the witness under cross-examination from being unfairly dealt with, and to allow a searching and skillful test of his intelligence, memory, accuracy, and veracity. As a general rule, it is better that cross-examination should be too free than too much restricted. This is a matter that necessarily belongs to and abides in the discretion of the court. * * * There must be allowed some degree of skill, if not sharpness, in conducting cross-examinations; because a witness, however fair and honest and truthful, may not be careful enough; and it is to the interest of justice to expose the blundering of a witness, as well as his willful departures from veracity. A jury ought to be made to know what character of mind they have before them on the witness stand; whether they have a careful, cautious witness, or one who is disposed to take things on trust. That is quite essential. But the court is there watching the proceedings, and acquainted with all the surroundings; it is proper to leave such a question to the discretion of the court."[1]

§ **419. Court may curtail Needless Repetitions.**— As a general rule it is not error for the court to refuse to allow cross-examining counsel to require the witness to *repeat* in detail what he has *fully stated* on his direct examination.[2] It was so held where a conversation, partly in a foreign language, had been testified to and interpreted by the witness on cross-examination.[3] How many times the *same question* shall be *repeated* on cross-

[1] Harris *v.* Central R. Co. (Ga.), 3 S. East. Rep. 355.

[2] Simon *v.* Home Ins. Co., 58 Mich. 278.

[3] Ulric *v.* People, 39 Mich. 245, 251

examination, and how far the witness shall be compelled to answer, are obviously matters within the *discretion* of the presiding judge, and not the subject of exception.[1] But, as elsewhere seen,[2] this rule cannot be applied so as to restrain the cross-examining party from calling out the details of matters which have been stated by the witness, on his direct examination, in general terms only.

§ 420. Prescribe what Counsel shall Examine and Cross-examine. — It is said by Lake, J., speaking for the Supreme Court of Nebraska: "A court may doubtless make reasonable rules for the regulation and examination of witnesses, and go so far even as to require the attorney who begins either the examination in chief or the cross-examination, to complete it. To this, however, there must necessarily be some exceptions, — as where, during an examination, the attorney, from any cause, is disabled to proceed; in such case it may, of course, be concluded by another. But no rule can be upheld that arbitrarily dictates which of several attorneys in a case — there being no disagreement between them — shall examine or cross-examine a witness, or that requires the same attorney who took part in the examination in chief, to conduct the cross-examination. A rule of this sort could serve no good purpose, and would unwarrantably interfere with the constitutional right of a party to select his own counsel to represent him in the several branches of the case. One attorney may be employed with special reference to the examination or cross-examination of witnesses, or of a particular witness, another to argue questions of law to the court, and still another to sum up the case to the jury, and to do this is a right which no court can rightfully deny." [3]

[1] Demerritt *v.* Randall, 116 Mass. 331.

[2] *Ante*, §§ 406, 408.

[3] Olive *v.* State, 11 Neb. 4, 26. Under Michigan circuit court rule No. 63, providing that, on the trial of issues of fact, *one counsel only* on each side shall examine and cross-examine witnesses, an assistant counsel is not prevented from objecting to questions put in cross-examination to a witness, who had been cross-examined in chief by his coadjutor on the same side. Baumeier *v.* Antiau (Mich.), 31 N. W. Rep. 888.

§ 421. Prescribe Order in Case of Several Defendants having separate Defenses. — The order in which several defendants, having separate defenses, shall cross-examine the plaintiff's witnesses, present their defense, and make their argument, rests in the sound discretion of the trial judge.[1] Although their defenses may be separate, yet if their interests are identical, this discretion will not be abused by confining the cross-examination on behalf of all the defendants to one counsel, the same as though their defense were joint.[2]

§ 422. Allow Re-cross-examination on the Same Subject. — To allow a witness to be recalled and cross-examined again on the same subject is a matter purely *discretionary* with the trial court, and is the subject of exception only when the discretion is abused.[3]

§ 423. Whether Admissibility of Matter on Cross-examination Depends upon its Admissibility on Direct Examination. — Upon this subject, it was said by Mr. Justice Brewer: "As a rule, the admissibility of a cross-examination depends upon the admissibility of the direct examination. If, upon any matter, the testimony in chief is excluded, no cross-examination thereon is allowed. The fact that testimony has been taken by deposition before the trial in no manner affects the question of the competency of each and every part of it. Its competency is determined in the same manner, and upon the same principles, as though the witness was present on the stand and being interrogated in person. A question which, if the witness were present, counsel could not ask, cannot be asked in deposition; and if asked and answered, must be stricken therefrom." Accordingly, where the answers to the direct interrogatories in a deposition were excluded for want of sufficient identification in respect of time and place, it was held that the party offering the deposition could not read the answers given in response to the cross-inter-

[1] Fletcher *v.* Crosbie, 2 Mood. & Rob. 417.

[2] Chippendale *v.* Masson, 4 Camp. 174; Mason *v.* Ditchbourne, 1 Mood. & Rob. 462 *n.*

[3] Knight *v.* Cunnington, 6 Hun (N. Y.), 100.

rogatories.[1] But it has been held that this rule cannot be made to work, as it were, in a converse manner, so as, where the irrelevant evidence has been admitted on the direct examination, to allow the opposite party to follow up and extend the irrelevant inquiry on the cross-examination. In order that this restriction shall work no hardship or inequality, it is ruled that, when this privilege is denied to the cross-examining party, he may ask the court to *rule out* the evidence already received in chief, so far as it is irrelevant, and if the court should refuse to do this, it would be ground for a new trial. The court, in thus holding that the error of one party does not justify the continued propagation of the error by the other, say: "The maxim '*similia similibus curantur*' has been applied to some extent in *medicine*, but the principle has never been applied to the cure of errors in *law*." [2]

§ 424. Cross-examining an Adverse Witness, whose Deposition has been taken. — Statutes exist in many jurisdictions enabling a party to compel the attendance of an adverse witness whose deposition has been taken, and to cross-examine him in respect of his testimony given in such deposition. It is a sound conclusion, in the construction of these statutes, that a party who thus subpœnas and cross-examines the adverse witness, does not thereby make him his own witness.[3]

[1] Callison *v.* Smith, 20 Kan. 28, 37.

[2] Phelps *v.* Hunt, 43 Conn. 194, 200, opinion by Loomis, J.

[3] By § 3842 of the Code of Tennessee, edition of 1858, it was provided that, "if the adverse party should desire to have any witness cross-examined in open court whose deposition has been taken, he may compel the attendance of such witness, as in other cases, unless the witness is exempted by law from the usual penalties." This, it is said, is merely an extension of the provisions of § 3836 of the same code, enabling the adverse party to compel the attendance of such witness and subjecting him to the usual penalties against witnesses for failing to obey subpœnas. When such a witness is brought into court under this section, or under § 3836, he continues to be the witness of the party who took his deposition, and is subject to cross-examination as such. It is therefore error for the trial court to rule that, by summoning his adversary's witness for cross-examination under this statute, the party makes the witness his own. Sweat *v.* Rogers, 6 Heisk. (Tenn.) 117, 122. In Ford *v.* Ford, 11 Humph. (Tenn.) 89, a similar ruling was made construing a similar statute.

§ 425. Not Necessary to State what Facts the Question will Elicit. — "It is not necessary, on cross-examination, to state what facts it is expected the answer will elicit; on direct examination this is essential, but not on the cross-examination.[1] The *reason* is, that the cross-examiner does not call the witness for the purpose of *proving anything;* the witness is called by the adverse party, and the cross-examiner is seeking to extort from him a qualification of his testimony in chief. He cannot be presumed to know what the answers of the witness will be to questions propounded in a proper cross-examination, nor would he be bound by such answers. "The value of a cross-examination, as a test of truth, would be lost in the case of a crafty and unreliable witness, if the examiner were bound to disclose in advance the purpose and intent of every question asked." [2] In one jurisdiction there is a *modified view* that, even where a *party* is under cross-examination, the court may exercise a sound *discretion*, in requiring counsel to make the relevancy of his questions apparent.[3]

ARTICLE II. — AMERICAN RULE OF STRICT CROSS-EXAMINATION.

SECTION

430. English Rule that the Witness may be Cross-examined on the Whole Case.
431. Applications of this Rule.
432. American Rule of Strict Cross-examination.
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434. Defendant cannot Introduce his Defense by Cross-examination.
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436. Liberality in applying the Rule — How far Relaxed in Discretion.
437. [Illustration.] Witness to prove Execution not Cross-examined as to Consideration.
438. [Continued.] Witness to Prove Identity not Cross-examined as to Consideration.
439. [Continued.] Defendant's Title in Ejectment.
440. [Continued.] Further Illustrations of the Rule.

[1] Hyland *v.* Milner, 99 Ind. 308, 310; Wood *v.* State, 92 Ind. 269; Harness *v.* State, 57 Ind. 1.

[2] Martin *v.* Elden, 32 Oh. St. 282, 289. To the same effect see Burt *v.* State, 23 Oh. St. 394, 402.

[3] City Bank *v.* Kent, 57 Ga. 285.

SECTION
441. [Continued.] Illustrative Cases not within the Rule.
442. Effect of the Rule — When makes Adversary's Witness one's own.
443. Leading Questions Developing new Matter.
444. [Continued.] Reason of the Rule which admits Leading Questions.
445. [Continued.] Cross-examination of the Adverse Party.
446. Cross-examination in Criminal Cases.

§ 430. English rule that the Witness may be Cross-examined on the whole case. — The English rule on cross-examination is that, when a witness has been introduced, sworn and examined as to any material point in the case, the other party may cross-examine him as to the whole case, including any new matter of defense; but the extent to which he may be allowed to press the witness with *leading questions* will depend upon the circumstances of the case, the demeanor of the witness, his apparent bias and other considerations, and must, to a great extent, be left to the sound *discretion* of the trial judge.[1] This rule is adopted by several of the American State courts.[2] Its reason has been thus stated: "The oath administered to a witness requires him to speak the truth, *the whole truth*, and nothing but the truth; and therefore when a witness is put upon the stand, he ought to be allowed an opportunity for stating *all* the facts within his knowledge bearing upon the issues involved in the case, and should not be confined to those facts only, about which the party who offers him as a witness chooses to interrogate him. It is

[1] 2 Phil. Ev. 896–911; Morgan *v.* Brydges, 2 Stark. 314; Rex *v.* Brooke, *Id.* 472.

[2] *Massachusetts:* Webster *v.* Lee, 5 Mass. 335; Merrill *v.* Berkshire, 11 Pick. (Mass.) 269, 274; Moody *v.* Rowell, 17 Pick. (Mass.) 490, 498; *s. c.* 28 Am. Dec. 317; Blackington *v.* Johnson, 126 Mass. 21; Beal *v.* Nichols, 2 Gray (Mass.), 262. *New York:* Varick *v.* Jackson, 2 Wend. (N. Y.) 166; *s. c.* 19 Am. Dec. 571; Fulton *v.* Stafford, 2 Wend. (N. Y.) 483. [But *doubtful:* see next section.] *Vermont:* Linsley *v.* Lovely, 26 Vt. 123. *Ohio:* Legg *v.* Drake, 1 Oh. St. 286. *Missouri:* Page *v.* Kankey, 6 Mo. 433; Brown *v.* Burrus, 8 Mo. 26; St. Louis &c. R. Co. *v.* Silver, 56 Mo. 265; State *v.* Sayres, 58 Mo. 585. *Wisconsin:* Knapp *v.* Schneider, 24 Wis. 70. *Louisiana:* Durnford *v.* Clark, 1 Mart. (La.) 202; Davidson *v.* Lallande, 12 La. Ann. 826, 828; Nicholson *v.* Desobry, 14 La. Ann. 81, 84; King *v.* Atkins, 33 La. Ann. 1057, 1064. *South Carolina:* Kibler *v.* McIlwain, 16 S. C. 551. It was assumed that this was the rule in Clinton *v.* McKenzie, 5 Strobh. L. 36, 41. *Alabama:* Kelly *v.* Brooks, 25 Ala. 523; Fralick *v.* Presley, 29 Ala. 457, 461.

very true that the other party may put him on the stand as his witness and examine him as to any facts within his knowledge which he may desire to bring before the court. But he is not obliged to do so; and it may, and often does happen, that the other party would prefer to forego the opportunity of bringing out such other facts, rather than adopt one of his adversary's witnesses as his own. In such case the result would be that the witness would have no opportunity of telling *the whole truth*, as he had been sworn to do."[1]

§ **431. Applications of the Rule.** — Under the English rule, where a witness has been called by one party, the other party may cross-examine him, although *no question* has been asked him in chief.[2] But if the plaintiff's counsel calls a witness *by mistake*, he cannot be cross-examined.[3] And if a witness is called, and has only answered an *immaterial question*, when his examination is stopped by the judge, the opposite party will have no right to cross-examine him.[4] And where a witness has said *nothing* in chief, he cannot be cross-examined to *discredit* him.[5]

§ **432. American Rule of strict Cross-examination.** — The Supreme Court of the United States and the courts of some of the American States have adopted the contrary rule, which is sometimes called, by way of distinction, the American rule, and sometimes the rule of the Supreme Court of the United States. This rule is, that a party has no right to cross-examine except as to facts and circumstances connected with the matter stated in the direct examination of the witness, and that, if he wishes to examine him as to other matters, he must do so by making him his own witness, and by calling him as such in the subsequent progress of the cause.[6]

[1] Kibler *v.* McIlwain, 16 S. C. 550, 557.

[2] Phillips *v.* Middlesex, 1 Esp. 355.

[3] Clifford *v.* Hunter, 3 Car. & P. 16; *s. c.* Mood. & M. 103; Wood *v.* Mackinson, 2 Mood. & Rob. 273.

[4] Creevy *v.* Carr, 7 Car. & P. 64.

[5] Bracegirdle *v.* Bailey, 1 Fost. & Fin. 536.

[6] Philadelphia &c. R. Co. *v.* Stimpson, 14 Pet. (U. S.) 448; Houghton *v.* Jones, 1 Wall. (U. S.) 702; Wills *v.* Russell, 100 U. S. 621; 1 Greenl. Ev., § 445. This rule has been adopted in

§ **433. Scope of the American Rule.** — According to a very learned and accurate writer, "the limits of a strict cross-examination, within the meaning of this rule, include whatever tends to qualify or explain his testimony, or rebut or modify any inference resulting from it." [1] In Pennsylvania it is said in a late case: "It has been reiterated in this State that cross-examination must be confined to matters which have been stated in examination in chief, and to such questions as may tend to show bias and interest in the witness; that to permit a party to lead out *new matter*, constituting *his own case*, under the guise of a cross-examination, is disorderly and often unfair to the opposite party; and that these rules are established for the purpose of eliciting truth and preserving the equality of rights of parties in trials of causes." [2] In a case in Arizona, where this question was very exhaustively and thoughtfully discussed by Dunne, C. J., the following rules were laid down as applications of the American doctrine: "1. When an adverse witness has testified to any point material to the party calling him, he may then and there be fully cross-examined and led by the adverse party, upon all matters pertinent to the case of the party calling him, except

the following States: *Pennsylvania:* Hughs *v.* Westmoreland Coal Co., 104 Penn. St. 207, 213; Monongahela Water Co. *v.* Stewartson, 96 Pa. St. 436; Jackson *v.* Litch, 62 Pa. St. 451. *Maryland:* Herrick *v.* Swomley, 56 Md. 439, 455: Griffith *v.* Diffenderffer, 50 Md. 466, 478. *Indiana:* Stinhouse *v.* State, 47 Ind. 17; Aurora *v.* Cobb, 21 Ind. 493; Patton *v.* Hamilton, 12 Ind. 256. *Illinois:* Stafford *v.* Fargo, 35 Ill. 481; Lloyd *v.* Thompson, 5 Bradw. (Ill.) 90, 96; Stevens *v.* Brown, 12 Bradw. (Ill.) 619, 622; Bell *v.* Prewitt, 62 Ill. 361. *Iowa:* Glenn *v.* Gleason, 61 Ia. 28, 32; Pellersells *v.* Allen, 56 Ia. 717; *s. c.* 10 N. W. Rep. 261. *Nebraska:* Clough *v.* State, 7 Neb. 320, 341; Boggs *v.* Thompson, 13 Neb. 403; Davis *v.* Neligh, 7 Neb. 84; Cool *v.* Roche, 15 Neb. 24; *s. c.* 17 N. W. Rep. 119. *New York:* Neil *v.* Thorn, 88 N. Y. 270, 275; Hartness *v.* Boyd, 5 Wend. (N. Y.) 563. [In Neil *v.* Thorn, *supra*, it is *said* that the trial court may, in its discretion, relax the rule, so as to allow the cross-examining party to go beyond the limits of the direct examination.] *California:* McFadden *v.* Mitchell, 61 Cal. 148. *Nevada:* Ferguson *v.* Rutherford, 7 Nev. 385, 390. *Arizona:* Rush *v.* French, 1 Ariz. 99, 139.

[1] Abb. Tr. Brief, 46; citing Wilson *v.* Wagar, 26 Mich. 452; Campan *v.* Dewey, 9 *Id.* 381, 419; Haynes *v.* Ledyard, 33 *Id.* 319; Ferguson *v.* Rutherford, 7 Nev. 385; Baird *v.* Daly, 68 N. Y. 547, 550; Mayer *v.* People, 80 N. Y. 364, 378.

[2] Hughes *v.* Westmoreland Coal Co., 104 Pa. St. 207, 213.

exclusively new matter; and nothing shall be deemed new matter except it be such as could not be given under a general denial. 2. The fact that evidence, called forth by a legitimate cross-examination, happens also to sustain a cross-action or counter-claim, affords no reason why it should be excluded. 3. The party entitled to cross-examine may waive his right to do so at the time, and recall the witness and cross-examine him after he opens his case. 4. The court, in its discretion, may forbid the cross-examining party putting leading questions, when objection is made that the witness is biased in favor of the party cross-examining, and the court is satisfied that the objection is good." [1]

§ **434. Defendant cannot introduce his Defense by Cross-examination.**— Where this rule prevails a defendant cannot, by cross-examining a witness for the plaintiff, except by consent of parties and permission of the court, open up his own defense by interrogating the witness as his own witness.[2] But he may cross-examine as to all that constitutes the cause of action, though not with regard to matters in confession and avoidance.[3] He may, according to principles already stated,[4] sift and probe the direct examination to the fullest extent. As was well said by Mr. Justice Christiancy: "All testimony elicited on cross-examination, consisting, as it does, of facts which, relating to the direct examination, may have been omitted or concealed in that examination, or facts tending to contradict, explain or modify some inference which might otherwise be drawn from them, must, in the nature of things, constitute a part of the evidence given in chief, and both alike and taken together must therefore be treated as evidence given on the part of the party calling the witness." [5]

[1] Rush *v.* French, 1 Ariz. T. 99, 139.

[2] Da Lee *v.* Blackburn, 11 Kan. 190; Malone *v.* Dogherty, 79 Pa. St. 46; Elmaker *v.* Buckley, 16 Serg. & R. 72; MacKinley *v.* McGregor, 3 Whart. (Pa.) 370; Floyd *v.* Bovard, 6 Watts & S. (Pa.) 75.

[3] Henderson *v.* Hydraulic Works, 9 Phila. (Pa.) 100.

[4] *Ante*, § 408.

[5] Wilson *v.* Wager, 26 Mich. 452; quoted with approval in Callison *v* Smith, 20 Kan. 28, 37.

§ 435. Confined to the Testimony in Chief of the Particular Witness, or Extended to all the Plaintiff's Evidence. — In jurisdictions where this rule prevails, a tendency is discovered to relax its strictness, so far as to allow the defendant to cross-examine the plaintiff's witnesses as to all the facts which have been developed by the testimony given for the plaintiff, whether delivered by the particular witness or by other witnesses. Thus, in Pennsylvania, while it is conceded that "cross-examination, as a general thing, is only regular when confined to the testimony given by the witness in chief,[1] the *modified view* has been laid down, that it ought not to transcend the testimony in chief, taken as a whole, or in other words, the case which the *witnesses* on the other side are called to prove. If it is confined to narrower limits, the plaintiff may distribute the case arbitrarily among the witnesses, and, by restricting each to a particular line, prevent the disclosure of truths which he desires to conceal."[2] The Supreme Court of Nevada have also laid down a modified rule, by stating that the one invariable *test* by which to determine whether the cross-examination can be permitted is, Does it concern new matter of defense or not?[3]

§ 436. Liberality in Applying the Rule — How far Relaxed in Discretion. — One court has gone so far as to hold, even in civil cases, that when such cross-examination is carried to an unreasonable length on new matters, whereby improper testimony is obtained, it is error.[4] But another court has said: "The purpose of the rule might often be defeated by a rigid enforcement of the rules in all cases. In the order of examination of witnesses and the introduction of testimony, much must be left to the *discretion* of the court below. This court has rarely, if ever, reversed for an error in permitting a violation of the rules relat-

[1] Helser *v.* McGrath, 52 Pa. St. 531.

[2] Henderson *v.* Hydraulic Works, 9 Phila. (Pa.) 100, opinion by Hare, P. J. Such also is the *rule* of the *common law* as practiced in New York, Massachusetts and Vermont. Fulton Bank *v.* Stafford, 2 Wend. (N. Y.) 483; Moody *v.* Rowell, 17 Pick. (Mass.) 490, 497; Beal *v.* Nichols, 2 Gray (Mass.), 262; Linsley *v.* Lovely, 26 Vt. 123.

[3] Ferguson *v.* Rutherford, 17 Nev. 390.

[4] Bell *v.* Pruitt, 62 Ill. 362.

ing to cross-examination, which does not result to the prejudice of the party."[1] In the opinion of another court we find the following language: "As to what are and what are not circumstances connected with the testimony in chief, is sometimes very difficult of determination, owing to the remote connection between the direct examination and the facts sought to be elicited by the cross-examination; and, unless a trial court should so far overstep the bounds as to admit that in cross-examination which clearly has no connection with the direct testimony, an appellate court would not be justified in reversing a judgment for such cause, especially where the cross-examination is upon facts competent to be proved under the issues in case. In such questions, very much must be left to the *discretion* of the trial court."[2] Another court, in applying the rule, holds that it is *not necessary* that the *precise subject* should have been called to the attention of the witness on the direct examination, but the cross-examination should be allowed to extend to any matter not foreign to the subject of the direct examination, and tending to limit, explain or modify the same.[3] In another court, where the action was upon a promissory note, and its genuineness was put in issue, a witness who had testified in chief that he knew the defendant's handwriting and that the note was in his handwriting, was asked, on cross-examination, when he first saw the note. It was held, applying the same liberal rule, that this question grew legitimately out of the direct examination, since it had a tendency to elicit from the witness what opportunities he had had of examining the signature.[4] For the same reason, it was permitted to ask the witness on cross-examination, who showed him the note.[5] So, another court has held that, on the cross-examination of a witness who has given evidence making out a *prima facie* case

[1] Hughes *v.* Westmoreland Coal Co., 104 Pa. St. 207, 213.

[2] Glenn *v.* Gleason, 61 Ia. 28, 32.

[3] Haynes *v.* Ledyard, 33 Mich. 319. See as to the Michigan rule, Chandler *v.* Allison, 10 Mich. 460; Thompson *v.* Richards, 14 Mich. 172; Detroit &c. R. Co. *v.* Van Steinberg, 17 Mich. 99.

[4] Herrick *v.* Swomley, 56 Md. 439, 455. Compare Griffith *v.* Diffenderffer, 50 Md. 466, 478.

[5] Herrick *v.* Swomley, *supra*.

for the plaintiff, it is competent to draw out any facts which would tend to destroy the case thus made out.[1]

§ 437. [ILLUSTRATION.] WITNESS TO PROVE EXECUTION NOT CROSS-EXAMINED AS TO CONSIDERATION. — A frequent instance, and one which throws into contrast the English and American rule, is that, under the English rule, a witness called by the plaintiff for the purpose of proving the *execution* of the written contract which is the foundation of the suit, may be cross-examined by the defendant as to its *consideration*, and the defendant may contradict his statements concerning such consideration.[2] But, under the American rule, a witness called by the plaintiff for the purpose of proving the execution of the contract sued on, cannot be cross-examined as to its consideration; but if the defendant would have his testimony on that point, he must call him as his own witness.[3]

§ 438. [CONTINUED]. WITNESS TO PROVE IDENTITY NOT CROSS-EXAMINED AS TO CONSIDERATION. — By parity of reasoning, under the American rule, witnesses called to prove identity cannot be cross-examined as to consideration. Thus, in a contest between the mortgagee of chattels and an alleged purchaser, the mortgagee called the mortgagor as a witness and proved by him the single fact that the chattels were the same which were described in the mortgage. The court then permitted, against objection, a lengthy cross-examination of the witness, in regard to the consideration of the mortgage and various other matters not touched upon in the examination in chief, and a verdict resulted against the mortgagee. It was held that for this error the judgment must be reversed.[4]

§ 439. [CONTINUED.] DEFENDANT'S TITLE IN EJECTMENT. — The defendant's title in ejectment is not new matter, within the meaning of this rule; and therefore questions may be asked, on cross-examination of the plaintiff's witness in ejectment, eliciting answers which set up the defendant's title.[5] But in Illinois it is held that, where the plaintiff in ejectment files an affidavit that he claims title through a common source

[1] Jacobson *v.* Metzger, 35 Mich. 103.

[2] Lamprey *v.* Munch, 21 Minn. 379.

[3] Youman's *v.* Carney, 62 Wis. 580, 582; McFadden *v.* Mitchell, 61 Cal. 148. Compare Leavitt *v.* Stansell, 44 Mich. 424.

[4] Bell *v.* Pruitt, 62 Ill. 362.

[5] Marshall *v.* Shafter, 32 Cal. 176; Rush *v.* French, 1 Ariz. T. 99, 139.

with the defendant, and the defendant, or his agent or attorney, denies under oath that he claims title through such source, or states that he claims title through some other source, — the latter will not be subject to a cross-examination as to his source of title. So held as to the effect of a statute touching the action of ejectment.[1]

§ 440. [CONTINUED.] FURTHER ILLUSTRATIONS OF THE RULE. — An illustration of the ridiculous consequences which flow from a strict application of the American rule is found in a case in Indiana, where the relatrix in a prosecution for *bastardy* having testified as a witness, the defendant asked her what was the *color* of the *hair* and *eyes* of the *child*. It was held that this question was properly excluded, on the ground that it was an attempt to introduce new defensive matter by cross-examining a witness for the plaintiff, which was inadmissible.[2]

§ 441. [CONTINUED.] ILLUSTRATIVE CASES NOT WITHIN THE RULE. — On the trial of an indictment for seduction under a promise of marriage, witnesses had testified, on behalf of the State, that the defendant kept company with the female alleged to have been seduced, and that they had walked and rode together a few times. It was held that these witnesses might be asked, on cross-examination, whether *other men* had not kept company with her in like manner. The court said: "The fact stated by the witnesses, in their direct examination, was introduced to corroborate the testimony of the girl, and as tending to show that a promise of marriage had been made by the appellant. The object of the cross-examination was to overthrow or weaken the effect of the evidence. For that purpose it was proper, and the court erred in refusing it."[3] - - - - Where, in an action against executors on certain promissory notes purporting to be those of the testator, the plaintiff was allowed, without objection, to testify that the testator had signed the notes, and the notes were thereby admitted in evidence, making a *prima facie* case for the plaintiff, it was held competent for the defendant to cross-examine the plaintiffs as to where, when, under what circumstances, and for what consideration, the notes were signed.[4] - - - - In a suit by a passenger on a stage coach against the proprietors as common carriers, to recover damages for personal injuries sustained by the upsetting of the coach, the plaintiff, testifying as a witness, stated that he was received by the

[1] Thatcher *v.* Olmstead, 110 Ill. 26.

[2] Hull *v.* State, 93 Ind. 128.

[3] Stinhouse *v.* State, 47 Ind. 17.

[4] Glenn *v.* Gleason, 61 Ia. 28, 31.

driver, as a passenger from Boulder to Helena, without charge, and that one of the defendants had said, since the accident, that the driver had orders to carry him without fare to Helena. On cross-examination, he was asked whether his fare was not demanded before the accident at Jefferson — a station between Boulder and Helena,-- whether he had not refused to pay it, or to leave the coach when required to do so. These cross-questions were objected to, and the objection sustained by the trial court. It was held that they related to the transaction inquired of in chief, and should have been allowed.[1] - - - - In a suit by a commission merchant to recover of the person for whom he had made the purchase, for loss on a resale, for want of putting up a further margin, the defendant has the right, in Illinois, on cross-examination, to inquire when, where, and in what manner the purchase was made for him, and whether the plaintiff has settled the purchase, and if so, what was paid to him, and the manner it was paid, -- for the purpose of showing whether the mode of dealing was fair and free from fraud and injustice or wrong to him.[2]

§ 442. Effect of the Rule — When makes Adversary's Witness One's Own. —The effect of the American rule is that, where a party, on the cross-examination of a witness, draws out new matter not inquired about in the examination in chief, he makes the witness his own in respect of such new matter, and gives the right to the party originally calling the witness, to cross-examine him on such new matter.[3]

§ 443. Leading Questions in Developing New Matter. — Under the English rule, as applied in several American jurisdictions,[4] the cross-examining counsel may put leading questions to the witness, even while developing new matter not touched upon in the examination in chief.[5] Other courts, which follow the so-called American rule,[6] have declared that, when the cross-examiner proceeds to develop new matter, the witness becomes so far

[1] Gilmer *v.* Higley, 110 U. S. 47

[2] Oldershaw *v.* Knowles, 101 Ill. 117.

[3] So held in Bassham *v.* State, 38 Tex 622, and cases in the next section

[4] *Ante*, § 430.

[5] Dickenson *v.* Shee, 4 Esp. 67; Moody *v.* Rowell, 17 Pick. (Mass.) 490, 498; *s. c.* 28 Am. Dec. 317; Beal *v.* Nichols, 2 Gray (Mass.), 264; Jackson *v.* Varrick, 7 Cow. (N. Y.) 238.

[6] *Ante*, § 432.

his own witness, that it is not proper for him to ask leading questions in respect of such new matter.[1] "A different rule," says Finch, J., in giving the opinion of the Court of Appeals of New York, "would enable a party to develop his defense untrammelled by the rules which govern a direct examination, and give him an advantage for which we can see no just reason. As to the new matter the witness becomes his own, and in substance and effect the cross-examination ceases. That is properly such only while it is directed to the evidence given in behalf of the adversary. When it passes beyond that, it becomes the direct and affirmative evidence of the party, and should be subjected to the appropriate restraints. There is no reason, in the nature of the case, why a direct examination should be guarded against the evil and danger resulting from leading questions, which does not apply to an effort upon cross-examination to introduce a new and affirmative defense."[2] A modified view is found in the decisions of several of the courts which follow the American rule, which is to the effect that a leading question in respect of new matter, though objectionable, may be allowed[3] or denied[4] in the *discretion* of the court. The courts which adhere to this rule generally hold that a party cannot cross-examine his adversary's witness as to new matter, in order to introduce his own case, untrammelled by the rules of direct examination.[5] In New York it was early laid down that the

[1] Harrison *v.* Rowan, 3 Wash. C. C. (U. S) 580; Landsberger *v.* Gorham, 5 Cal. 451; Aitken *v.* Mendenhall, 25 Cal. 213; Wetherbee *v.* Dunn, 32 Cal. 106; Harper *v.* Lamping, 33 Cal. 641, 647; Ferguson *v.* Rutherford, 7 Nev. 385, 390. See also Houghton *v.* Jones, 1 Wall. (U. S.) 705; Jackson *v.* Feather R. W. Co., 14 Cal. 19, 24; Thornton *v.* Hook, 36 Cal. 223; Ellmaker *v.* Buckley, 16 Serg. & R. (Pa.) 72, 77; Philadelphia &c. R. Co. *v.* Stimpson, 14 Pet. (U. S.) 448; Castor *v.* Bavington, 2 Watts & S. (Pa.) 505; Floyd *v.* Bovard, 6 Watts & S. (Pa.) 75; Jackson *v.* Son, 2 Caines (N. Y.), 178; People *v.* Moore, 15 Wend. (N. Y.) 419.

[2] People *v.* Oyer & Terminer, 83 N. Y. 438, 459; affirming *s. c.* 19 Hun (N. Y.), 91 where the subject is fully and ably discussed by Brady, J.

[3] Harrison *v.* Rowan, 3 Wash. C. C. (U. S.) 580.

[4] Ellmaker *v.* Buckley, 16 Serg. & R. (Pa.) 72, 77.

[5] Castor *v.* Bavington, 2 Watts & S. (Pa.) 505; Floyd *v.* Bovard, 6 *Ibid.* 75; Philadelphia &c. R. Co. *v.* Stimpson, 14 Pet. (U. S.) 448.

cross-examination of a witness in such a manner as to call forth new matter, made him the witness of the cross-examining party,[1] and it was said that the court ought not, except in peculiar cases, to permit a direct examination, meaning the examination of the adversary's witness on new matter, to assume the form of a cross-examination.[2] The conclusion seems to be that the question rests largely in the discretion of the presiding judge.[3]

§ 444. [CONTINUED.] REASONS OF THE RULE WHICH ADMITS LEADING QUESTIONS. — In stating the reason of this rule in a leading case in Massachusetts, Chief Justice Shaw said: "On the whole, the court are of opinion that the weight of authority is in favor of the right to put leading questions under the circumstances stated, and that this is confirmed by practice and experience. It is most desirable that rules of general practice, of so much importance and of such frequent recurrence, should be as few, simple and practical as possible, and that the distinctions should not be multiplied without good cause. It would be often difficult, in long and complicated examinations, to decide whether a question applies wholly to new matter, or to matter already examined into in chief. The general rule, admitted on all hands, is that, on a cross-examination, leading questions may be put; and the court are of opinion that it would not be useful to engraft upon it a distinction not in general necessary to attain the purposes of justice in the investigation of the truth of facts; that it would often be difficult of application, and that all the practical good expected from it may be as effectually attained by the exercise of the discretionary power of the court, where the circumstances are such as to require its interposition."[4] After many years' experience of the workings of this rule, the Massachusetts court say, in a more modern case: "Experience has shown that this rule is convenient and easy of application in practice, and works no disadvantage to the party producing a witness. On the other hand, a different rule, by making it necessary for the court, during the examination of the witness, constantly to determine what is or what is not new matter, upon which the opposite party has a right

[1] Jackson *v.* Son, 2 Caines (N. Y.), 178; People *v.* Moore, 15 Wend. (N. Y.) 419, 423.

[2] People *v* Mather, 4 Wend. (N. Y.) 229, 248.

[3] People *v.* Genet, 19 Hun (N. Y.), 91, 100; *s. c., sub nom.* People *v.* Oyer & Terminer, affirmed, 83 N. Y. 438.

[4] Moody *v.* Rowell, 17 Pick. (Mass.) 490, 499; *s. c.* 28 Am. Dec. 317.

to put leading questions, leads to confusion and delay in the progress of trials." [1]

§ 445. [Continued.] **Cross-examination of the Adverse Party.** — A greater latitude is allowed, under the American rule, in the cross-examination of a party who testifies in his own behalf; but this matter rests very largely in the control of the trial court, in the exercise of a sound *discretion*, which is not reviewable on error.[2] A statute of Pennsylvania, of which there are no doubt counterparts in other States, is as follows: "A party to the record of any civil proceeding in law or equity, or a person for whose immediate benefit such proceeding is prosecuted or defended, may be examined as if under cross-examination, at the instance of the adverse party, or any of them, and for that purpose, may be compelled, in the same manner, and subject to the same rules of examination as any other witness to testify; but the party calling for such examination shall not be concluded thereby, but may rebut it by counter testimony." [3] Under this statute it is held that, when a party is called as a witness by his adversary, leading questions may be put to him, and there may be drawn from him any facts or admissions which weaken his case or strengthen his adversary's.[4]

§ 446. **Cross-examination in Criminal Cases.** — Where the State introduces a witness and examines him, the defendant may, under the English rule, cross-examine him as to all matters involved in the case, no matter how formal or unimportant the examination in chief may have been.[5] Indeed, the rules of evidence are the same in civil and criminal cases; and in both it is in the discretion of the judge, how far he will allow the examination in chief of a witness to be by leading questions, or to assume the form of a cross-examination.[6] But in one juris-

[1] Beal *v.* Nichols, 2 Gray (Mass.) 264, opinion by Bigelow, J.

[2] Rea *v.* Missouri, 17 Wall. (U. S.) 532, 542.

[3] Penn. Act April 15th, 1869; 1 Bright. Purd. Dig. 624, pl. 17.

[4] Bubaker *v.* Taylor, 76 Pa. St. 83.

[5] State *v.* Brady, 87 Mo. 142.

[6] Reg. *v.* Murphy, 8 Car. & P. 297.

diction a distinction is taken between the right of the State to cross-examine witnesses for the accused, and the right of the accused to cross-examine witnesses for the State. The accused must be allowed to cross-examine the witnesses of the State as to any fact tending to establish his defense, whether it be or be not connected with the facts testified to in his examination in chief.[1] In a capital trial, where the defendant, upon cross-examination of a witness for the State, by direct questions, disclosed for the first time the commission of another crime by him than that for which he was on trial, — it was held no ground for reversing the judgment, that the State was afterwards permitted to prove, by another witness, the same facts, in relation to a crime which had already been brought out by such cross-examination.[2]

Article III. — Questions Affecting Credibility.

Section

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[1] State *v.* Swayze, 30 La. Ann. 1323, 1327; State *v.* Thomas, 32 La. Ann. 349, 351.

[2] State *v.* Kring, 74 Mo. 612, 631.

SECTION

469. Cross-examination on collateral Matters for the Purpose of Contradiction.
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§ 450. Relations Between Witness and Parties — Facts Showing Bias or Prejudice — It is one of the objects of a cross-examination to discover the motives, inclinations and prejudices of the witness, for the purpose of reducing the effect which might otherwise be given to his evidence.[1] Accordingly, it has been well said that "it is always competent to show the relations which exist between the witness and the party against, as well as for whom he was called."[2] The general rule is that anything tending to show bias or prejudice on the part of a witness may be brought out on his cross-examination. The reason for the rule is, that such matters affect the *credit* of the witness, and it is therefore material to indulge in such an inquiry.[3] For this purpose it is competent to inquire of the witness concerning acts, declarations and circumstances, showing the existence of *hostile feelings* or *prejudice;* and the latitude of cross-examination is not restricted by the fact that the witness is a party testifying in his own behalf.[4] The *state of mind* and feelings of a witness may

[1] 1 Greenl. Ev. (12th ed.), § 446.

[2] Starks *v.* People, 5 Denio (N. Y.), 106. See also Newton *v.* Harris, 2 Seld. (N. Y.) 345; Cameron *v.* Montgomery, 13 Serg. & R. (Pa.) 128; Howard *v.* City Fire Ins. Co., 4 Denio (N. Y.), 502; Turnpike Co. *v.* Loomis, 32 N. Y. 127; Madden *v.* Koester, 52 Ia. 693; People *v.* Furtado, 57 Cal. 346; Dance *v.* McBride, 43 Ia. 624; Miles *v.* Sackett, 30 Hun (N. Y), 68; Com. *v.* Gallagher, 126 Mass. 54.

[3] State *v.* Krum, 32 Kan. 372, 373; Harris *v.* Tippett, 2 Camp. 637; Atty.-General *v.* Hitchcock, 11 Jur. 478; Morgan *v.* Frees, 1 Am. L. Reg. 92; Chapman *v.* Collin, 14 Gray (Mass.), 454; Davis *v.* Roby, 64 Me. 430; Cameron *v.* Montgomery, 13 Serg. & R. (Pa.) 128; Batdorff *v.* Bank, 61 Pa. St. 183; 1 Whart. Ev., § 566; 1 Greenl. Ev. (13th ed.), §§ 449, 455, 459, 461.

[4] Watson *v.* Twombly, 60 N. H. 491; Brewer *v.* Crosby, 11 Gray (Mass.), 29; People *v.* Casey, 72 N. Y. 393, 398.

materially affect his testimony, and the credit of a witness, upon whose testimony in part the issue is to be determined, is not a *collateral* and *immaterial* matter.[1] "Otherwise, biased or dependent witnesses, a parent, child, brother, sister or person with strong motives for prejudice or partiality, — might be put on the stand by defendant, and, in the absence of any question by his counsel on the subject, the State would be prevented from putting the jury in possession of the fact of such *relationship*, which would be entitled to legitimate consideration, as affecting the weight and credibility of the testimony."[2] So, for the purpose of affecting the credibility of a witness, he may always be cross-examined as to his *interest* in the event of the suit.[3] It may, therefore, be laid down, as a general rule, that any question is proper which tends to show that the personal situation, or interest of the witness, may have influenced the testimony given by him on direct examination.[4]

§ 451. Whether Details and Particulars of Witness's Ill-will may be shown. — To this end, it has been held that it is competent, on cross-examination, where the witness has admitted his ill-will toward a party, to go into the details and particulars of such ill-will, for the purpose of showing the extent

[1] Watson *v.* Twombly, 60 N. H. 491; Martin *v.* Farnham, 25 N. H. 195; Folsom *v.* Brawn, *Id.* 114; Combs *v.* Winchester, 39 N. H. 13; Carr *v.* Moore, 41 N. H. 131; Sumner *v.* Crawford, 45 N. H. 416; Collins *v.* Stephenson, 8 Gray (Mass.), 438; Day *v.* Stickney, 14 Allen (Mass.), 255.

[2] State *v.* Willingham, 33 La. Ann. 537, opinion by Fenner, J. On this subject the Supreme Court of California has said: "It is perfectly well settled that, on cross-examination, a witness may be interrogated as to any circumstance which tends to impeach his credibility, by showing that he is biased against the party conducting the cross-examination, or that he has an interest in the result adverse to such party. No citation of authorities is needed on a point so well settled." People *v.* Benson, 52 Cal. 380.

[3] Vaughan *v.* Westover, 4 Thomp. & C. (N. Y.) 316; Phœnix Ins. Co. *v.* Sholes, 20 Wis. 35; Cornell *v.* Barnes, 26 Wis. 473; Suit *v.* Bonnell, 33 Wis. 180. See also Starks *v.* People, 5 Denio (N. Y.), 106; People *v.* Cunningham, 1 Denio (N. Y.), 524; Newton *v.* Harris, 6 N. Y. 345; Wells *v.* Kelsey, 37 N. Y. 143, 146; McCabe *v.* Brayton, 38 N. Y. 196; People *v.* Albright, 23 How. Pr. (N. Y.) 306; Turner *v.* Austin, 16 Mass. 181, 185; Garfield *v.* Kirk, 65 Barb. (N. Y.) 464; Knight *v.* Forward, 63 Barb. (N. Y.) 311, 320.

[4] Atchison &c. R. Co. *v.* Blackshire, 10 Kan. 477, 487.

of his bias and prejudice. Johnson, J., in giving the opinion of the court, said: "The defendants were entitled to know the character and extent of the feeling of enmity which the witness entertained toward them. The question of bias and prejudice, and how far her hostility towards the defendants may have affected her testimony, are for the jury, and they cannot properly determine this until they learn the *degree* and *intensity* of the hostile feeling."[1] In like manner, the Supreme Court of Minnesota has said: "The object of this kind of testimony is to show bias and prejudice on the part of the witness, for the purpose of leading the jury to scrutinize and perhaps to discredit the testimony. If testimony of this character is to be received, it should be received in its *most effective form*, so that the purposes for which it is introduced may be best accomplished. A mere vague and general statement that hostile feeling existed would possess little force. It certainly must be proper to ask what the expression of hostility was, for the purpose of informing the jury of the *extent and nature* of the hostile feeling, so that they may determine how much allowance is to be made for it."[2] But, in the opinion of another court, the rule is that the witness may be interrogated as to the *state* of his feelings towards one of the parties, but that it is not competent to inquire into the *cause* of such feelings.[3] On a somewhat similar view, in a criminal trial, it has been held error to permit the State's counsel, in cross-examining the defendant's witnesses, to inquire of them as to the *particulars* of a difficulty which they have had with the prosecutor, they having denied ill-feeling toward him.[4]

§ **452. Remoteness of Ill-Feelings in Point of Time.** — But the unkind feeling must be shown to exist when the evidence is given. The witness may have been angry at the party years

[1] State *v.* Collins, 33 Kan. 77, 81.

[2] State *v.* Dee, 14 Minn. 35, 39. See also Batdorf *v.* Bank, 61 Pa. St. 179, 183; Davis *v.* Roby, 64 Me. 427, 430; McFarlin *v.* State, 41 Tex. 23.

[3] Conyars *v.* Field, 61 Ga. 258; Bishop *v.* State, 9 Ga. 260.

[4] Patman *v.* State, 61 Ga. 379. It is respectfully submitted that the conception of this court is unsound, for the reasons given by the Kansas and Minnesota courts, as above.

before the trial, and the anger may have entirely disappeared. Unless it is made to appear that the unkind feeling exists *at the trial*, or that it has arisen so recently that it may be presumed to have continued down to the trial, evidence to show it is inadmissible.[1]

§ **453. Attempts to Suborn other Witnesses.** — For the purpose of affecting the credibility of the witness by showing his *animus* against the cross-examining party and the extent to which he is willing to go in defeating the latter, it is competent to ask the witness on cross-examination, with the requisite circumstances of time, place and person, whether he has not attempted to suborn or get out of the way other witnesses subpœnaed on behalf of the cross-examining party.[2] But, as was decided by the judges in an answer to a question propounded by the Lords,[3] it is not competent to prove such attempts at subornation or tampering with witnesses, without first laying a *foundation* therefor, by interrogating the witness whom it is intended thus to accuse.[4]

§ **454. Previous Offer of the Prosecutor to settle.** — It has been held that the prosecuting witness, in a criminal case, cannot

[1] Higham *v.* Gault, 15 Hun (N. Y.), 383.

[2] The Queen's Case, 2 Brod. & Bing. 312; Morgan *v.* Frees, 15 Barb. (N. Y.) 352; State *v.* Downs (Mo.), 3 S. W. Rep. 219; *s. c.* 91 Mo. 19. Compare Oberfelder *v.* Kavanaugh (Neb.), 32 N. W. Rep. 296; *s. c.* 21 Neb. 483.

[3] The Queen's Case, *supra*.

[4] So held in Bates *v.* Holladay, No. 3864, St. Louis Court of Appeals, MS. In Lord Stafford's Case, 7 How. St. Tr. 1294, 1400, witnesses for the crown were allowed to testify to attempts at subornation, of which the prisoner protested his innocence, without a previous foundation being laid. But this decision, although sometimes cited by American courts, should not be regarded as of any authority upon the point. It was held that where the questions put to the witness would not, if answered either way, elicit answers tending to show this, they are properly excluded. Oberfelder *v.* Kavanaugh (Neb.), 32 N. W. Rep. 296; *s. c.* 21 Neb. 483. On a criminal trial in Missouri a witness for the State stated on his cross-examination that he did not, at a designated time and place, say to a relative of the defendant that he and another witness would leave, and not be witnesses against the defendant, if the person addressed would pay him $100. It was held that the defendant had the right to contradict this denial — to prove by the person to whom this offer had been made that the witness had made it. The question was not collateral to the case on trial. State *v.* Downs (Mo.), 3 S. W. Rep. 219; *s. c.* 91 Mo. 19.

be asked, on cross-examination, whether he had not frequently, during the session of the court, offered to the prisoner that if the prisoner would settle the subject matter of the indictment, he, the prosecuting witness, would leave the court and not appear against the prisoner. The reason was, that this testimony did not tend to impair the credibility of the prosecuting witness.[1]

§ 455. Other Illustrations of the Foregoing Principles. — Accordingly, in an action brought by certain executors against a co-executor, to recover the value of a certain promissory note given by the latter to the testator, a witness called by the plaintiffs, whose testimony tended to establish the defendant's liability, was asked, on cross-examination, whether it was not after a request to the executors to pay a sum which they alleged she owed the estate, that she first gave the information of the facts to which she had testified. It was held that the referee erred in refusing to allow this question to be put.[2] - - - - So, it has been held within the discretion of the trial judge, to allow a witness for the defendant in a criminal case to be asked, on cross-examination, whether he has offered a certain person money to be a surety on the defendant's appeal bond.[3] - - - - On the cross-examination of the State's witness in a criminal case, he may be asked whether he has not told the defendant that he had been his friend, but was then his enemy, and intended to have him prosecuted on the charge for which he was then being tried.[4] - - - - Where a defendant was on trial for a homicide committed while an attempt was being made to expel him from premises claimed by the deceased, it was held that a witness for the prosecution might properly be asked, on cross-examination, whether he, the witness, had agreed to be present and to aid the deceased in the expulsion of the defendant. The court said: "The defendant had a right to have that question answered, and to have the jury give it such weight as they might think it entitled to. The question whether the witness had a right to participate in the expulsion of the defendant is quite immaterial, as the object of the question was to draw out a statement which would enable the jury to determine what relations, if any, the witnesses sustained toward the deceased and the defendant respectively."[5] - - - - Where, in an action against a corpora-

[1] People *v.* Genung, 11 Wend. 19.

[2] Miles *v.* Sackett, 30 Hun (N. Y.), 68.

[3] Com. *v.* Gallagher, 126 Mass. 54.

[4] Sager *v.* State, 11 Tex. App. 110.

[5] People *v.* Furtado, 57 Cal. 346, opinion by Sharpstein, J.

tion, it appears that its president and treasurer are members of another corporation, having persons in its employ, and the plaintiff's counsel, in examining a witness for the defendant, asks him if he is not an employé of the latter corporation, for the purpose of showing bias, no exception lies to the exclusion of the evidence. Such evidence was admissible only within the discretion of the judge, and it did not appear that in excluding it, his discretion had been abused.[1]

§ 456. [CONTINUED.] FURTHER ILLUSTRATIONS.— In a civil action for damages for the seduction of the plaintiff's wife, a witness for the plaintiff, Lohman, testified that he went to the plaintiff's house one day to see the plaintiff; that the front door was open; that he went in without rapping, or ringing the bell, or otherwise announcing himself; that he went to the door of the bed-room, which was shut, and, without even rapping at the door or otherwise announcing himself, opened it and saw the defendant standing in the room and Mrs. Dance (the plaintiff's wife) on the bed with her person somewhat exposed. In cross-examination, the defendant's counsel asked the witness what he wanted to see Mr. Dance about, to which plaintiff's counsel objected and the court sustained the objection. It was held that this was error. Adams, J., said: "This question, we think, should have been allowed. If the object of the visit was really not to see Mr. Dance, but to penetrate to Mrs. Dance's bed-room, whether on a voyage of pleasure or discovery, it was proper that the jury should know it. The evidence tends to show that Lohman was an unsuccessful candidate for Mrs. Dance's favor, and this fact also, as well as his familiarity or boldness in the plaintiff's house, made him a worthy subject of cross-examination within all reasonable latitude."[2] - - - - In the same trial, the witness Lohman was asked, on cross-examination, whether he did not write to Mrs. Dance (the plaintiff's wife) while she was in Michigan, in the fall of 1873. The plaintiff's counsel objected to the question, and the court sustained the objection. It was held that the court erred in this ruling. Adams, J., said: "The bed-room occurrence was in the fall of 1872. If, the next fall, he was writing her letters of either love or friendship, it would tend to show that the interpretation put by him on the bed-room occurrence was not at that time such as to impair his admiration for her. Again, it was proper to show, upon cross-examination of the witness, whether Mrs. Dance answered his letters, that the jury might judge, in

[1] Wallace *v.* Taunton Street Ry. Co., 119 Mass. 91.

[2] Dance *v.* McBride, 43 Iowa, 624, 627.

case she did not, whether he was testifying under bias or ill-feeling, either towards her or towards the defendant, who is supposed to have participated more largely in her favoritism."[1]

§ 457. [CONTINUED.] FURTHER ILLUSTRATIONS.—Counsel for the State, in a criminal prosecution, has the right, on the cross-examination of a witness for the defendant, to ask him what "the *feelings* are between him and one of the State's witnesses, though nothing on this point has been brought out in the examination in chief.[2] - - - - On this ground, on the trial of an indictment for *murder*, it was held competent to ask a witness the following question: "I will ask you now, Mr. Carroll, if, in Pike Payne's saloon in the town of Red Bluff, in the presence of Mr. McGowan and Mr. Thatch, both witnesses in this case, you did not make the remark that Wasson [the defendant] ought to have been hung before he left Butte Creek?"[3] - - - - So, a witness may be asked on cross-examination, whether he has not been active in procuring testimony in the case, and if he denies this, he may be contradicted.[4] - - - - Whether the plaintiff (the witness) had not, prior to the date of the act for which the action was brought, made a *similar charge* against the defendant, may likewise be asked.[5]

§ 458. Questions affecting Character of Witness. — It is sometimes laid down without qualification that, on cross-examination, a witness may be compelled to answer any questions which tend to test his credibility or to shake his credit by injuring his character, however irrelevant to the facts in issue, or however disgraceful the answer may be to himself, except where the answer would expose him to a criminal charge.[6] But the prevailing opinion seems to be that, except in cases where the witness is the prisoner on trial, the extent to which an inquiry will be allowed in his *past life*, with the view of affecting his credibility, rests in the *discretion* of the trial court.[7]

[1] Dance *v.* McBride, 43 Iowa, 624, 628.

[2] State *v.* Willingham, 33 La. Ann. 537.

[3] People *v.* Wasson, 65 Cal. 538.

[4] Hamilton *v.* People, 29 Mich. 173; 182; Geary *v.* People, 22 Mich. 220.

[5] Watson *v.* Twombly, 60 N. H. 491.

[6] Muller *v.* St. Louis Hospital Assn., 5 Mo. App. 390; *s. c.* affirmed, 73 Mo. 243.

[7] Real *v.* People, 42 N. Y. 270; Ryan *v.* People, 19 Hun (N. Y.), 188. See also Maine *v.* People, 9 Hun (N. Y.), 113; Vaughn *v.* Westover, 2 Hun (N. Y.), 43; Stokes *v.* People, 53

§ 459. [Continued.] **Judicial Expressions on this Question.** — Many expressions are found in the judicial opinions to the effect that the trial courts should fix the limits of the cross-examination of the witnesses, where the questions tend to develop the real character of the witness, with great hesitation. Thus, in a case in New York it is said by Peckham, J.: "I wish to say that, in my opinion, as a general rule, evidence on cross-examination, tending to impeach the credibility of a witness, should be rejected with very great caution; its exclusion can rarely be proper." [1] So, in another case in the same court is said by Allen, J.: "In the latitude of cross-examination, and to enable the jury to it understand the character of the witness they are called upon to believe, collateral evidence is allowed from the witness himself, tending to discredit and disgrace the witness under examination." [2] In a later case in the same court, where the question was elaborately examined, it is said by Grover, J.: "It is well settled that, for the purpose of impairing the credit of a witness, by evidence introduced by the opposite party, such evidence must go to his general character. * * * It is held, for the purpose of discrediting his testimony, the *witness* may be asked, upon cross-examination, as to *specific acts*. This shows that, upon a cross-examination of a witness, with a view of testing his credibility, inquiries are proper as to facts not competent to be proved in any other way. * * * In such examination the presumption is strong that the witness will protect his credibility, as far, at least, as truth will warrant. All experience shows this to be so. It would be productive of

N. Y. 164; Russell *v.* St. Nicholas &c. Co., 51 N. Y. 643; Allen *v.* Bodine, 6 Barb. (N. Y.) 383; Storm *v.* United States, 94 U. S. 76, 85; Sturgis *v.* Robbins, 62 Me. 289, 293; Prescott *v.* Ward, 10 Allen (Mass.), 203, 209; Wroe *v.* State, 20 Oh. St. 460; 1 Greenl. Ev., § 449; People *v.* Arnold, 40 Mich. 710; Great Western &c. Co. *v.* Loomis, 32 N. Y. 127; Bank *v.* Slemmons, 34 Oh. St. 142; People *v.* Court, 83 N. Y. 436, 460; Gutterson *v.* Morse, 58 N. H. 165; State *v.* R. R., 58 N. H. 410, 412; Plummer *v.* Ossipee, 59 N. H. 55, 57; Free *v.* Buckingham, 59 N. H. 219; Merrill *v.* Perkins, 59 N. H. 343, 345; Perking *v.* Towle, 59 N. H. 583; Tilton *v.* Am. Bible Society, 60 N. H. 377, 384.

[1] Le Beau *v.* People, 34 N. Y. 223, 234.

[2] Newcomb *v.* Griswold, 24 N. Y. 298.

great injustice, often, if, where a witness is produced of whom the opposite party has before never heard, and who gives material testimony, and from some source, or from the manner and appearance of the witness, such party should learn that most of the life of the witness had been spent in jails and other prisons for crimes, — if this fact could not be proved by the witness himself, but could only be shown by records existing in distant counties, and perhaps States, which, for the purposes of the trial, are wholly inaccessible. No danger to the party introducing the witness can result from this class of inquiries, while their exclusion might, in some cases, wholly defeat the ends of justice. My conclusion is that a witness, upon cross-examination, may be asked whether he has been in jail, the penitentiary, or State prison, *or any other place that would tend to impair his credibility*, and how much of his life he has passed in such places."[1] In a civil case in Michigan, Campbell, J., in giving the opinion of the court says: "It has always been found necessary to allow the witnesses to be cross-examined, not only upon the facts involved in the issue, but also upon such collateral matters as may enable the jury to appreciate their fairness and reliability. To this end a large latitude has been given, where circumstances seemed to justify it, in allowing a full inquiry into the history of witnesses, and into many other things tending to illustrate their true character. This may be useful in enabling the court or jury to comprehend just what sort of person they are called upon to believe, and such a knowledge is often very desirable. It may be quite as necessary, especially where strange or suspicious witnesses are brought forward, to enable counsel to extract from them the whole truth on the merits. It cannot be doubted that a previous criminal experience will depreciate the credit of a witness to a greater or less extent, in the judgment of all persons, and there must be some means of reaching this history. The rules of law do not allow specific acts of misconduct, or specific facts of a disgraceful character to be proved against a witness by others. * * * Unless the remedy is

[1] Real *v.* People, 42 N. Y. 270, 281.

found in cross-examination, it is practically of no account. It has always been held that, within reasonable limits, a witness may, on cross-examination, be very thoroughly sifted upon his character and antecedents. * * * We think a witness may be asked concerning all antecedents, which are really significant, and which will explain his credibility. * * * He must be better acquainted than others with his own history, and is under no temptation to make his own case worse than truth will warrant. There can with him be no mistakes of identity. If there are extenuating circumstances, no one else can so readily recall them. We think the case comes within the well established rules of cross-examination, and that the few authorities which seem to doubt it have been misunderstood, or else have been based upon a fallacious course of reasoning, which would, in nine cases out of ten, prevent an honest witness from obtaining better credit than an abandoned ruffian." [1] In a criminal case subsequently before the same tribunal, the same learned justice said: "The quality of such testimony can never be regarded as entirely separated from the character which is indicated by their crimes; and, if the position they occupy indicates moral turpitude, there is a necessity for more thorough cross-examination, and nothing ought to be shut out which can sensibly aid in explaining their credibility, unless there is some fixed rule of law that excludes it." [2]

§ 460. [Continued.] **Views of Dr. Greenleaf.**— In his work on Evidence, while recognizing the fact that the courts are not in perfect harmony upon this subject, Dr. Greenleaf uses the following language: "There is certainly great force in the argument that, where a man's liberty, or his life, depends upon the testimony of another, it is of infinite importance that those who are to decide upon that testimony should know, to the greatest extent, how far the witness is to be trusted. They cannot look into his breast to see what passes there, but must form their opinion on the collateral indications of his good faith and

[1] Wilbur v. Flood, 16 Mich. 40, 43.

[2] Foster v. People, 18 Mich 266, 271.

sincerity. Whatever, therefore, may materially assist them in this inquiry is most essential to the investigation of truth; and it cannot but be material for the jury to understand the character of the witness whom they are called upon to believe, and to know whether, although he has not been convicted of any crime, he has not in some measure rendered himself less credible by his disgraceful conduct. The weight of this argument seems to have been felt by the judges in several cases in which questions tending to disgrace the witness have been permitted in cross-examination. * * * Nor does there seem to be any good reason why a witness should be privileged from answering a question touching his present situation, employment and associates, if they are of his own choice; as, for example, in what house or family he resides, what is his ordinary occupation, and whether he is intimately acquainted and conversant with certain persons, and the like; for, however these may disgrace him, his position is one of his own selection. * * * The State has a deep interest in the inducements to reformation held out by the protecting veil which is thus cast over the past offenses of the penitent; but where the inquiry relates to transactions comparatively recent, bearing directly upon the present character and moral principles of the witness, and therefore essential to the due estimation of his testimony by the jury, learned judges have of late been disposed to allow it." [1]

§ **461. Cross-examination as to Collateral Matters affecting Credibility. — (1.) View that such cross-examination is not permissible.** — Upon this subject there appear to be two views: 1. That a witness cannot be cross-examined at all, as to matters which are collateral to the issues on trial, and which do not concern his relations or feelings toward the parties or toward the action, for the purpose of affecting his credibility. 2. That such inquiries may be permitted by the court in the exercise of a sound discretion. There is also a third rule, upon which all courts are agreed, which is, that a witness cannot be cross-exam-

[1] Greenl. Ev. (14th ed.), §§ 455, 456, 459.

ined as to independent collateral facts, for the mere purpose of impeaching him by contradiction.[1] The English and some of the American courts hold that evidence of particular collateral facts cannot be adduced in any case, whether civil or criminal, in order to discredit a witness.[2]

§ 462. [CONTINUED.] ILLUSTRATIONS OF THE RULE LAST STATED. — On the trial of an issue "whether (during a certain period) there arose from the works of the defendants noisome, offensive, noxious or unwholesome smoke, and other vapors, to the nuisance of the plaintiff, whereby the produce of his garden was deteriorated," evidence was adduced, for the plaintiff, to show that the smoke and other vapors from the defendants' works had injured the produce of other gardens in the neighborhood; and also, for the defendants, to show that their works did not injure the produce of any other grounds, and one of the defendants' witnesses, having, on his examination in chief, described several gardens in the neighborhood of the works as in the utmost health, was asked, on cross-examination by the plaintiff's counsel, whether he knew Glasgow Field (grounds in the neighborhood), and having answered that 'he knew Glasgow Field, and never knew of any damage done there,' he was asked whether he had known of any sum having been paid by the defendants to the proprietors of Glasgow Field for alleged damage there, occasioned by their works. It was held that the question was inadmissible, as leading to a new collateral inquiry, which, answered either way, could not affect the issue, or test the credit of the witness.[3] - - - - In an action of trover for converting pension money collected by the defendant for the plaintiff, it was held not error to refuse to allow a witness for the plaintiff to be cross-examined as to whether he had been arrested for conspiring to procure fraudulent pensions.[4] - - - - On the trial of an action on the warranty of a horse, the plaintiff cannot be asked, on cross-examination, how many other purchases of horses he had made and tried to set aside within the last twenty years.[5] - - - - On the trial of a bastardy suit, the prosecutrix, after being com-

[1] *Post*, § 469.

[2] Rex *v.* Watson, 2 Stark. 149; Spencely *v.* DeWillott, 7 East, 108; *s. c.* 3 Smith, 289; Marks *v.* Hilsendegen, 46 Mich. 336; Bissell *v.* Starr, 32 Mich. 299; Tennant *v.* Hamilton, 7 Cl. & Fin. 122.

[3] Tennant *v.* Hamilton, 7 Cl. & Fin. 122; *s. c.* 1 Rob. 821.

[4] Marks *v.* Hilsendegen, 46 Mich. 336. See also Bissell *v.* Starr, 32 Mich. 299.

[5] Russell *v.* Cruttenden, 53 Conn. 564.

pelled, on cross-examination, to give a detailed account of the time, place and attending circumstances of the alleged illicit intercourse, was asked where she went and dined that day, — the counsel proposing to follow this up by showing that she had, on different occasions, made different statements in this respect. The court, having sustained an objection to the question, it was, on appeal, held no error, — the Supreme Court taking the view that the matters proposed to be drawn out were collateral; and also that, while it might have been proper to allow questions as to her movements and conduct, yet her answers on such collateral matters would be conclusive for the purpose of laying a ground to impeach her.[1]

§ **463.** [**Exception.**] **Where Counsel Promise to show Relevancy.** — Upon a principle already explained,[2] the judge may, even under this strict rule, in his discretion, allow the defendant's counsel to cross-examine as to facts which appear to be irrelevant, if he undertakes that it shall be shown by other evidence that they are relevant.[3]

§ **464.** [**Continued.**] (**2.**) **Such Inquiries Permissible in Discretion.** — The other and better view is, that it is within the *discretion* of the presiding judge to determine whether, in view of the evidence which has been introduced, and of the nature of the testimony given by the witness in chief, it is fit and proper that questions of the kind should be overruled, or to what extent such a cross-examination should be allowed.[4] In one jurisdiction this rule has been stated thus: "How far justice requires a tribunal to go from the issue for the trial of collateral questions; how much time should be spent in the trial of such questions; what evidence may be excluded for its remoteness of time and

[1] Moore *v.* People, 108 Ill. 484. But, under the English rule, in a prosecution for rape, it was held error to refuse to allow defendant's counsel to ask the prosecuting witness on cross-examination, what her object was in going to Scott's station, the place where the rape was alleged to have been committed. State *v.* Hartnett, 75 Mo. 251.

[2] *Ante*, § 351.

[3] Haigh *v.* Belcher, 7 Car. & P. 389.

[4] Storm *v.* United States, 94 U. S. 76; Johnston *v.* Jones, 1 Black (U. S.), 209; State *v.* Rollins, 77 Me. 380; People *v.* Blakeley, 4 Park. Cr. (N. Y.) 176; Pooler *v.* Curtiss, 3 Thomp. & C. (N. Y.) 228; Schenck *v.* Griffin, 38 N. J. L. 463, 471.

place; and what evidence is otherwise too trivial to justify a prolongation of the trial, — are often *questions of fact* to be determined at trial." [1] It follows, where this rule prevails, that the decision of the judge, in the exercise of this discretion, is *not subject to review*, except in cases of manifest injustice or abuse; [2] but in one jurisdiction, as hereafter seen,[3] convictions have been reversed for trivial violations of this rule.

§ 465. [CONTINUED.] ILLUSTRATIONS OF THIS RULE. — Thus, it is within the sound discretion of the trial court to permit a witness to be cross-examined, for the purpose of affecting credibility, as to his *belief* in the existence of *God* and a state of future rewards and punishments; [4] or whether he has not committed a *particular act of immorality or criminality*, the fact of which, if true, would injuriously affect his credit as a witness,[5] — as whether he has been *indicted* for assault and battery; [6] or whether he had *deserted* from the army, or had been charged with *crime*, no attempt having been made to impeach him by contradiction on these collateral matters; [7] or how many times he has been *in prison*; [8] or whether he has been arrested for *vagrancy*.[9] - - - - The extent of this discretion is also illustrated by a ruling that it is not error for which a judgment will be reversed, that the presiding judge allowed counsel to cross-examine a witness as to the contents of a paper which was incidental and collateral to the issues, when the object of the cross-examination was to affect the credibility of the witness merely.[10] - - - - In a prosecution for larceny from a store, committed while the merchant's attention was engaged by the defendant, he was tried as an accomplice,

[1] Watson *v.* Twombly, 60 N. H. 491 493.

[2] Great West. Turnp. Co. *v.* Loomis 32 N. Y. 127; Le Beau *v.* People, 34 N. Y. 223; West *v.* Lynch, 7 Daly (N. Y.), 247.

[3] *Post*, § 472.

[4] Clinton *v.* State, 33 Oh. St. 27, 34; Wroe *v.* State, 20 Oh. St. 460; Stanbro *v.* Hopkins, 28 Barb. (N. Y.) 270; People *v.* McGarren, 17 Wend. (N. Y.) 460; 2 Tayl. Ev., § 1258.

[5] South Bend *v.* Hardie, 98 Ind. 577, 583. Compare Bersch *v.* State, 13 Ind. 434; Wilson *v* State, 16 Ind. 392; Smith *v.* Yaryan, 69 Ind. 445; *s. c.* 35 Am. Rep. 232.

[6] Ryan *v.* People, 19 Hun (N. Y.), 188; distinguishing People *v.* Brown, 72 N. Y. 571. See also People *v.* Genet, 19 Hun (N. Y.), 92, 102.

[7] Hamilton *v.* People, 29 Mich. 173, 183.

[8] People *v.* Hovey, 29 Hun (N. Y.), 383, 390.

[9] People *v.* Manning, 48 Cal. 335. But see *post*, § 467.

[10] Klein *v.* Russell, 19 Wall. (U. S.) 433.

the merchant being the complaining witness; and, having said that he had once been a member of a banking firm, was asked on cross-examination the following question: "Did you not, while a member of that firm, extract from an envelope securities which were left in your vault for safe keeping, and use the proceeds for stock speculations in New York?" It was held that, although the witness might refuse to *criminate himself*, yet as this was a *personal privilege* which he might *waive*, the question should have been allowed.[1] - - - - So, in a civil action for indecent assault upon a woman, it was held proper to cross-examine the defendant, testifying as a witness in his own behalf, as to whether he had ever been arrested on a criminal charge made by another woman, and whether he had settled it by the payment of money. Graves, J., said: "The jury were required to decide on the value of his testimony tendered in his own behalf, and it was competent to call upon him to inform them of such incidents of his life, not amounting to self-crimination, as would assist them in placing an accurate estimate upon his statements as a witness; and the questions objected to called for nothing more."[2] - - - - So, on the trial of a bastardy proceeding, the court refused to allow the complaining witness to be asked, on cross-examination, whether she had not, and whether her mother with her had not, stated to various persons named, that the complainant was going to get a prostitute, then in the House of Correction, out of it, and hire her to swear a case against the respondent. Having refused this, the court allowed the complainant's own counsel to ask her for her version of this conversation. "These rulings," said Campbell, J., were erroneous and injurious to the respondent. Such questions were admissible on two grounds. They were directly important in bearing on the character and veracity of the witness, and they bear also on her disposition to resort to criminal practices to injure him. And it is very clear that it was improper to allow her to give her own version without cross-examination, and shut out cross-examination."[3] - - - - The defendant in a murder trial insisted that he was acting in self-defense. The only witness who was present at the shooting was the wife of the deceased, and her testimony was in direct opposition to that of the defendant. On her cross-examination, the defense offered to prove by her that she had previously been married to one man, from whom she had never been divorced; that she then lived with another, who, by reason of her conduct, became jealous, and shot her, afterwards killing himself; that

[1] People *v.* Arnold, 40 Mich. 710.
[2] Leland *v.* Kauth, 47 Mich. 508.
[3] People *v.* White, 53 Mich. 537, 539.

she and the deceased lived together as man and wife until the previous fall, and that they were married by reason of the regulations governing the military reservation on which they lived. This offer was rejected. It was held that this was error; the rejected questions were proper cross-examination, for the purpose of impeaching her testimony.[1]

§ 466. [CONTINUED.] CONTRARY AND CONFUSING VIEWS. — Contrary and confusing views are sometimes met with upon this question. In one jurisdiction it is not competent, on cross-examination, to ask the witness whether he has not *committed certain acts*, although the commission of such acts, if admitted, would have a tendency to discredit his testimony, by showing that he is a man of bad character. He cannot, for instance, be asked if he has not been concerned in a particular transaction which involved an attempt to cheat and swindle.[2] - - - - In another State, in an action by a father for the seduction of his daughter, her character for chastity being involved in the question of damages, evidence of her particular acts of sexual immorality has been held admissible; and yet it has been held that in such a case the principal female witness cannot, over objections by her counsel, be asked, on cross-examination, whether she had not been previously criminally intimate with other men. The reasoning was, that in her character as witness she stood as any other witness in the case,[3] and that in that character she could be impeached only "in the usual mode, through general questions.[4] - - - - But the same court has held, in a later case, that, in an action by a female for her own seduction, or in a case of bastardy, it is competent to ask the prosecuting witness, on cross-examination, whether she had sexual intercourse with any person other than the defendant about the time the child was begotten, as this would be a proper fact to be considered in estimating the damages.[5] - - - - Another court, which has vacillated with reference to the rule of the preceding section, seems to have taken the view in one case that evidence that a witness made statements in other cases, or generally, of his being *open to bribery*, does not come within any recognized rule of impeachment, unless such facts have created for him a reputation for untruth, and then

[1] United States *v.* Wood (Dak.), 33 N. W. Rep. 59. Francis, J. dissented.

[2] Madden *v.* Koester, 52 Ia. 692.

[3] Shattuck *v.* Myers, 13 Ind. 146.

[4] Long *v.* Morrison, 14 Ind. 595. Compare Wilson *v.* State, 16 Ind 392.

[5] Smith *v.* Yarvan, 69 Ind. 445; *s.c* 35 Am. Rep. 232.

it is only the reputation which is admissible, and not its cause.[1] - - - - A witness had testified, on her examination in chief, in a criminal case, as to what took place at two interviews between her and the accused, and, on cross-examination, stated that there had been several interviews between the two interviews which she had spoken of. It was held that the witness would not be required to state generally what took place at these interviews, but only so much, if anything, as bore upon the issue.[2] - - - - The defendant in a criminal prosecution proved, by two of the State's witnesses, upon their cross-examination, that they had expressed to L. their willingness, for a *bribe*, to leave the State, so as not to appear as witnesses against the prisoner. Upon a *subsequent examination* of L., on behalf of the prisoner, touching his negotiations with those witnesses in regard to the matter of the bribery, it was held that the motive and purpose of L. in the transaction were not admissible.[3]

§ 467. Arrested, Indicted, Convicted. — There is a confusion in the authorities as to whether a witness may be asked, on cross-examination whether he has been arrested, indicted or convicted upon a criminal charge. One of the difficulties grows out of the question whether such a matter can be proved by *secondary evidence* — even by the admission of the witness, who must of all men be certain of the fact if it existed. The strain about secondary evidence in such a case is a mere quibble, totally destitute of common sense. One court has held that a party seeking to impeach a witness may, on cross-examination, ask him whether he has been convicted of a felony, and if so, what sentence was imposed upon him.[4] The same court has held that it is competent to ask a witness on cross-examination whether he has been arrested for vagrancy, — the objection that the question calls for secondary evidence not being tenable, since the fact of an arrest does not necessarily imply any record showing it.[5] Another court has held that a witness cannot be asked on cross-examination whether he has been indicted for a crime,— as, for instance, perjury. Assuming that the question whether a witness has been in

[1] Hamilton *v.* People, 29 Mich. 175, 183.

[2] Mitchell *v.* Com., 75 Va. 856.

[3] Chelton *v.* State, 45 Md. 565.

[4] People *v.* Rodrigo, 69 Cal. 601; *s. c.* 8 Crim. Law Mag. 503.

[5] People *v.* Manning, 48 Cal. 335.

dicted merely for a crime, instead of asking him whether he has been convicted of a crime, is competent at all, it has been held in some jurisdictions that such a fact cannot be proved by the admission of the witness upon cross-examination, but can only be proved by the record.[1] In another case in the same State a prisoner, testifying as a witness in his own behalf, was asked on cross-examination by the State's attorney: "How many times have you been arrested?" This was objected to by the prisoner's counsel as incompetent, irrelevant, tending to degrade the witness, etc. The objection was overruled and the prisoner's counsel excepted. The witness answered: "Five times, I believe." It was held that the evidence was inadmissible as an impeachment of the prisoner's character, either generally or in respect of truth and veracity.[2]

§ 468. Questions creating Prejudice, but not affecting Credibility. — Within the rule of the preceding text,[3] questions which might excite prejudice against the witness, but the answers to which would not properly affect his credibility, are not allowed to be put on cross-examination. Thus, it has been held, but it is conceived on a doubtful view of the proper application of this principle, that, in an action to set aside a mortgage as *usurious*, where a witness for the defendant, who had acted for him in the negotiation of the mortgage, was questioned as to whether he had not, on other loans of defendant to other parties, taken notes from them in excess of legal interest paid to defendant, — the question was inadmissible for the purpose of affecting the credit of the witness.[4]

§ 469. Cross-examination on Collateral Matters for the Purpose of Contradiction. — All courts agree that a witness can-

[1] Peck *v.* Yorks, 47 Barb. (N. Y.) 131, 134; Newcomb *v.* Griswold, 24 N. Y. 298.

[2] Brown *v.* People, 8 Hun (N. Y.), 562. The court cite: Jackson *v.* Osborn, 2 Wend. (N. Y.) 555; People *v.* Gay, 7 N. Y. 378; Lipe *v.* Eisenlerd, 32 N. Y. 229, 238; and distinguish Brandon *v.* People, 42 N. Y. 265.

[3] *Ante*, § 458.

[4] Pooler *v.* Curtiss, 3 Thomp. & C. (N. Y.) 228; denying the *dictum* of Peckham, J., in Ross *v.* Ackerman, 46 N. Y. 210.

not be cross-examined as to any matters which are purely collateral to the issues on trial, with the view of impeaching him by contradiction.[1] The rule is somewhat *differently stated* and applied by different authorities. It is thus stated by Mr. Starkie: "It is here to be observed, that a witness is not to be cross-examined as to any distinct collateral fact, for the purpose of afterwards impeaching his testimony by contradicting him."[2] "The rule does not, of course, exclude the contradiction of a witness as to any facts immediately connected with the subject of the inquiry, which in themselves would otherwise be legitimate evidence in the cause."[3] It is thus stated by the late Judge Taylor: "In accordance with this general principle, a witness may be cross-examined as to a former statement made by him relative to the subject matter of the cause, and inconsistent with his present testimony."[4] Professor Greenleaf says: "It is a well settled rule that a witness cannot be cross-examined as to any fact which is collateral and irrelevant to the issue, merely for the purpose of contradicting him by other evidence, if he should deny it, thereby to discredit his testimony." Mr. Starkie's statement has been adopted by some courts[5] and criticised by others.[6] In Massachusetts it is said: "The rule which excludes all evidence tending to contradict the statements of a witness as to collateral matters does not apply to any facts immediately and properly connected with the main subject of inquiry."[7] In Indiana it is added: "These decisions, however, do not go to the extent of limiting the right to cross-examine, for the purpose of laying a foundation for an impeachment, to particular matters

[1] Clinton *v.* State, 33 Oh. St. 27, 34; Spenceley *v.* De Willott, 2 Lewin C. R. 155, *n.; s. c.* 7 East. 110; Smith *v.* State, 5 Neb. 183; Henderson *v.* State, 1 Tex. App. 432; People *v.* Devine, 44 Cal. 452, 458; People *v.* Furtado, 57 Cal. 346; Hester *v.* Com., 85 Pa. St. 139, 157; Harris *v.* Wilson, 7 Wend. (N. Y.) 57; Lee *v.* Chadsey, 2 Keyes (N. Y.), 546; People *v.* Cox, 21 Hun (N. Y.), 47.

[2] 1 Stark. Ev. 9th Ed. 200.

[3] *Id.* 203.

[4] Tayl. Ev. (8th ed.), § 1445.

[5] Lawrence *v.* Lanning, 4 Ind. 194; Ware *v.* Ware, 8 Me. 42.

[6] Atty.-Gen. *v.* Hitchcock, 1 Exch. 91; Hildeburn *v.* Curren, 65 Pa. St. 59.

[7] Com. *v.* Hunt, 4 Gray (Mass.), 421.

testified to by the witness on his direct examination; nor do they limit the cross-examination to such matters as bear directly and immediately upon the issue. The effect of proving contradictory statements extends no further than the question of credibility. Such evidence does not tend to establish the truth of the matters embraced in the contradictory statements; it simply goes to the credibility of the witness.[1] This consideration in itself supplies a strong reason for allowing a *liberal latitude* in cross-examining for the purpose of laying the foundation for impeachment; for a witness who tells a falsehood concerning a matter incidentally connected with the subject of the action, is as likely to testify untruly as if the falsehood had directly affected the issue. It is difficult to perceive why a material falsehood concerning a matter collaterally related to the main issue, is not as effective against the credibility of the witness, as one immediately bearing upon the question."[2] The rule was thus stated by Baron Alderson in

[1] Citing Davis *v.* Hardy, 76 Ind. 272; Docks *v.* Stone, 13 Minn. 434.

[2] Seller *v.* Jenkins, 97 Ind. 430, 435. The Supreme Court of Indiana seems to have settled upon the idea that the rule does not limit the cross-examination to such matters as bear *directly and immediately* upon the issue, although they must be connected with the subject matter of the action. The court say: "We are not to be understood as holding that matters foreign to the subject matter of the action, or wholly irrelevant to the issue, can be used for the purpose of impeachment; but we hold, with the authorities cited, that where the matters properly come up on cross-examination, they may be made use of for the purpose of impeachment, though the specific matter was not explicitly developed in the direct examination." The court then, after proceeding to give the definitions of several text writers as to the meaning of the word "issue" and the word "relevant," proceed to say: "His statements concerning the matter which, as a witness, he declares to be true, must be relevant to the issue, even using that word in its strict technical sense. If his statements out of court are untrue, then they conduce to the truth of a pertinent hypothesis, namely, the hypothesis that the appellant's statements tending to establish his charge were not true; so that even taking the word 'issue' in its strict technical sense, evidence of statements containing an account of his charge against the appellee are relevant. That the statements given out of court may tend to discredit the statements made in court tending to prove the plea of justification, is evident when it is brought to mind that if, out of court he made one charge, and in court testified to the truth of a different one, there would be a material inconsistency in his testimony." Seller *v.* Jenkins, *supra*, opinion by Elliott, J.

a leading case: "A witness may be asked any question which, if answered, would qualify or contradict some previous part of that witness' testimony, given at the trial of the issue; and if that question is so put to him and answered, the opposite party may then contradict him, — and for this simple reason, that the contradiction qualifies or contradicts the previous part of the witness' testimony, and so removes it."[1]

§ 470. [Continued.] **If Witness Answers, Answer Conclusive.** — If he is so cross-examined, the cross-examining party makes him his own witness in respect of such matters, and cannot contradict the testimony which he gives.[2] The *reason of the rule* has been variously stated. In one case it was said to be that the time of the court is too limited to admit of collateral inquiries.[3] The more usual reason which the courts give is, that such a practice would confuse the jury by an interminable multiplication of issues.[4] But this rule never applies to testimony which is *not collateral*, but which is *material* to the issue. When a party, brings out evidence on cross-examination, which is material to the issue, he is not necessarily bound by it, but may contradict it by other witnesses.[5] The reason is that a contrary rule would result in making his opponent's witness his own, by the mere fact of cross-examining him, and would have the effect of depriving a party of the advantage of a cross-examination, so necessary to the sifting of the truth and the attainment of justice.

[1] Atty.-Gen. *v.* Hitchcock, 1 Exch. 91, 102.

[2] Leavitt *v.* Stansell, 44 Mich. 424; People *v.* McKeller, 53 Cal. 65; People *v.* Bell, 53 Cal. 119; Newberry *v.* Furnival, 46 How. Pr. (N. Y.) 139; Crounse *v.* Fitch, 6 Abb. Pr. (N. S.) (N. Y.) 185; Kaler *v.* Builders' Mutual Fire Ins. Co., 120 Mass. 333, 336; Farnum *v.* Farnum, 13 Gray (Mass.), 508; Com. *v.* Cain, 14 Gray (Mass.), 7; Fletcher *v.* Boston & Maine R. R., 1 Allen (Mass.), 9; People *v.* Webb (Cal.), 11 Pac. Rep. 509; *s. c.* 70 Cal. 120; Gaines *v.* Com., 50 Pa. St. 319, 327; State *v.* Patterson, 74 N. C. 157; Harris *v.* Tippett, 2 Camp. 637; Rex *v.* Watson, 2 Stark. 116, 149; Rex *v.* Rudge, Peake Add. Cas. 232; Madden *v.* Koester, 52 Iowa, 693; Hawkins *v.* Pleasants, 71 N. C. 325; State *v.* Roberts, 81 N. C. 606; State *v.* Patterson, 2 Ired. L. (N. C.) 346.

[3] Att'y-Gen. *v.* Hitchcock, 1 Exch. 91.

[4] Spenceley *v.* De Willott, 7 East, 108.

[5] Newberry *v.* Furnival, 46 How. Pr. (N. Y.) 139.

§ 471. [CONTINUED.] ILLUSTRATIONS. — Under this rule, where, upon the trial of a proceeding in bastardy, the defendant asked the prosecutrix, on cross-examination, if she had ever had sexual intercourse with A., to which she replied that she had not, — it was held that the question was collateral and irrelevant, and the answer of the prosecutrix, conclusive on the defendant, and that the court did not err in excluding the testimony of A. in contradiction thereof.[1] - - - - So, where a witness on his cross-examination was asked whether the prosecutor had not paid him for coming from another State to be a witness, and he answered that he had not, it was held incompetent for the defendant to introduce witnesses to prove declarations that he had been so paid.[2] - - - - In a civil case, the defendant called George Morse, for the purpose of impeaching the plaintiff, Mr. Wilder, as a witness. Morse gave testimony to the effect that the plaintiff's general reputation for truth and veracity was bad. He was then asked by the defendant this question: "Did Mr. Wilder state to you, in a certain conversation, that he regarded it as no wrong to swear falsely against such a man as Albert Morse?" This was objected to, the objection overruled, and an exception taken. The witness answered, "He did," though he could not tell "how long ago it was." It was held that, to allow this question was error, for which the judgment should be reversed.[3] - - - - In an action on a policy of insurance against fire, the issues were whether an addition to the building, in which was the property insured, materially increased the risk, and whether the insurer assented to the addition being made. A witness for the defendant, who had the general management of his business, was asked, on cross-examination, whether the plaintiff did not, in an interview with him, show him a letter containing this statement: "All my companies have paid, and I see no reason why the others should not pay." The witness answered in the negative. It was held that this evidence was collateral and irrelevant to the issues of the trial, that the witness could not be contradicted upon this point, and that the admission of a letter written by an agent of other insurance companies, containing such a clause, with evidence that it was shown to the witness, gave the defendant good ground of exception.[4] - - - - A defendant charged with an indecent assault, having been cross-examined as to alleged indecencies in respect of other

[1] State *v.* Patterson, 74 N. C. 157.

[2] State *v.* Patterson, 2 Ired L. (N. C.) 346. See also Clark *v.* Clark, 65 N. C. 655.

[3] Wilder *v.* Peabody, 21 Hun (N. Y.), 376.

[4] Kaler *v.* Builders Mutual Ins. Co., 120 Mass. 333.

persons, and having denied them, — evidence in disproof of these imputations on the one side, or in respect of them on the other, is properly rejected under the foregoing rule, as relating to collateral issues. The plaintiff is bound by the defendant's answers as to these collateral matters.[1] - - - - So, where the mother of the accused, on a criminal trial, was called by the defense and gave evidence tending to show that the accused was at home at the time a certain letter was delivered, and, having stated on cross-examination that she did not know that the accused wrote a letter on the morning of the day the one in question was delivered, she was subsequently asked on cross-examination whether she did not tell certain persons named that the accused had written a letter on the morning of that day, and she replied that she did not. Subsequently these persons were called and allowed, against the objection of the accused, to testify that the mother had told them that the accused had written a letter on the morning of that day. The mother had made no reference to the writing of the letter in her direct examination. It was held that the prosecution, by attempting to prove by her that the accused had written one on the day in question, had made her, for that purpose, their own witness, and could not thereafter discredit her testimony in regard to it, by showing contradictory statements made to other persons when not under oath.[2]

§ 472. [CONTINUED.] INSTANCES OF CONVICTIONS REVERSED FOR A VIOLATION OF THIS RULE. — A witness for the defendant, on a criminal trial, on cross-examination, stated that he lived in the City of San Francisco ever since the year 1855, except that he had been out of the city for the space of two years, working on a ranch in Marin county. He also stated that he had testified in this cause, as a witness for the prisoner, at a former trial. He was then asked by the people's counsel, whether he had not testified at the former trial that he had lived in Marin County *four* years, or that he had been in that county *six* or *seven* years since the year 1855, and he answered that he had not so testified. In rebuttal, the people, in order to contradict the witness on this point, were permitted by the court,

[1] Tolman *v.* Johnstone, 2 Fost. & Fin. 66.

[2] People *v.* Cox, 21 Hun (N. Y.), 47. Compare Hogan *v.* Cregan, 6 Rob. (N. Y.) 138; Com. *v.* Bean, 111 Mass. 438; Thomas *v.* David, 7 Carr. & P. 350. It is said in People *v.* Cox, *supra*, that Greenfield *v.* People, 13 Hun (N. Y.), 244, was not intended to be carried beyond the above authorities, some of which are therein cited.

against the objections of the prisoner, to read to the jury a portion of the evidence given by the witness at the former trial, and by which it was made to appear that he had, in point of fact, testified as claimed by the counsel for the prosecution, and had stated at the former trial that he had been absent from San Francisco and in Marin county some six or seven years since the year 1855. For this trivial departure from the rules of evidence a conviction of felony was reversed and the cause remanded for a new trial.[1] - - - - On a trial for murder the defendant was examined as a witness in his own behalf, and, on his cross-examination testified, that the deceased, on the occasion of the quarrel which resulted in his death, called the defendant and his brother "damned sons of bitches." The witness further testified: "That is not the first time I ever heard him use that kind of language. Have heard him use it frequently. I do not know as he was a practical swearer." The prosecution called several witnesses in rebuttal, who were permitted to testify, against the objection of the defendant, that they were intimately acquainted with the deceased in his life time, and that he was not a profane swearer, and that they never heard him use profane language. The defendant excepted to the ruling of the court; and, because the prosecution was allowed to go into this collateral and irrelevant matter, which could not possibly affect the merits of the case or prejudice the accused in any way, a conviction was reversed and a new trial ordered.[2] Such decisions are a mere travesty upon the administration of justice.

§ 473. [Continued.] **What if Question answered without Objection.** — Although the witness may be asked such an irrelevant and collateral question and may answer it without objection, evidence cannot be afterwards admitted to contradict his testimony in respect of such collateral matter.[3] But the answers are evidence in the case, and when they tend to affect the credibility of a witness, are to be weighed and considered by the jury.[4]

§ 474. **Where the Opposite Party is a Witness.** — It has been suggested, on grounds that are obviously sound, that the fact that the witness is a party to the action, will justify the court, in

[1] People *v.* McKeller, 53 Cal. 65.
[2] People *v.* Bell, 53 Cal. 119.
[3] Sloan *v.* Edwards, 61 Md. 90, 105. See also Goodhand *v.* Benton, 6 Gill & J. (Md.) 481.
[4] Craig *v.* Rohrer, 63 Ill. 325.

its discretion, in allowing even a *broader range* of cross-examination than would be allowed where the witness is not a party.[1] But at the same time it is held that this is not the *right* of the adverse party, but that the *rules* of cross-examination are the same, whether the witness be a party or not.[2] Thus, the plaintiff having testified in his own behalf, in a suit against a city for personal injury claimed to have been received from a defective sidewalk, the defendant proposed, by cross-examining him, to show that, three years before, he had combined with others to defraud an insurance company which had taken a risk upon his life. It was held that such cross-examination might, in the discretion of the trial court, be either refused or permitted without error, the witness not claiming his privilege.[3] Reasoning from the same premises, it has been held that a defendant who offered himself as a witness in his own behalf, might be asked whether he had not disposed of his property so as to avoid the payment of any recovery in the action then being tried; whether, since such disposal, he had not been engaged in selling the same property; and whether he had not gone to New York to consult a spiritualist in regard to the money which was the subject of the controversy, — and his answers to these questions were held the proper subjects of comment to the jury.[4] But this rule does not extend so far as to render it proper to allow *frivolous* and *immaterial* questions.[5]

[1] Norris *v.* Cargill, 57 Wis. 251, 255; Knapp *v.* Schneider, 24 Wis. 70. The subject of the cross-examination of *accused* persons, who offer themselves as witnesses in *criminal trials*, is reserved for a future chapter. *Post*, chap. 23.

[2] Norris *v.* Cargill, *supra*; Howland *v.* Jenks, 7 Wis, 57.

[3] South Bend *v.* Hardy, 98 Ind. 577.

[4] State ex rel. *v.* Phillips, 70 N. C. 462.

[5] Thus, in a civil case in Iowa, the plaintiff was asked on cross-examination: "Who told you to bring this suit against him (defendant)?" also, "Did you tell Mr. Beach or Mr. Hoyt (plaintiff's attorneys), or either of them, how much Mr. Arts owed you when you brought this suit?" It was held that these questions were properly excluded. It was utterly immaterial under whose advice or direction the suit was brought; nor could a communication of facts made to the plaintiff's counsel be introduced in evidence. Walthelm *v.* Arts, 70 Ia. 609; *s. c.* 31 N. W. Rep. 953. In *Georgia* a ruling of the trial court was sustained, in *suppressing* a series of *interrogatories* sued out by the plaintiff, on the ground that one of the

§ 475. **Right of Witness to Explain.** — A witness is entitled to explain his declarations, introduced for the purpose of showing an apparent hostility against the defendant.[1] Where, on the cross-examination of a witness, collateral facts are called out from him tending to create a distrust in his integrity, fidelity or truth, it is competent for the adverse party to ask, on re-examination an *explanation*, which will tend to support his testimony, although the circumstances thus proved are foreign to the main issue, and would not have been permitted but for the previous cross-examination.[2] Thus, if he admits on cross-examination that he has given contrary testimony, — as, for instance, before a committing magistrate in the same case, — he may, on re-examination, be permitted to state that such former testimony was given in consequence of *threats* of personal violence by the opposing witness.[3] So, where a witness is interrogated, on cross-examination, as to former inconsistent declarations, and denies that he made them, he may state, in rebuttal, *what he did say* on the particular occasion.[4] So, if the plaintiff's testimony is assailed by that given for the defendant, setting up a *new state of facts*, the plaintiff may explain away or modify the facts by re-examination or by rebutting testimony. Thus, where a defendant, on a trial for stabbing, gave in evidence a previous

cross-interrogatories had *not* been *fully answered*. The court said: "Where a party to a cause makes himself a witness in his own behalf, he should be held to answer strictly and minutely every interrogatory put to him of which he has knowledge, and if he neglects to answer, or answers evasively, such testimony should be rejected. Howard *v.* Chamberlin, 68 Ga. 684, 696. This was probably ruled in conformity with some statutory requirement; the general rule would be that the failure to answer the cross-interrogatories fully would go merely to the credibility of the witness and be a subject of comment before the jury. Where the plaintiff's witness testified, on cross-examination, to conversations with the defendant, the defendant, called as a witness by the plaintiff, may be examined on the subject of the same conversations. Homans *v.* Corning, 60 N. H. 418. See also Laws of New Hampshire, chap. 228, § 15.

[1] State *v.* Stewart, 11 Ore. 52. As to the right of a witness to explain a *mistake* made in his testimony on the trial of another case between the same parties, see McDonald *v.* McDonald, 55 Mich. 155.

[2] United States *v.* Eighteen Barrels of High Wines, 8 Blatchf. (U. S.) 475, 478.

[3] Lewis *v.* State, 35 Ala. 380.

[4] Haley *v.* State, 63 Ala. 83.

difficulty or quarrel on the same day, to show a conspiracy to do him bodily harm, it was competent for the State to prove other incidents of such previous difficulty, in order that the jury might better understand the real merits of the case.[1] A witness having testified to certain facts was asked on cross-examination if he had not made a different statement to A., and he replied that he had not. The adverse party afterwards called A. as a witness, who testified that the former witness had made a different statement to him. The former witness was again recalled and stated what he did say to A., and was going on to give the further conversation between him and A. upon the subject, when, on objection of the adverse party, the court ruled it out. It was held that the party calling the witness was entitled to have the *whole conversation* detailed so far as it related to the same subject.[2]

[1] McAffee *v.* State, 31 Ga. 411.

[2] Harrison's Appeal, 48 Conn. 202.

CHAPTER XVIII.

OF THE RE-EXAMINATION.

SECTION
480. Purpose of.
481. Developing New Matter brought out on Cross-examination.
482. When not Permitted without Leave of Court.
483. Re-examination as to Incompetent and Irrelevant Matters.
484. Limits of Re-examination as to Former Statements.
485. [Continued.] An Illustration of the Rule.
486. Re-examination as to Reasons for Animosity towards Accused.

§ **480. Purpose of.** — After the witness has been cross-examined, he may often be re-examined by the party originally calling him. The re-examination sustains, in respect of the cross-examination, a relation similar to that which the cross-examination sustains to the direct examination. Its object is to develop, explain, or modify any *new matter* which may have been brought out on the cross-examination.

§ **481. Developing New Matter brought out on Cross-examination.** — The privilege which is extended to the cross-examining party, of developing and following into detail matter which has been brought out on the direct examination, extends equally to the other party, in respect of new matter which is brought out on cross-examination. When, therefore, a witness has, on cross-examination, detailed a *part of a conversation*, the other party has a right, on re-examination, to have him state the whole of the conversation, so far as it is material to the issues.[1] So, the re-examination of a witness should be permitted in respect of matters drawn out on the cross-examination, or which furnish circumstances by which a material transaction is impressed on the witness' mind.[2] It is obviously competent for a party

[1] Roberts *v.* Roberts, 85 N. C. 9. See Cabiness *v.* Martin, 4 Dev. L. (N. C.) 106; Gray *v.* Cooper, 65 N. C. 183.

[2] Farmers &c. Bank *v.* Young, 36 Ia. 44.

to recall a witness, once sworn and examined in his behalf, for re-examination *in rebuttal*, without express leave of the court.[1] Under the American rule,[2] where the cross-examiner, in developing new matter, thereby makes the witness his own, it follows, in the view of some courts, that the party who originally called the witness may follow up the line of inquiry thus touched upon, by a re-examination, which re-examination is in the nature of a cross-examination of the defendant's witness.[3] But this rule has no application where the matter brought out is not new matter, but is merely matter which was touched upon in the examination in chief. If this matter was not competent, it does not afford a justification to the party who originally stirred it, to go on and develop, in re-examination, a greater mass of incompetent evidence of the same character. Thus, on the examination of a witness for the plaintiff, certain evidence, touching transactions between the plaintiff and his deceased partner, was ruled out under the defendant's objection, the same being clearly incompetent under the statute. On cross-examination, the defendant asked the witness a question touching the evidence so ruled out, which the witness answered. On re-direct examination, the witness was permitted by the court, against the defendant's objection, to enter into a full explanation of the matter. The Supreme Court held that this was error.[4]

§ 482. When not Permitted without leave of Court. — It is an established rule, both of courts of law and of equity, founded, it is believed, upon a sound policy, that a witness cannot, without express leave of court, be re-examined as to matter upon which he has *already been examined* in chief, unless it becomes necessary or proper in view of his cross-examination.[5] But where a witness is recalled, and objection is made to his examina-

[1] Osborne *v.* O'Reilly, 34 N. J. Eq. 60, 66.

[2] *Ante*, § 432.

[3] Gray *v.* Cooper, 65 N. C. 183.

[4] Jackson *v.* Evans, 73 N. C. 128.

[5] Whart. Ev., § 574; Dan. Ch. Pr. 1104; Osborne *v.* O'Rielly, 34 N. J. Eq. 60, 66. See also Crawford *v.* Berthof, 1 N. J. Eq. 458; Delaney *v.* Noble, 3 N. J. Eq. 441; Hanson *v.* Presbyterian Church, 11 N. J. Eq. 441; Swartz *v.* Chickering, 58 Md. 291, 297.

tion, it will not be assignable for error that the court permitted him to be examined, unless the ground of the objection was stated.[1] Such testimony, in a chancery case, should be excluded on exception.[2] But the passing of an order allowing the re-examination of a witness in equity, is a matter resting in the *discretion* of the court, which discretion is not subject to review on appeal.[3]

§ **483. Re-examination as to Incompetent and Irrelevant Matters.** — If one side introduces evidence irrelevant to the issue, which is prejudicial and harmful to the other party, then, although it come in without objection, the other party is entitled to introduce evidence which will directly and strictly contradict it. The government, in a criminal trial, waives the strict rule to this extent, by its misstep of introducing illegal evidence; but the respondent is not entitled to a *further* relaxation of the common rule, because he could, by his objection, have excluded the illegal or ir relevant evidence.[4] This is just and proper, to enable the other party to explain away the prejudicial effect of the evidence, which, in many cases cannot be cured by an instruction withdrawing it from the attention of the jury. Thus, where, in a criminal trial, the State's attorney was allowed by the court to ask the defendant's witnesses where they came from when they came to the witness stand, to which they answered that they *came from jail*, — it was held error not to allow them to state on what charge they were committed to jail, though they could not regularly be discredited by such testimony.[5] In one jurisdiction, where the rule prevails that a witness for the prosecution in a criminal trial is as much the people's witness when under cross-examination as when being examined in chief,[6] the conclusion has been drawn

[1] Osborne *v.* O'Reilly, 34 N. J. Eq. 60, 66.

[2] Swartz *v.* Chickering, 58 Md. 291, 297.

[3] Swartz *v.* Chickering, 58 Md. 291, 297.

[4] State *v.* Witham, 72 Me. 531, 536; State *v.* Sargent, 32 Me. 431; Williams *v.* Gilman, 71 Me. 21; Mowry *v.* Smith, 9 Allen (Mass.), 67; Parker *v.* Dudley, 118 Mass. 602, 605; Phillips *v.* Hoyle, 4 Gray (Mass.), 568; Eddy *v.* Gray, 4 Allen (Mass.), 435; Com. *v.* Fitzgerald, 2 Allen (Mass.), 297; Brown *v.* Perkins, 1 Allen (Mass.), 89.

[5] State *v.* Ezell, 41 Tex. 35.

[6] Wagner *v.* People, 30 Mich. 384; Wilson *v.* Wagar, 26 Mich. 458, 459.

that the mere fact that a witness has been permitted, on cross-examination on a subject touched upon in the direct examination, to detail, without objection, evidence which is hearsay merely, will not authorize the calling out of *the rest of the story*, against objection, on the re-direct examination, on the claim that it is a part of the same conversation.[1] Elsewhere it is ruled, on a conception analogous to the doctrine of estoppel, that it is not ground of error that a witness, on his re-examination, is permitted to repeat incompetent evidence which has been brought out on the cross-examination.[2]

§ 484. Limits of Re-examination as to former Statements. — Professor Greenleaf says: "After a witness has been cross-examined respecting a former statement made by him, the party who called him has a right to re-examine him to the same matter. The counsel has a right, upon such re-examination, to ask all questions which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful, and also of the motive by which the witness was induced to use those expressions; but he has no right to go further, and to introduce matter new in itself, and not suited to the purpose of explaining either the expressions or motives of the witness."[3]

§ 485. [CONTINUED.] AN ILLUSTRATION OF THE RULE. — Upon the trial of an indictment for arson a witness for the State, on his direct examination, testified that, in a conversation with him on a certain occasion, the accused said to him, "I suppose you are going to send me up on that buggy scrape." On his cross-examination the witness explained that the words "buggy scrape" referred to a buggy which one L. had caused the accused to be arrested for stealing a few days before, and that the witness had been employed by L. to look it up and had recovered it. On his re-direct examination, the witness was permitted, against objection, to testify "what he knew and what he did in regard to that buggy scrape," and to detail facts having a strong tendency to show that the accused had stolen the buggy. It was held

[1] Wagner *v.* People, 30 Mich. 384.
[2] Goodman *v.* Kennedy, 10 Neb. 270.
[3] 1 Greenl. Ev., § 467. So held in Schaser *v.* State, 36 Wis. 429, 432.

that this was new matter, not admissible within the foregoing rule in respect of re-direct examination, and that its admission was fatal error.[1] The decision is supportable on the ground that the evidence was incompetent, since it was evidence of another and a distinct offense, of a diferent character from the one on trial; but the opinion, so far as it holds that it is fatal error, in a criminal or in a civil trial, for the judge to allow new matter to be gone into on re-direct examination, is manifestly unsound. Such a matter, by the best authority and reason, is left to rest within the sound *discretion* of the trial judge.[2]

§ 486. Re-examination as to Reasons of Animosity towards Accused. — In Louisiana, it is held that, where a witness for the State, on cross-examination, admits that his feelings to the accused are unfriendly, the counsel of the State cannot, on the re-examination, ask the witness to state the reasons of his animosity. The reason is that, to permit the State's witness thus to detail the causes of his animosity towards the accused, is to suffer him to testify to matters which are wholly irrelevant to the issues on trial, and also to give him an opportunity of poisoning the minds of the jury against the accused, by relating facts and circumstances, and making accusations, wholly disconnected with the charge for which the accused is being tried, without an opportunity of defense or reply being offered to the accused. Such an irregularity has been held good ground for reversing a conviction.[3] The rule, heretofore explained, that such statements are *collateral* to the inquiry, in the sense that the cross-examining party, by interrogating the witness concerning them, makes the witness his own witness, so that he is bound by his answers, does not apply; and it is *error* to reject the contradictory evidence on this ground.[4] Thus, it is competent, for the purpose of impeaching the credibility of a witness, to show that there has been a quarrel between him and the party against whom he testifies; and it is not necessary that the cause of the quarrel should be connected with the subject-matter of the suit on trial.

[1] Schaser *v.* State, 36 Wis. 429.

[2] *Ante*, § 349.

[3] State *v.* Gregory, 33 La. Ann. 737.

[4] Bosborough *v.* State (Tex. Ct. of App.), 8 Crim. Law Mag. 751; *s. c.* 21 Tex. App. 672.

Where the party against whom a witness testifies asks him, on cross-examination, whether there has not been such a quarrel, he does not thereby make the witness his own witness so as to preclude himself from contradicting him.[1] The rule which thus requires a foundation to be laid, applies equally to the case of oral statements and to a previous *deposition* given by the witness.[2] Accordingly, it has been held that, where the *deposition* of the witness has been read in evidence, and the opposing party produces another and a *conflicting deposition* of the same witness, in another action between the same parties, of a prior date, and offers to introduce the same to impeach the witness, and the court of its own motion excludes the testimony, it is not error.[3] It has even been held that, where the *deposition of a deceased witness* had been by consent read in evidence, another and conflicting deposition of the same witness, at a prior trial, could not be read, in order to impeach the witness, for the reason that the attention of the witness had not been called to the conflict between the two depositions.[4] But this last holding does not seem to be supported by reason; since the prior deposition would certainly have some tendency to impair the effect of the latter one, and since the death of the witness has rendered it impossible to examine him respecting the discrepancy between the two.

[1] Beardsley *v.* Wildman, 41 Conn. 515.

[2] Cropsey *v.* Averill, 8 Neb. 157.

[3] Greer *v.* Higgins, 20 Kan. 420, 424.

[4] Hubbard *v.* Briggs, 31 N. Y. 518. Runyan *v.* Price, 15 Oh. St. 1.

CHAPTER XIX.

OF INDIRECT IMPEACHMENT.

SECTION
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515 Contradicting the Statements of one's own Witness.

§ **489. Four Modes of Impeaching the Credit of a Witness.** — There are but four modes of impeaching the credit of a witness: 1. By cross-examination. 2. By proving previous contradictory statements or acts. 3. By producing the record of his conviction of some infamous crime. 4. By adducing gen-

eral evidence tending to show that he is unworthy of belief on his oath.[1] The *first* has been already considered;[2] the *second* will be considered in this, and the *third* and *fourth*, in the succeeding chapter.

§ **490. Right to Impeach by Proof of Previous Contradictory or Hostile Statements or Acts.** — It is the absolute right of a cross-examining party to lay a foundation for impeaching a witness, by interrogating him as to whether or not he has made contrary declarations on a former occasion, and the exclusion of questions put for this purpose is error for which new trial will be granted;[3] and where the proper foundation has been laid, as hereafter explained, it is the right of the party seeking to impeach the witness, to introduce such impeaching evidence, and the exclusion of it will be error.[4] The *acts* of the witness, relevant to the subject of the action and inconsistent with his testimony, may be shown as affecting his credibility.[5]

§ 491. [CONTINUED.] ILLUSTRATIONS. — A witness testified in his direct examination, that he had *no ill feeling* against the accused, when he approached him, just before the difficulty which occasioned the indictment. It was error to exclude his testimony, on cross-examination, regarding his declarations, made just before the difficulty, showing a *different state of feeling*.[6] - - - - A witness had testified, on his direct examination, as to the *unprofitableness* of keeping a certain railroad eating house. It was held competent to ask him, on his cross-examination, whether he had not published the following notice, and to offer the notice in evidence: "For sale. Railroad Eating House, with furniture and good will, on line of Union Pacific R. R. in Nebraska; regular eating house for all trains; large trains and *large profits;* terms, part on cash and part on time. For particulars address," etc.[7]

[1] Rex *v.* Watson, 2 Stark. 116, 149; Spencely *v.* De Willott, 7 East, 108; *s. c.* 3 Smith, 289.

[2] *Ante*, chap. XVII.

[3] Pruitt *v.* Brockman, 46 Ind. 56; McFarlin *v.* State, 41 Tex. 23; Turney *v.* State, 9 Tex. App. 193.

[4] Joseph *v.* Com. (Ky.), 1 S. W. Rep. 4; State *v.* Downs (Mo.), 3 S. W. Rep. 219; *s. c.* 91 Mo. 19.

[5] Hyland *v.* Milner, 99 Ind. 308; *ante*, § 450.

[6] McFarlin *v.* State, *supra*.

[7] Markel *v.* Moudy, 13 Neb. 323, 327.

§ 492. Previous Declarations not Evidence in Chief. — What a witness, who is not a party, states out of court, is not evidence in chief, to prove the fact as stated by him; but can only be shown to discredit his testimony at the trial, when his testimony is contradicted by such outside statements.[1] The effect of proving contradictory statements extends no further than the question of *credibility;* it does not tend to establish the *truth* of the matters embraced in the contradictory statements; it simply goes to the credibility of the witness.[2]

§ 493. Rule does not extend to Contrary Expressions of Opinion. — The rule does not extend so far as to introduce previous expressions of opinion made by the witness. Thus, on the trial of an indictment for a criminal offense, the defendant cannot show that a witness, who has testified to circumstances tending to connect him with the crime, had previously expressed the opinion that he, the defendant, was innocent; since the expression of such an opinion would not tend to contradict the facts to which the witness testified.[3] So, where, in an action for damages for an assault and battery, a witness was asked, on cross-examination, whether he had not gone to the plaintiff 's store some time after the occurrence, and there stated to the plaintiff that the assault upon him was a great outrage, and that he would be foolish if he did not make the defendant smart for it; and the plaintiff then, for the purpose of contradicting the witness, was allowed to testify, against the objection of the defendant, that the witness had come to his store a week after the occurrence, where, after the plaintiff had explained the occurrence to the witness, the witness had said that it was a great outrage, and that the plaintiff should make the defendant smart for it.[4]

§ 494. Degree of Contradiction does not determine Competency. — The Supreme Court of Indiana say: "There must be

[1] Law *v.* Fairfield, 46 Vt. 425.

[2] Seller *v.* Jenkins, 97 Ind. 430, 435; Davis *v.* Hardy, 76 Ind. 272; Hicks *v.* Stone, 13 Minn. 434.

[3] Com. *v.* Mooney, 110 Mass. 99.

[4] Sloan *v.* Edwards, 61 Md. 90, 104.

contradiction between the statements alleged to have been made out of court, and those made on the witness stand; but the degree of contradiction does not determine the competency of the impeaching testimony, however much that consideration may affect its potency." [1] The Supreme Court of Minnesota expresses the same conclusion thus: "The admissibility of the discrediting testimony does not depend on the degree of variance between it and the subsequent testimony. If it differs in any material particular, it is for the jury to determine what effect such difference in statements shall have on the witness' credit." [2]

§ 495. **Not necessary that previous Declarations Intentionally False.** — It is not necessary that the previous contradictory statements should be intentionally false. Accordingly, it was held error for the court to give the following cautionary instruction to the jury: "The court instructs for the plaintiff that, before the jury can allow any contradiction of the testimony of any of the witnesses to affect their credibility in this suit, the jury must be satisfied, from the evidence, that such contradiction is not only true, but is upon a matter material to the issue in this case, and also that the testimony so contradicted was intentionally false." [3]

§ 496. **Necessity of Laying Foundation.** — "The rule," said Mr. Chief Justice Waite, "is that the contradictory declarations of a witness, whether oral or in writing, made at another time, cannot be used for the purpose of impeaching, until the witness has been examined upon the subject, and his attention particularly directed to the circumstances, in such a way as to give him full opportunity for explanation or exculpation, if he desires to make it." [4] Stated in the more usual way, the witness must first

[1] Seller *v.* Jenkins, 97 Ind. 430, 439, opinion by Elliott, J.

[2] Tinklepaugh *v.* Rounds, 24 Minn. 298.

[3] Craig *v.* Rohrer, 63 Ill. 325.

[4] Steamboat Chas. Morgan, 115 U. S. 69. So held in Conrad *v.* Griffey, 16 How. (U. S.) 38, 46; Seller *v.* Jenkins, 97 Ind. 430, 433; Lea *v.* Chadsey, 2 Keyes (N.Y.), 543, 553; State *v.* Wright, 75 N. C. 439; The Queen's Case, 2 Brod. & Bing. 284, 313; Conrad *v.* Griffey, 16 How. (U. S.) 38; Hooper *v.* Moore, 3 Jones L. (N. C.) 428; Howe

be interrogated concerning the supposed contradictory statements, together with the circumstances of *time*, *place* and *person* involved in the supposed contradiction.[1]

§ 497. When Foundation need not be laid. — The rule which requires the foundation thus to be laid does not apply where the *party himself* is a witness; since his previous self-disserving declarations are always admissible against him;[2] but he may, of course, always be asked whether he has not made contrary self-disserving statements respecting the matter in issue.[3] It is scarcely necessary to add that the rule does not extend so far as to preclude the cross-examining party from contradicting the witness as to any *fact* as to which he has testified in chief, without thus interrogating him on cross-examination with the view of laying a foundation. Thus, in an action for assault and

Machine Co. *v.* Clark, 15 Kan. 492; Payne *v.* State, 60 Ala. 80, 89; *see cases in 2 Brick. Dig. 548, §§ 117, 118;* Sprague *v.* Cadwell, 12 Barb. (N. Y.) 518; Booker *v.* State, 4 Tex. App. 564; Budlong *v.* Nostrand, 24 Barb. (N. Y.) 25; Briggs *v.* Wheeler, 16 Hun (N. Y.), 583. In Massachusetts and Maine the rule seems to be that contradictory statements of the witness are allowed, without any previous interrogation of him about them. Manning, J., in Payne *v.* State, 60 Ala. 80, 89; Baker *v.* State (Wis.), 33 N. W. Rep. 52; *s. c.* 69 Wis. 32.

[1] People *v.* Devine, 44 Cal. 452. Upon the cross-examination of a witness for the prosecution in a criminal trial, an affidavit which had been made by the witness was offered by the defendant, for the purpose of impeaching her testimony. It was held that the circumstances under which the affidavit was made, and the conversation had by the witness with the person at whose instance it was made, were admissible as parts of the transaction. People *v.* Smallman, 55 Cal. 185. It is not necessary that the impeaching testimony should be directed to the contradiction of the testimony given by the witness sought to be impeached on his direct examination; it is competent when it contradicts statements made by him to questions propounded to him on his cross-examination. Seller *v.* Jenkins, 97 Ind. 430, 437; Greenfield *v.* People, 13 Hun (N. Y.), 242. In Seller *v.* Jenkins, the following cases were cited by the court as applications of this rule: Dillon *v.* Bell, 9 Ind. 320; Brown *v.* State, 24 Ind. 113; Thompson *v.* State, 15 Ind. 473.

[2] Collins *v.* Mack, 31 Ark. 685, 694.

[3] Thus, in an action to recover damages for injuries from falling into an excavation, the plaintiff may be asked whether he has not stated that he had only been a little hurt, he having testified in chief that he had been severely hurt. Monongahela Water Co. *v.* Stewartson, 96 Pa. St. 436.

battery, the defendant testified as a witness, on his direct examination, that he had no feelings of enmity against the plaintiff at the time of the assault. It was held competent to prove, by another witness, without laying a foundation on the cross-examination of the defendant, that the defendant had, prior to the assault, made declarations showing feelings of enmity against the plaintiff.[1] But, as we shall hereafter see, where the question as to hostile feelings has not been gone into on direct examination, there is a view that the foundation must be laid on cross-examination before evidence of *declarations* tending to show such feelings can be introduced.[2]

§ **498**. [**Continued.**] **What if no Objection is made.**— The grounds on which the foregoing rule, which requires a foundation to be laid by first interrogating the witness on cross-examination, is usually put, is that it is the right of the witness to have the opportunity of explaining. If it is a *privilege* personal to him, it would seem to follow that it can not be *waived* by the party whose witness he is, without his consent; but that if the impeaching testimony is introduced without the foundation first being laid, he has the *right* of subsequent explanation.[3] We find, however, that it has been held competent for a coroner's clerk to read, for the purpose of contradicting a witness in a criminal trial, his previous deposition, taken before the coroner and subscribed and sworn to by him, without asking him on cross-examination concerning the making of such deposition, where no objection is made to the reading of it on that score.[4]

§ **499. Rule applies to Evidence of Previous Threats or Hostile Statements.** — According to some opinions, the rule which thus requires a foundation to be laid, applies to evidence of previous threats or hostile declarations, made by the witness against the cross-examining party. Thus, in a criminal trial, the defendant proposed to prove that, since the alleged assault, the

[1] Lucas *v.* Flinn, 35 Iowa, 9, 14.

[2] *Post*, § 499.

[3] Henderson *v.* State, 70 Ala. 29.

[4] Stephens *v.* People. 19 N. Y. 549, 573.

prosecuting witness had threatened to poison him. But, as the prosecuting witness, when on the stand, had not been interrogated as to whether he had made such threats, it was held that evidence was properly excluded.[1] It is always competent for the cross-examining party to put questions to the witness, tending to show his bias, prejudice or ill-will against such party, and, if the witness denies making such statements, to prove that he did make them.[2] It is said by the Supreme Court of California: "No mode of ascertaining the state of feelings of the witness exists, except that disclosed by the declarations or the acts of the witness sought to be impeached by these declarations. The same principle, which assures to him the privilege of explanation when contradictory declarations are offered, applies to assure him the *right of explanation* when declarations of hostility are sought to be introduced. * * * We can see no distinction between admitting declarations of hostility of the witness, by the way of impairing the force of his testimony, and admitting contradictory statements for the same purpose, so far as this rule is concerned; for in either case, an opportunity should be given the witness to explain what he said." [3]

§ 500. Rule where the Contradictory Declaration is in Writing. — "If," said Mr. Chief Justice Waite, "the contradictory declaration is in writing, questions as to its contents, without the production of the instrument itself, are ordinarily inadmissible, and a cross-examination for the purpose of *laying a foundation* for its use as impeachment, would not, except under special circumstances, be allowed, until the paper was produced and shown to the witness while under examination. Circumstances may arise, however, which will excuse its production. All the law requires is, that the memory of the witness shall be so refreshed by the necessary inquiries as to enable him to explain, if

[1] Booker *v.* State, 4 Tex. App. 564. Compare Briggs *v.* Wheeler, 16 Hun (N. Y.), 583; *ante*, § 450.

[2] Scott *v.* State, 64 Ind. 400; Sager *v.* State, 11 Tex. App. 110; *ante*, § 450.

[3] Baker *v.* Joseph, 16 Cal. 173, 178, quoted and affirmed in State *v.* Stewart, 11 Ore. 52. See Davis *v.* Franke, 33 Gratt. (Va.) 425; 1 Whart. Ev., § 566.

he can, and desires to do so. Whether this has been done is for the court to determine before impeaching evidence is admitted." [1]

§ 501. [Continued.] **Manner of Interrogating the Witness as to such Writing.** —When the depositions of a witness, on the preliminary examination of the accused, are taken down in writing, read over to the witness, assented to by him as correct, and by him signed, — then, upon plain principles, where the witness is asked whether he made the statement contained in the deposition, and answers in the negative, the deposition is admissible in evidence for the purpose of impeachment.[2] It has been held not proper to cross-examine the witness, by first reading what purports to be his previous deposition, and then asking him whether he had so testified. The correct rule is said to be, *first* to prove the deposition to be his, and *then* to read it as evidence, and to cross-examine the witness as to any supposed discrepancies between his testimony in court and the deposition.[3] An obvious way of proving the deposition to be that of the witness would be to put it into his hands and ask him whether it was his deposition. But, according to one view, it is not necessary to do this; all that is required is to prove that he is the witness who was sworn and examined by the commissioner taking the deposition and whose answer the commissioner purports to give, without submitting the deposition to him to be read, before he is asked by counsel whether he has not made certain answers therein contained, or before proving that the answers were read over to him before he signed the deposition.[4]

[1] The Charles Morgan, 115 U. S. 69, 77. See also Morrison *v.* Myers, 11 Ia. 538; Samuels *v.* Griffith, 13 Ia. 103; Stephens *v.* People, 19 N. Y. 549; Honstine *v.* O'Donnell, 5 Hun (N. Y.), 472. It has been thought doubtful whether the cross-examining party may rightfully ask the witness as to the contents of his *former deposition*, for the purpose of laying a foundation for his impeachment, the deposition itself being presumptively the best evidence of the fact. State *v.* Tickel, 13 Nev. 502, 508. But there should be no doubt about it. See the Queen's Case, 2 Brod. & B. 287; Newcomb *v.* Griswold, 24 N. Y. 298; Lightfoot *v.* People, 16 Mich. 512; Gaffney *v.* People, 50 N. Y. 416.

[2] State *v.* Tickel, 13 Nev. 502, 508.

[3] Cropsey *v.* Averill, 8 Neb. 151, 157.

[4] Ecker *v.* McAlister, 45 Md. 291.

§ 502. **Particularity in laying the Foundation.** — The question propounded to a witness on cross-examination, for the purpose of laying ground to impeach him by proof of contradictory statements out of court, must clearly state the *time when*, the *place where* and the *person to whom* the statements were made.[1] General questions whether he has ever said this or that, whether he has always told the same story, and the like, are not competent.[2] Thus, the question whether a witness has not recently made certain specified statements "to different parties in talking of the matter," is incompetent because not sufficiently definite."[3] So, a witness for the State in a criminal trial was asked, on cross-examination: "Have you not said yourself, that you thought the defendant half crazy, and did not know what he was doing at the time?" It was held that there was no error in ruling out this question upon objection.[4] But it is not necessary to put to the witness the *precise question* which it is intended to put to the witness by whom he is to be impeached; the *form* of the question is in the *discretion* of the court.[5]

§ 503. **Contradictory Testimony given on a former Occasion.** — A witness may be impeached by showing that he *testified differently at a former trial*.[6] But a witness cannot be impeached by showing that certain circumstances, to which he has testified on the present trial, were *omitted* by him, when testifying concerning the same occurrence on a former trial of the action, unless at the former trial his attention was particularly called to such circumstances.[7] Notwithstanding the policy of the law enforces, in some of the States, by statutes, the secrecy of proceedings before *grand juries*, it has been held competent to ask witness on cross-examination for the purpose of impeaching him by con-

[1] Hill *v.* Gust, 45 Ind. 45, 51; DaLee *v.* Blackburn, 11 Kan. 190.

[2] Henderson *v.* State, 1 Tex. App. 432; Tredway *v.* State, 1 Tex. App. 668.

[3] Standard Oil Co. *v.* Van Etten, 107 U. S. 325.

[4] State *v.* Kinley, 43 Ia. 294.

[5] Sloan *v.* N. Y. C. R. Co., 45 N. Y. 125; Hotchkiss *v.* Germania Fire Ins. Co., 5 Hun (N. Y.), 90, 94.

[6] State *v.* McDonald, 65 Me 466; Hampton *v.* State, 45 Tex. 154.

[7] Huebner *v.* Roosevelt, 7 Daly (N. Y.), 111; Com. *v* Hawkins, 3 Gray (Mass.), 463.

tradiction, whether he did not make contradictory statements before the grand jury.[1] On the contrary, it is held in another jurisdiction that the *minutes* of the witness' testimony before the *grand jury*, or the substance of his testimony taken before an examining magistrate, are in no proper sense the *writing* or the *act of the witness*, and consequently that such writings are not admissible in evidence, for the purpose of impeaching the witness by contradicting him, even after a foundation has been laid by his cross-examination.[2] It has been ruled not competent to ask a witness as to what he had sworn to on a former occasion, with a view to impeach him, where his testimony on the former occasion was *not admissible* in evidence.[3] This holding was erroneously supposed to fall within the rule that a witness cannot be examined upon *collateral matters* with a view to his impeachment.[4]

§ 504. Former Testimony, how Proved. — Where the former testimony is in the form of a deposition, subscribed and sworn

[1] Bressler *v.* People (Ill.), 8 Crim. Law Mag. 466; *s. c.* 117 Ill. 422; Burdik *v.* Hunt, 43 Ind. 382, 389. The court say: "It has been more than once decided by this court that the oath of grand jurors to keep their proceedings secret, does not prevent the public or an individual, from proving by one of the jurors, what passed before the grand jury." Burnham *v.* Hatfield, 5 Blackf. (Ind.) 21; Shattuck *v.* State, 11 Ind. 473. The court also hold that the statute of that State, prescribing, as a part of the grand juror's oath, "that you will not disclose any evidence given or proceedings had before the grand jury" (2 Gav. & Hord. Ind. Stat. 386, form 56) was not intended to change the previously existing rule on this subject.

[2] State *v.* Hayden, 45 Ia. 11, 13. In so holding Mr. Justice Rothrock, in giving the opinion of the court, said: "The witness is in no way connected with the act of taking these minutes of his testimony; they are not required to be read over to him nor to be signed by him. Unlike a deposition or affidavit, they do not purport to give statements of fact in full, but are what the law requires,—'mere minutes.' They are often taken down by persons wholly inexperienced in reducing the language of others to writing. A long experience upon the District Bench has enabled the writer hereof to observe that the evidence taken before grand juries is often of the most indefinite and uncertain character, and if used as the means of impeaching witnesses, would lead to the grossest injustice to witnesses, and tend to defeat a proper administration of justice." In State *v.* Hull, 26 Ia. 292 and State *v.* Collins, 32 Ia. 36, the question above decided had been left undetermined. In State *v.* Ostrander, 18 Ia. 435, it is held that the minutes taken before the grand jury are not admissible as *independent* evidence.

[3] Mitchum *v.* State, 11 Ga. 615, 616.

[4] *Ante*, § 469.

to by the witness, that is undoubtedly the best evidence.[1] On the trial of an indictment for murder, the *deposition* of a witness, given before the coroner's jury, and certified and returned by the coroner to the trial court, as required by statute, is admissible in evidence, for the purpose of contradicting the statement of a witness, made under oath, on the trial of the person accused of having murdered the deceased.[2] The testimony of a witness at a former trial may be also proved by any one who heard and recollects it. The fact that there was a legally appointed *stenographer* present at the former trial, who took *notes* of the testimony, and who could give better evidence of it than a witness who heard it could from his recollection, does not exclude the testimony of such other witness. There is no rule of law which makes a stenographer the only competent witness in such a case, and the rule which requires the production of the best evidence is not applicable. Walton, J., said: "Nothing more is intended by that rule than that evidence which is merely *substitutionary* in its nature shall not be received, so long as the original evidence can be had. It does not allow secondary evidence to be substituted for that which is primary. It will not permit the contents of a deed, or other written instrument, to be proved by parol, when the instrument can be produced. It has nothing to do with the *choice of witnesses*. It never excludes a witness upon the ground that another is more credible or reliable."[3] It is not error to refuse to allow a transcribed *phonographic report* of the testimony of a witness, given on a former trial, to be read, for the purpose of contradicting him, unless the legislature has declared that such report shall be evidence. The reason is that such stenographic reports are not seen by the witness, and that they may be fair and truthful reports of the testimony of the witness, and may not. They are merely in the nature of *private memoranda*, taken for the convenience of the parties, and are in no sense a *deposition*, unless made such by statute.[4] But the rule

[1] Compare *ante*, § 486.

[2] People *v.* Devine, 44 Cal. 452, 459; Rex *v.* Oldroyd, 1 Russ. & Ry. C. C. 88; Stephens *v.* People, 19 N. Y. 549. Compare Com. *v.* Hawkins, 3 Gray (Mass.), 463.

[3] State *v.* McDonald, 65 Me. 466.

[4] Phares *v.* Barber, 61 Ill. 272, 276.

is different, where the testimony has been taken down by a *commissioner* and duly certified by him, although not read over by the witness before signing.[1]

§ 505. **Proving the Contradictory Statements in other Cases.** — In a case in Connecticut it is said by Pardee, J., in giving the opinion of the court: "The party offering proof concerning these variant statements, is not only permitted, but is bound to give *so much of the conversation*, in connection with which they are said to have been made, as will enable the triers to know both their form and meaning."[2] The *deposition* of the person with whom the alleged conversation took place is admissible to impeach the witness, notwithstanding it was taken under a commission, at the execution of which the witness sought to be impeached was not examined.[3] It is said to be a matter of *discretion* with the trial court, whether testimony contradicting the statement which the plaintiff's witness has made on cross-examination, will be brought in *before* the plaintiff rests, or called later, *after* the *plaintiff has rested*.[4]

§ 506. **Rule where the Witness admits such Statements.** — Where the witness admits the statement which he is alleged to have made out of court, no other proof of his having made it is allowable.[5]

§ 507. **What if Witness says he does not Remember.** — It is competent to impeach a witness, in a criminal case, by proof of contradictory statements, made by him on a previous examination touching the same matter, although, when cross-examined as to such statements for the purpose of laying a predicate for his impeachment, he answers that he "does not remember" whether he made the contradictory statements or not.[6] A witness can-

[1] Ecker *v.* McAllister, 45 Md. 291.

[2] Beardsley *v.* Wildman, 41 Conn. 515.

[3] Pittsburg &c. R. Co. *v.* Andrews, 39 Md. 329, 354.

[4] Wilder *v.* Peabody, 21 Hun (N. Y.), 376, 378.

[5] Lightfoot *v.* People, 16 Mich. 507, 512; State *v.* Tickel, 13 Nev. 502, 508.

[6] Payne *v.* State, 60 Ala. 80, 86. It seems that the cases upon this point have not been uniform. It seems from statements made by Phillips in his work on evidence (2 Phil. Ev. (5th

not, by answering that he has *no recollection* of having made the former statement imputed to him, defeat the right of the impeaching party to prove that he did make such statement.[1] For like reasons, where the witness *neither admits nor denies*, on his cross-examination, that he has made a certain declaration, or given certain testimony, contrary to that which he has given on the witness stand, the adverse party may, by subsequent testimony, prove the fact.[2]

§ 508. Answer categorically and explain on Re-examination.— Where, on cross-examination, for the purpose of rebuttal and discrediting a witness, he is asked if he did not give certain different testimony on a former examination, he must answer categorically. If he wishes to explain what he did say, or to explain any other matter touching his former testimony, he may be allowed to do so on re-direct examination.[3]

Am. ed.) 960), that on one occasion Chief Justice Tindal said that he had "never heard such evidence admitted in contradiction except where the witness had expressly denied the statement," and rejected the evidence, and that Lord Abinger, C. B., had expressed a similar opinion. But Baron Parke in a case before him, held that contradictory statements of the witness could be introduced to impeach his evidence, although, in order to lay a foundation for them and to enable the witness to explain them (and some believe for that purpose only), "the witness must be asked whether he ever said what is suggested to him, with the name of the person to whom or in whose presence he had said it, or some other circumstance sufficient to designate the particular occasion. If the witness * * * admits the conversation imputed to him, there is no necessity to give further evidence of it; but, if he says he does not recollect, that is not an admission and you may give in evidence on the other side to prove that the witness did say what was imputed, always supposing the statements to be relevant to the matter in issue." In Alabama Mr. Justice Manning said: "We agree with Mr. Phillips that the ruling of Baron Parke is the most sound and fittest to be followed. If the rule were otherwise, it might happen that, under the pretense *of not remembering*, a witness, who has made a false statement, and knows it to be false, would escape contradiction and exposure." Payne *v.* State, 60 Ala. 80, 89. See also Holbrook *v.* Holbrook, 30 Vt. 433.

[1] Ray *v.* Bell, 24 Ill. 444, 451; Nute *v.* Nute, 41 N. H. 60.

[2] Bressler *v.* People (Ill.), 8 Crim. Law Mag. 466; *s. c.* 117 Ill. 422.

[3] Bressler *v.* People (Ill.), 8 Crim. Law Mag. 466; *s. c.* 117 Ill. 422.

§ 509. Impeachment of Married Woman by Evidence of Conspiracy by Husband. — It has been held that, where a married woman testifies as a witness for the prosecution in a criminal case, the defendant cannot, for the purpose of affecting her credibility, introduce testimony tending to prove a conspiracy on the part of her husband to obtain his property by falsely prosecuting him. The court, speaking through McKinstry, J., say: "There is nothing in the relation of husband and wife from which it can be inferred that the latter is a party to an offense committed by the former, or which directly tends to prove her a party. Proof of the relationship alone would not make a case to go to the jury against a wife, however strong the case against the husband. The offer of defendant was properly rejected, there being no statement therein of the existence of such evidence of complicity on the part of the witness in the alleged conspiracy, as would have justified a court, if the witness had been on trial for the crime, in submitting the question of guilt to the jury."[1] The conclusion of the court is more than doubtful. The question is entirely different from the question which would be presented if the married woman were thus on trial for a conspiracy. She would be surrounded with a presumption of innocence, and it would, on the plainest principles, be necessary to make a case against her by proof, not merely by such proof as might raise a remote inference as to her complicity, but by proof overthrowing the presumption of innocence beyond a reasonable doubt. But where a man is prosecuted for a crime — in the particular case, the crime of rape, — and a married woman appears as a witness against him, the fact that her husband has entered into a conspiracy to obtain his property by the coercion of a criminal prosecution, may well be considered as affecting the credibility of the wife; since wives are known to be in constant association with their husbands and under their influence and coercion. Every intelligent juror would give weight to such evidence.

§ 510. Recalling Opponent's Witness to put Impeaching Questions. — Where the defendant on a criminal trial recalled a witness and put to him questions for the purpose of impeaching him, it was held error to exclude the questions on the ground that, by recalling the witness, the defendant had made him his own witness.[2] On this subject it is said by Prof. Greenleaf: "Whether, when a party is once entitled to cross-examine a witness, this right continues through all the subsequent stages of

[1] People *v.* Parton, 49 Cal. 632, 637

[2] State *v.* Jones, 64 Mo. 391, 396.

the cause, so that if the party should afterwards recall the same witness, to prove a part of his own case, he may interrogate him by leading questions, and treat him as the witness of the party who first adduced him, is also a question upon which different opinions have been held. Upon the general ground on which this course of examination is permitted at all, namely, that every witness is supposed to be inclined most favorably towards the party calling him, there would seem to be no impropriety in treating him, throughout the trial, as the witness of the party who first caused him to be summoned and sworn."[1]

§ 511. Impeachment of One's Own Witness. — The general rule on this subject is, that a party cannot impeach a witness whom he has called himself, either by proving that his character for veracity is bad, or by proving that he has made declarations out of court contradictory to those made by him on the witness stand;[2] but it is always competent, for the purpose of affecting the credibility of a witness, to show that he is more favorable to the opposite party than to the party calling him.[3] Some of the cases assert the hard ground that a party cannot be allowed to discredit a witness called by him, *in any degree*, even when the witness has, been also called by the *opposite party*, and the discrediting testimony relates solely to facts drawn out by him.[4] The *reason* of the rule is, that the party has given credit to the witness by presenting him to the court, and that he ought not to have the privilege of accepting the testimony if it be for him, and rejecting it if it be against him.[5] Thus, a party calling a witness cannot show, for the purpose of discrediting him, that he has conspired to extort money from the parties in interest on the side in behalf of which he has been called.[6]

[1] 1 Greenl. Ev., § 447.

[2] People *v.* Safford, 5 Denio (N. Y.) 112; Thompson *v.* Blanchard, 4 N. Y. 303, 311; Coulter *v.* American &c. Co., 56 N. Y. 585, 589; Sisson *v.* Conger, 1 Thomp. & C. (N.Y.) 564, 568.

[3] Jones *v.* People, 2 Colo. 351, 358; Batdorf *v.* Farmers' Bank, 61 Pa. St. 179; Swett *v.* Shumway, 102 Mass. 365, 369; Geary *v.* People, 22 Mich. 221.

[4] Com. *v.* Hudson, 11 Gray (Mass.), 64; Craig *v.* Grant, 6 Mich. 447.

[5] 1 Greenl. Ev., § 442; Coulter *v.* American &c. Co., 56 N. Y. 585, 589.

[6] Sisson *v.* Conger, 1 Thomp. & C. (N. Y.) 564, 568.

§ 512. Exception where the Party is Surprised or Entrapped by the Witness.— An exception to this rule has been admitted, where the party calling the witness has been surprised by the testimony of the witness on the stand,—as where the witness, after, taking the stand, testifies differently from the statements which he had made before the trial, concerning the facts, to the party calling him as a witness. In such a case, on grounds of obvious justice, the party is not concluded by the treacherous conduct of his witness, but is allowed to show *contrary declarations* made by the witness.[1] The party may contradict his own witness by showing that he has made, at other times, *statements inconsistent with his testimony;* but he cannot do this without first calling his attention to the circumstances and occasion of the supposed statements; they can under no circumstances be used as substantive evidence to support the party's case.[2] In Alabama a party may ask his own witness whether he has not, on a former occasion, made statements inconsistent with his testimony on the trial.[3] But "it is not," said McCay, J., in Georgia, "sufficient that he shall have made contradictory statements; such statements must have *deceived* and led the complaining party to introduce him, and thus unwittingly to have been damaged by statements different from what he expected. Under such circumstances, the law permits a party to violate that salutary rule which assumes that one who brings a witness before a court has at least confidence in his truthfulness."[4] The strict rule, that a party who brings a witness into court to testify, even as to a single point, vouches for his credibility, and cannot thereafter discredit him, even though he is called by the other party to testify as to other matters, has in many cases worked such injustice that it has been broken into in some jurisdictions by statute.[5] In one jurisdiction, under a statute,[6] even direct impeachment is permitted under such circumstances.[7]

[1] 1 Greenl. Ev. § 444, note 1; Melhuish *v.* Collier, 19 L. J. (Q. B.) 493; People *v.* Jacobs, 49 Cal. 384; distinguishing Com. *v.* Welsh, 4 Gray (Mass.), 535.

[2] Newell *v.* Homer, 120 Mass. 277, 283.

[3] Campbell *v.* State, 23 Ala. 44, 76; Hemingway *v.* Garth, 51 Ala. 530.

[4] McDaniel *v.* State, 53 Ga. 253.

[5] Mass. Stat. 1869, chap. 425.

[6] Georgia Code, 1873, § 3869.

[7] Skipper *v.* State, 59 Ga. 66.

§ 513. EXCEPTION IN THE CASE OF A HOSTILE WITNESS. — In Colorado, an exception to the rule has been admitted, so as to allow the party calling the witness to prove that he has previously made *statements inconsistent* with his testimony on the witness stand, *delivered at the instance of the opposite party*. In so holding, Mr. Chief Justice Hallett said: "When applied to testimony called out by the party who seeks to discredit the witness, the reason is of great force; but it has little application to testimony drawn from the same witness by the opposite party. By bringing a witness into court, the party vouches for his general character for truth, and for the truth of his statements in regard to the particular matter of which he inquires. Further than this, neither the reason of the rule, nor the policy of the law can be safely extended. Even as to the matter as to which the witness is interrogated, if he declares against the party calling him, it is still open to proof by the testimony of other witnesses. It is obvious that a party may be willing to accept the testimony of a witness on one point, while he would be utterly unwilling to accept his testimony upon another point; and it is equally plain that a witness may testify truly as to one fact, and untruly as to another. If, by calling a witness to prove a single fact, a party shall be held to affirm his truthfulness absolutely and in all things, the rule would appear to be a hard one. It is often necessary for a party to call his adversary, or a witness who is hostile to him, and who is a principal witness for his adversary, to prove a single fact. And if in such case the witness is subsequently called by the opposite party, justice requires that the party first calling him should be permitted to show the interest or hostility of the witness, not for the purpose of showing that the latter is unworthy of belief generally, but that he is more favorable to one party than to the other." [1]

§ 514. Assailing Credit of Witness called by both Parties. — When, therefore a witness had been called in a criminal trial by both parties, it was held competent for the government to ask him whether, in relation to the matters as to which he had testified on behalf of the defendant, he had not given a different account at another time and place. The evidence was regarded as admissible, because it had a tendency to prove that the witness was more favorable to the prisoner than to the government.[2]

[1] Jones *v.* People, 2 Colo. 351, 357. [2] Jones *v.* People, 2 Colo. 351, 355.

§ 515. Contradicting the Statements of One's Own Witness.— The rule does not extend so far that the party is *estopped* by the statements of his witness. He is not *conclusively* bound by them. While he may not impeach the character of his witness for veracity, or interrogate him as to contradictory statements previously made by him, or interrogate him with a view to affect his credibility merely, or introduce other evidence for that purpose, — he may, nevertheless, *contradict* him as to a fact material in the case, although the effect of such contradictory evidence may be to discredit him; but he cannot introduce such evidence when it is only material in so far as it bears upon his credibility. In other words, *contradiction* is allowed, though *impeachment*, direct or indirect, is not.[1]

[1] Skipper *v.* State, 59 Ga. 63, 66; Mechanics' Bank *v.* Rawls, 7 Ga. 191, 198, 199; Burkhalter *v.* Edwards, 16 Ga. 593; 1 Greenl. Ev., § 442, 443; Coulter *v.* American &c. Co., 56 N. Y. 585, 589; Sisson *v.* Conger, 1 Thomp. & C. (N. Y.) 564, 568.

CHAPTER XX.

OF DIRECT IMPEACHMENT.

SECTION

520. Preliminary.
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535 Impeaching by Proof of Conviction of a Felony or other Infamous Crime.
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537. Inadmissible Modes of Impeaching.

§ **520. Preliminary.** — Having concluded the subject of indirect impeachment, that is, of impeachment by proof of contradictory declarations or statements, let us next consider the modes in which a witness may be subjected to what is termed direct impeachment. We find that this may be done in three ways: 1. By proof of bad character for veracity, or in some jurisdictions, of general bad character. 2. By proof that the witness has been convicted of a felony or other infamous crime. 3. By proof that the witness is of defective memory, or is otherwise mentally infirm, in such a sense as to disqualify him as a witness or impair his credibility. It is said in Illinois by Mr. Justice Craig, following a *dictum* of Starkie,[1] that the general rule as

[1] 2 Stark. Ev. (9th ed.) 364.

to the admissibility of evidence of the *moral character* and conduct of a person in society, confines such proof to three classes, namely: 1. To afford a presumption that a particular party has, or has not been guilty of a criminal act. 2. To affect the damages in particular cases, where their amount depends upon the character and conduct of any individual. 3. To impeach and confirm the character of a witness.[1] With the last we have now to deal.

§ 521. **Error to Exclude Competent Impeaching Testimony.** — Where competent impeaching testimony is seasonably offered, it is *error* to exclude it, for which error a judgment will be reversed;[2] though a *new trial* will not be granted merely because the unsuccessful party has discovered new or additional impeaching testimony.[3]

§ 522. **Impeachment by Evidence of bad Character.** — In some jurisdictions, for the purpose of impeaching a witness, it is competent to prove, by testimony of other witnesses, that his general character or reputation is bad, in the community where he resides or has recently resided.[4] Where this doctrine prevails, the inquiry extends to the general moral character of the witness,[5] and it is proper to interrogate the impeaching witness thus: "Do you know the defendant's general character in the neighborhood where he lives, for truth and veracity, honesty, chastity and morality?"[6]

[1] Berdell *v.* Berdell, 80 Ill. 604, 607.

[2] State *v.* Thomas (Ind.), 10 West. Rep. 808.

[3] Porter *v.* State, 2 Ind. 435; State *v.* Clark, 16 Ind. 97; Jackson *v.* Sharpe, 29 Ind. 167.

[4] State *v.* Shields, 13 Mo. 236; Day *v.* State, 13 Mo. 422; State *v.* Hamilton, 55 Mo. 420; State *v.* Breeden, 58 Mo. 507; State *v.* Clinton, 67 Mo. 380; *s. c.* 29 Am. Rep. 506. Upon the question whether the inquiry extends in ordinary cases to the character of the witness for morality, see the opinion of Mr. Justice Clifford in Teese *v.* Huntingdon, 23 How. (U. S.) 2. By statute in *Indiana*, "In all questions affecting the credibility of a witness, his general moral character may be given in evidence." Ind. Acts 1881, pages 157, 158; Crim. Code Ind., § 230; Morrison *v.* State, 76 Ind. 335. This rule has been introduced in *Arkansas* by statute. Gantt Ark. Stat., § 2524; Majors *v.* State, 29 Ark. 112.

[5] State *v.* Breeden, 58 Mo. 507.

[6] State *v.* Clinton, 67 Mo. 380; *s. c.* 29 Am. Rep. 506. In *California* the statutory rule in civil cases is as follows: "A witness may be impeached

§ 523. **By Evidence of bad Character for Veracity.** — In other jurisdictions the inquiry is confined to the character of the witness for veracity.[1]

§ 524. **Specific Acts not Inquired into.** — Under either rule, the evidence is confined to the *general* character of the witness, or to his *general* character for veracity. Particular acts cannot be gone into; since this would raise a multiplicity of issues which the party calling the witness cannot be expected to be prepared to meet, and which could serve no other purpose than to distract the attention of the jury from the main issue.[2] Thus, it is not competent to impeach a witness by proving that he has *lied* on other occasions.[3] But when *sustaining testimony* as to general reputation is given by a witness, it seems to be the rule that, on his cross-examination, with the view to lessen the effect of his testimony, or to show a bias in favor of the party who has called him, but not for the purpose of establishing the particular facts,— the witness may be asked whether he has not *heard reports* which tend to contradict the purport and effect of his testimony.[4] A person who states that he has no knowledge of the general character of a witness, save only as connected with "some alleged frauds," is not competent as an impeaching witness.[5]

by the party against whom he is called, by contradictory evidence, or by evidence that his general reputation for *truth, honesty* or *integrity* is bad, but not by evidence of particular wrongful acts, except that it may be shown by the cross-examination of the witness, or the record of the judgment, that he has been convicted of a felony." Cal. Code Civ. Proc., § 2051.

[1] Fry *v.* Bank, 11 Ill. 373; Dimick *v.* Downs, 82 Ill. 570, 573; Rudsill *v.* Slingerland, 18 Minn. 380.

[2] Douglas *v.* Taussey, 2 Wend. (N. Y.) 352; Com. *v.* Moore, 3 Pick. (Mass.) 194; Curtis *v.* Fay, 37 Barb. (N. Y.) 69; Rex *v.* Rudge, 2 Peake N. P. Cas., 232; Jackson *v.* Lewis, 13 Johns. (N. Y.) 505; Rex *v.* Hemp, 5 Carr. & P. 468. See also Harrington *v.* Lincoln, 3 Gray (Mass.), 133. Carpenter *v.* Blake, 10 Hun (N. Y.), 358; Bakeman *v.* Rose, 14 Wend. (N. Y.) 110; Corning *v.* Corning, 6 N. Y. 104; Fox *v.* Com. (Ky.), 1 S. W. Rep. 396; Leverich *v.* Frank, 6 Ore. 212; 1 Greenl. Ev., § 461; Wehrkamp *v.* Willett, 4 Abb. App. Dec. (N. Y.) 548.

[3] Com. *v.* Ford, 130 Mass. 64; *s. c.* 39 Am. Rep. 426.

[4] Carpenter *v.* Blake, 10 Hun (N. Y.), 358; Leonard *v.* Allen, 11 Cush. (Mass.) 241; Rex *v.* Martin, 6 C. & P. 562.

[5] Sorrelle *v.* Craig, 9 Ala. 535.

§ 525. **Character of Female Witness for Chastity.** — An exception to the rule which ignores evidence of immorality for the purpose of impeachment, is made in cases where men are indicted for sexual offenses against women. Thus, in cases of rape, or assault with intent to commit rape, the inquiry as to the reputation of the prosecutrix is not confined to veracity, but extends to her chastity.[1] Yet the general holding of the courts is that evidence of sexual prostitution is not admissible to impeach a witness, or to affect his or her credit in any other class of cases,[2] though there is some opinion to the contrary.[3]

§ 526. **Limitations as to Time and Place.** — The inquiry must in general be restricted to the community in which the witness *resides* or has *recently resided*.[4] But this rule is not imperative; the inquiry may be extended to general reputation at a *former period* and in *another neighborhood*, if it be *not too remote* in point of time.[5] The general effect of the decisions is that the inquiry should relate to a period of time

[1] Pleasants *v.* State, 15 Ark. 652.

[2] Dimick *v.* Downs, 82 Ill. 570, 573; Bakeman *v.* Rose, 18 Wend. (N. Y.) 148; Spears *v.* Forrests, 15 Vt. 435; Com. *v.* Churchill, 11 Metc. (Mass.) 538; Evans *v.* Smith, 5 T. B. Mon. (Ky.) 363.

[3] It has been held that a witness testifying in an action for slander, for calling her a thief, could not be impeached by giving in evidence a letter written by her to another person containing language which would indicate that she was unchaste, and such a letter was properly excluded. This was ruled under a statute (Ore. Civ. Code, § 830) which recites that "a witness may be impeached by contradictory evidence, or by evidence that his general reputation for truth is bad, or that his moral character is such as to render him unworthy of belief, but not by evidence of particular wrongful acts." Leverich *v.* Frank, 6 Ore. 212. But the conclusion of the court was rested on the ground that the effect of introducing the letter would be to attempt to impeach the character of the witness by evidence of particular acts of immorality.

[4] Marion *v.* State (Neb.), 29 N. W. Rep. 911.

[5] Brown *v.* Leuhrs, 1 Bradw. (Ill.) 74; Teese *v.* Huntingdon, 23 How. (U. S.) 14; Holmes *v.* Stateler, 17 Ill. 453; State *v.* Lamer, 79 N. C. 622; Com. *v.* Billings, 97 Mass. 407; Rathbun *v.* Ross, 46 Barb. (N. Y.) 127; Sleeper *v.* Van Middlesworth, 4 Denio (N. Y.), 431; 1 Greenl. Ev., §§ 141, 142. Compare Willard *v.* Goodenough, 30 Vt. 393; Luther *v.* Skeen, 8 Jones L. (N. C.), 356; State *v.* Speight, 69 N. C. 72; State *v.* Parks, 3 Ired. L. (N. C.). 296; State *v.* O'Neale, 4 Ired. L. (N. C.) 88; Stratton *v.* State, 45 Ind. 468

near the time of the trial. Unless *some little latitude* is allowed, it has been well said that it would be impossible to impeach the most corrupt, or to sustain the most truthful witness.[1] The obvious reason is that reputation is a thing of slow growth; it is not formed in a day, nor is it suddenly changed in a day. Accordingly, it has been said that it is competent for the parties to give evidence of the character of a witness within a *reasonable time* before the trial.[2] Another court, relapsing into a poetical vein, has suggested that the former character of the witness is relevant only "as it blends with the continuous web of life and tinges its present texture."[3] Again, it has been suggested that the period of time to which the inquiry may be extended is, to some extent, at least, in the *discretion* of the trial court.[4] In a case of bastardy, it was held incompetent to prove the character of the prosecutrix for chastity at a period prior to the begetting of the child.[5] In another case the same court held that the inquiry could not be extended back to a period of *five years* before the time of the trial;[6] and where an attempt was made to impeach a witness by evidence of statements made out of court, in conflict with his testimony on the trial, and evidence had been given of the good character of the witness, — it was held not error to admit testimony that his character was also good *two years* before, in a different neighborhood.[7] Another court has ruled that evidence of bad reputation for veracity, *four years* previous to the trial, may be admitted to impeach a witness who has no fixed domicile, who has been out of the State over a year of this time, and whose residence at the place of such reputation was as long as at any other place. In such a case it is not improper to allow a larger range of inquiry than would be proper where there has been a more fixed domi-

[1] Stratton *v.* State, 45 Ind. 468, 472.

[2] *Ibid.* 473. Compare Aurora *v.* Cobb, 21 Ind. 492, 510.

[3] Willard *v.* Goodenough, 30 Vt. 393.

[4] Stratton *v.* State, 45 Ind. 468, 473.

[5] Walkers *v.* State, 6 Blackf. (Ind.) 1.

[6] Rucker *v.* Beaty, 3 Ind. 70. Compare King *v.* Kearsey, 2 Ind. 402. Chance *v.* Indianapolis &c. R. Co., 32 Ind. 472.

[7] Stratton *v.* State, 45 Ind. 468.

cile.[1] In another jurisdiction it has been held that evidence of the reputation of the witness for truth and veracity at a different place of residence, and at a period of time, *two years*,[2] and even *seven years*,[3] before the trial, is admissible for the purpose of impeaching him.[4] In an important case in Michigan it was laid down by Campbell, J., speaking for the court: "Where an impeached witness has changed his domicile, there appears to be no objection to showing his reputation in *both places*, within a reasonable limit of time. But, as the only object is to know whether he is to be believed at the time when he testifies, a witness knowing his reputation *then*, should state that knowledge, although he may also be authorized, in addition, to show what his reputation had been *elsewhere before*."[5]

§ **527. Extent of the Reputation.** — It is not competent to show what *two or three persons* only may say concerning the witness sought to be impeached, but the inquiry should extend to the *general estimation* in which he is held by his neighbors and acquaintances.[6] But a witness is competent to speak of the general character of another witness, without being able to say that he knows what a *majority of the neighbors* of such other

[1] Keator *v.* People, 32 Mich. 484. Compare Hamilton *v.* People, 29 Mich. 173.

[2] Lawson *v.* State, 32 Ark. 220.

[3] Snow *v.* Grace, 29 Ark. 131.

[4] In so holding it was reasoned by Williams, Sp. J.: "That the reputation a witness has for truth is a mere circumstance, which the rules of law allow to be considered by the jury, to aid them in determining the degree of credit to be given the witness, and is purely a question of fact. If so, does not reputation at some other time than that of testifying, and some other place than that of the then residence, equally tend to shed light upon the question of credit? The light may be dim and flickering on account of remoteness, but is it not still light? The remoteness of time and place are also circumstances and facts to which, ordinarily, under proper instructions, the jury will give due weight. If this sort of testimony is to be admitted at all, it would be difficult to draw the line and say when it — the evidence of reputation — ceases to be fact and becomes a question of law." At the same time it is admitted that there are cases where the testimony would be so remote as to time that the court, in the exercise of its discretion, might exclude it.

[5] Hamilton *v.* People, 29 Mich. 173, 188.

[6] Matthewson *v.* Burr, 6 Neb. 312.

witness have said about him or thought of him. The reason is, that "it may so happen that a man has a reputation, well established, either good or bad, and yet a majority of his neighbors may never have spoken upon the subject, or expressed their thoughts in any manner whatever." Again, "there may not have been a majority who have expressed an opinion to the witness; nor may he be able to say with positive knowledge what the majority think; nor may he have heard any one else say what a majority said or thought; and yet he may himself be competent to swear what his general reputation is. A person's position in the community may be so obscure that very few of his neighbors know anything of him. His general character may be very circumscribed. To hold that he could not prove his general character, except by witnesses who could swear as to what the majority of his neighbors said and thought of him, would be to deprive him of the benefit of this species of testimony."[1] But the production of *one witness* only to prove the fact, would not usually be satisfactory, although the law does not fix any required number.[2]

§ 528. REPUTATION DEFINED.— In a case in Iowa, several witnesses were introduced for the purpose of impeaching another witness. The court instructed the impeaching witness, before allowing them to testify, that a man's reputation for truth and veracity is what the persons who deal and associate with him say about him. The Supreme Court did not approve this definition. Adams, J., said: "This definition, we think, is not broad enough. A man's reputation for veracity is what is said of him in the community in which he lives. Those who deal and associate with him may say nothing about his veracity, while the remainder of the community may regard and speak of him as a notorious liar."[3]

§ 529. Mode of Examining Impeaching Witnesses. — It is necessary here, as in many other cases, to *lay a foundation*

[1] Dave *v.* State, 22 Ala. 23, 38; Robinson *v.* State, 16 Fla. 835, 839.

[2] Wafford *v.* State, 44 Tex. 439.

[3] Dance *v.* McBride, 43 Ia. 624, 629.

for the introduction of evidence of the reputation of the witness sought to be impeached, before such evidence can be introduced. Thus, it is necessary for the impeaching witness to show that he has lived in the same community with, or knows the reputation of the witness sought to be impeached, or of the party whose character is in question; and until this is shown, it is not proper to interrogate him on the subject.[1] It is competent to ask the impeaching witness what is the *general reputation* of the impeached witness for truth, instead of asking him what is the *general character* of such witness for truth. "It is true," said Mr. Justice Strong, "that in many cases it has been said that the regular mode of cross-examining is to inquire whether the witness knows the general character of the person whom it is intended to impeach; but in all such cases the word 'character' is used as synonymous with 'reputation.' What is wanted is the *common opinion*, that in which there is general concurrence, — in other words, general reputation or character attributed. That is presumed to be indicative of actual character, and hence it is regarded as of importance when the credibility of a witness is in question." [2] It is not enough that the impeaching witness professes merely to state *what he has heard others say;* for these others may be but few. He must be able to state what is *generally said* of the person, by those among whom he dwells, or with whom he is chiefly conversant; for it is this only that constitutes his general reputation or character. *Ordinarily*, the witness ought himself to come from the neighborhood of the person whose character is in question. If he is a stranger, sent thither by the adverse party to learn his character, he will not be allowed to testify as to the result of his inquiries." [3] Where the impeaching witness was asked whether "he knew the general character of the defendant in his neighborhood, *from rumor*," and answered that he did, and that it was bad, it was held that the question should not have been allowed. [4]

[1] People *v.* Rodrigo (Cal.), 8 Crim. Law Mag. 503.

[2] Knode *v.* Williamson, 17 Wall. (U. S.) 586, 588.

[3] Sorrelle *v.* Craig, 9 Ala. 534, 539, reaffirmed in Hadjo *v.* Gooden, 13 Ala. 718, 721.

[4] Haley *v.* State, 63 Ala. 83.

§ 530. [CONTINUED.] CROSS-EXAMINING HIM. — Where a witness had testified as to the reputation of another for veracity, it was held error to exclude, *on cross-examination*, the questions: "*What makes reputation?*" and "*What is reputation?*" The testimony seems to have been excluded under the idea that it called for a conclusion of law; but the court held that this could not be so, since, if reputation were a conclusion of law, the witness ought not to have been called to prove reputation at all. The court said: "The reputation of a party in his neighborhood is not a conclusion of law, it is a fact; but it is one about which many honest and well meaning witnesses have mistaken or imperfect conceptions. * * * It seems to us that, after the appellee's witness had testified in chief that he knew the general reputation of the appellee in his neighborhood, the appellant had the right, clearly and unquestionably, to cross-examine him *as to his means of knowledge*, and, to that end, to inquire of him what constituted reputation. In our opinion the court erred in sustaining the appellee's objection to the questions above set out, propounded by the appellant." [1]

§ **531. What Interrogatories after Foundation laid.** — If a witness testifies that he knows the reputation, or reputation for veracity, of the impeached witness in the neighborhood where he lives, this may be followed up with the question whether that reputation is good or bad; and if the witness answers that it is bad, by the question whether, from that reputation, the impeaching witness would believe him under oath.[2] The opposite party, then, upon cross-examination, will have the opportunity of ascertaining the extent of the information of the witness and the sources of his knowledge.[3] The following *form of question* is sanctioned by the authority of Lord Ellenborough: "Have you the means of knowing what the general character of the witness

[1] Hutts *v.* Hutts, 62 Ind. 215, 224.

[2] Robinson *v.* State, 16 Fla. 835, 840. Compare Crabtree *v.* Hagenbaugh, 25 Ill. 233; Boon *v.* Weathered, 23 Tex. 675; Sorrelle *v.* Craig, 9 Ala. 534; Hadjo *v.* Gooden, 13 Ala. 718, 721. See next section.

[3] Robinson *v.* State, *supra*. It has been ruled that, where a witness, called to sustain an impeached witness, states, on his direct examination, that he has heard the character of the witness spoken against, — it is admissible for the party calling him to ask him to give the names of the parties referred to by him. Bakeman *v.* Rose, 18 Wend. (N. Y.) 146.

is; and from such knowledge of his general character, would you believe him on his oath?" [1]

§ 532. **Whether the Impeaching Witness would believe Impeached Witness on Oath.** — Contrary to the erroneous text of Greenleaf,[2] the English,[3] and prevailing American rule is, that it is competent to ask the impeaching witness whether, from his knowledge of the reputation of the impeached witness, or his knowledge of the reputation of the latter for veracity,[4] he would believe him on oath.[5]

§ 533. REASON OF THE RULE WHICH ADMITS THIS QUESTION. — The existence of this rule is an undisputed branch of legal doctrine, and the reasons upon which it is founded were thus stated at length in an opinion of the Supreme Court of Michigan by Mr. Justice Campbell: "The purpose of any inquiry into the character of a witness is to enable the jury to determine whether he is to be believed on oath. Evidence of his reputation would be irrelevant for any other purpose, and a reputation which would not affect a witness so far as to touch his credibility under oath, could have no proper influence. The English textbooks and authorities have always, and without exception, required the testimony to be given directly on this issue. The questions put to the impeaching and supporting witnesses relate, first, to their knowledge of

[1] Mawson *v.* Hartsink, 4 Esp. 102; recommended by Senator Tracy in Bakeman *v.* Rose, 18 Wend. (N. Y.) 146, 151; and by Collier, C. J., in Sorrelle *v.* Craig, 9 Ala. 534, 539.

[2] 1 Greenl. Ev. § 461.

[3] 1 Stark. Ev. 237 *et seq*; 2 Phill. Ev. (Edward's Edition) 955, 958; Reg. *v.* Brown, L. R. 1 Cr. Cas. Res. 70.

[4] According to the rule prevailing in the particular jurisdiction. *Ante* §§ 522, 523.

[5] Adams *v.* Greenwich Ins. Co., 70 N.Y. 166, 170; People *v.* Davis, 21 Wend. (N. Y.) 309; Hamilton *v.* People, 29 Mich. 173; Keator *v.* People, 32 Mich. 484; Uhl *v.* Com., 6 Gratt. (Va.) 706; People *v.* Mather, 4 Wend. (N. Y.) 229; People *v.* Rector, 19 Wend. (N. Y.) 569; People *v.* Davis, 21 Wend. (N. Y.) 309; Titus *v.* Ash, 24 N. H. 319; Bogle *v.* Kreitzer, 46 Pa. St. 465; Lyman *v.* Philadelphia, 56 Pa. St. 488; Knight *v.* House, 29 Md. 194; Stevens *v.* Irwin, 12 Cal. 306; People *v.* Tyler, 35 Cal. 553; Eason *v.* Chapman, 21 Ill. 33; Wilson *v.* State, 3 Wis. 798; Stokes *v.* State, 18 Ga. 17; Taylor *v.* State, 16 Ga. 7; Ford *v.* Ford, 7 Humph. (Tenn.) 92; M'Cutchen *v.* M'Cutchen, 9 Port. (Ala.) 650; Mobley *v.* Hamit, 1 A. K. Marsh. (Ky.) 590; United States *v.* Van Sickle, 2 McLean (U. S.), 219.

the reputation for truth and veracity of the assailed witness; and, second, whether, from that reputation, they would believe him under oath. The only controversy has been whether or no the grounds of belief must rest upon, and be confined to a knowledge of reputation for veracity only. But as to that the authorities are harmonious. The reason given is that, unless the impeaching witness is held to showing the extent to which an evil reputation has affected a person's credit, the jury cannot accurately tell what the witness means to express by stating that such reputation is good or bad, and can have no guide in weighing his testimony. And since it has become settled that they are not bound to disregard a witness entirely, even if he falsifies in some matters, it becomes still more important to know the extent to which the opinion in his neighborhood has touched him. It has also been commonly observed that impeaching questions as to character are often misunderstood, and witnesses, in spite of caution, base their answer on bad character generally, which may or may not be of such a nature as to impair confidence in testimony. When the question of credit under oath is distinctly presented, answers will be more cautious."[1] "The objection alleged to such an answer by a witness," continued Campbell, J., "is that it enables the witness to substitute his opinion for that of the jury; but this is a fallacious objection. The jury, if they do not act from personal knowledge, cannot understand the matter at all, without knowing the witness' opinion, and the ground on which it is based. It is the same sort of difficulty which arises in regard to insanity, to disposition

[1] Hamilton *v.* People, 29 Mich. 173, 185, 186. The learned judge criticised the *dictum* of Prof. Greenleaf (1 Greenl. Ev. § 461), to the effect that the American authorities on this subject disfavored the English rule; and stated that, of the cases cited by the author in support of this doctrine, not one contained a decision upon the question, and only one contained more than a passing *dictum*, not in any way called for. The decision referred to was Phillipps *v.* Kingfield, 19 Me. 375. The learned judge pointed out that the authorities referred to in that case contained no such decision and that the Maine court, after reasoning out the matter somewhat carefully, declared that the question was not presented by the record for decision. He also calls attention to the fact that the American editors of Phillipps and Starkie do not appear to have discovered any such conflict, and do not allude to it; whereas they do, as many decisions do, refer to the *kind of reputation* which should be shown, whether for veracity merely or for other moral qualities also. He also pointed out that in Webber *v.* Hanke, 4 Mich. 198, no question arose on the record except as to the species of reputation, and the neighborhood and time of its existence, saying that what was said further was not in the case, and could not dispose of the matter.

or temper, to distances and velocities, and many other subjects, where a witness is only required to show his means of information, and then state his conclusions or belief based on those means. If six witnesses are merely allowed to state that a man's reputation is bad, and as many say it is good, without being questioned further, the jury cannot be said to know much about it. Nor would any cross-examination be worth much, unless it aided them in finding out just how far each witness regarded it as tainted." [1] The learned judge concluded with this statement: "Mr. Greenleaf himself intimates that it might be a proper inquiry on cross-examination. We think the inquiry proper, when properly confined and guarded, and not left to depend on any basis but the reputation for truth and veracity. And we also think that the cross-examination of impeaching or sustaining testimony should be allowed to be full and searching." [2]

§ 534. [CONTINUED.] REASONS FOR THE OPPOSING RULE.—In a case in Texas where the subject is extensively examined, it was said by Bell, J.: "Where the impeaching witness is asked, 'Whether or not he could believe the other under oath,' he is more likely to give an answer suggested by his personal knowledge, or prompted by his personal feelings, or his individual opinion, than he is when asked whether or not he is acquainted with the general reputation of the impeached witness for truth, and whether it is good or bad. If the impeaching witness states that he is acquainted with the general reputation of the former witness for truth in the community where he lives, he may then be properly asked whether that general reputation is such as to entitle the witness to credit on oath, or any other form of words may be used which do not involve a violation of the cardinal principles that the inquiry must be restricted to the general reputation of the impeached witness for truth in the community where he lives, or is best known; and that the impeaching witness must speak from general reputation or report, and not from his own private opinion." [3] Following this ruling, it has been held proper, where an impeaching witness has stated that he knows the witness' character for truth and veracity in the neighborhood in which he has lived and that it is bad, to exclude the further question, "from that reputation would you believe him on oath?" [4]

[1] Hamilton *v.* People, 29 Mich. 173, 186.

[2] *Ibid.* 187, 188.

[3] Boon *v.* Wethered, 23 Tex. 675, 686.

[4] Marshall *v.* State, 5 Tex. App. 274, 293.

§ 535. Impeachment by Proof of Conviction of Felony or other Infamous Crime. — It is competent, for the purpose of impeaching a witness, to put in evidence the record of a conviction of felony or other infamous crime.[1] But under this rule, a witness cannot be impeached by proving that he has been convicted of a simple misdemeanor, such as assault and battery,[2] or the violation of a city ordinance.[3] For stronger reasons, the record of a mere *complaint* or *indictment*, charging a crime, is not admissible, for this does not impeach the witness;[4] since, "until convicted, the law presumes the person indicted to be innocent of the charge."[5] The *record* is the only competent evidence of the fact of such a conviction;[6] though, as elsewhere seen,[7] the

[1] Carpenter *v.* Nixon, 5 Hill (N. Y.), 260; Newcomb *v.* Griswold, 24 N. Y. 300.

[2] By statute in Indiana, a witness might be impeached by proving by the record that he had been convicted of an infamous crime; but it was held that this cannot be done by showing that, on an indictment for assault and battery with intent to commit a rape, he had been convicted of a simple assault and battery; since this was not an infamous crime. Glenn *v.* Clore, 42 Ind. 60. As to what is an infamous crime see Pruitt *v.* Miller, 3 Ind. 16.

[3] The Statute of Ohio provides that, "No person shall be disqualified as a witness in any criminal prosecution by reason of his interest in the event of the same, as a party or otherwise, or by reason of his conviction of any crime; but such interest or conviction may be shown for the purpose of affecting his credibility." 66 Oh. Laws, 308; Rev. (1880), § 7284. It is held that the conviction referred to in this section, which may be shown for the purpose of affecting the credibility of the witness, is such, and such only, as, before the enactment of the section, would have disqualified the person from testifying as a witness. Convictions for violations of city ordinances never disqualified a person from testifying in any cause; and therefore such convictions cannot be shown, under this section, for the purpose of affecting the credibility of the witness Coble *v.* State, 31 Oh. St. 100.

[4] People *v.* Gay, 7 N. Y. 378; Lipe *v.* Eisenlerd, 32 N. Y. 238; Jackson *v.* Osborn, 2 Wend. (N. Y.) 555; West *v.* Lynch, 7 Daly (N. Y.), 245.

[5] West *v.* Lynch, *supra*. Thus, it has been held that the fact that the witness has been *indicted* for *forgery* or *perjury* is inadmissible as affecting his character without proof of conviction under the indictments. Jackson *v.* Osborne, *supra*.

[6] In *Georgia*, the rule of law concerning secondary evidence has been carried to the extent of holding that it is not competent to show, on the cross-examination of a witness, for the purpose of impairing his testimony, that he had, during the term of court then in session, pleaded guilty to a criminal offense; the record of the plea of guilty was held the only proper evidence. Johnson *v.* State, 48 Ga. 116.

[7] *Ante*, § 464. 465, 467.

rules of practice in some jurisdictions allow such a question to be put by the witness *on cross-examination*, but he cannot be contradicted by the record if he denies the fact.

§ 536. By Evidence that the Witness is of Defective Mind or Memory. — A person entirely without memory is incompetent as a witness, and if his memory is naturally weak, or has been impaired by disease or age, his testimony will naturally have less weight with a jury than if his memory is sound and unimpaired. It is therefore competent to give evidence that the memory of a witness is weak, for the purpose of affecting his testimony.[1] It is not necessary that such testimony should be given by an *expert*.[2]

§ 537. Inadmissible Modes of Impeaching. — It is not admissible, for the purpose of impeaching a witness, to prove that he is a *chronic witness* for particular cases. Thus, in a late criminal case in Mississippi, in an indictment for gaming, the defendant offered to prove that a certain witness for the State had already made, in the form of witness fees, about $20 that week, by testifying for the State in several cases. It was held that the court correctly excluded this evidence. "Such evidence," said Cooper, C. J., "would not prove or tend to prove that he ought not to be believed."[3] Nor can evidence be introduced to affect the credibility of a witness, by showing that he testified on a former trial and was not *believed* by the jury.[4]

[1] Isler *v.* Dewey, 75 N. C. 466.

[2] *Ibid.*; Clary *v.* Clary, 2 Ired. L. (N. C.) 78; Bailey *v.* Pool, 13 Ired. L. (N. C.) 404.

[3] Rebecca Lea *v.* State (Miss.), 1 So. Rep. 244; *s. c.* 64 Miss. 294.

[4] Schenck *v.* Griffin, 38 N. J. L. 463, 471.

CHAPTER XXI.

CORROBORATING AND SUSTAINING WITNESSES.

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§ 541. Right to Introduce Corroborating Testimony.— Where a witness is contradicted, the party calling him has the obvious right to introduce competent testimony corroborating him, and no exception lies to the hearing of such testimony.[1]

§ 542. Witness' own Evidence as to Corroborating Facts.— But a party cannot support his own positive testimony of facts, stated upon his own knowledge, by testifying himself to other consistent or corroborative facts, which are immaterial in themselves, and which, like the facts sought to be corroborated, rest entirely upon his own oath. "Such evidence," said Cooley, C. J., "coming from other persons, might have had some such tendency; but when the question is whether one fact to which a witness testifies is correct, it can receive no support whatever from his swearing to another which, though consistent with the first, must, like that, rest entirely upon his own statement."[2]

§ 543. Additional Evidence of the Facts testified to by the Impeached Witness. — Where the character of a witness is im-

[1] Green *v.* Gould, 3 Allen (Mass.), 465. See also Holbert *v.* State, 9 Tex. App. 219. In an action to recover real estate, it was held no error to allow a deed for *other lands* than that in controversy to be put in evidence for the purpose of corroborating the statements of witnesses. Buie *v.* Carver, 75 N. C. 559.

[2] Anderson *v.* Russell, 34 Mich. 109, 111.

peached, it is competent for the party calling him to introduce *further testimony* in support of the facts to which the discredited witness has testified. So held in a criminal trial, where one of the State's witnesses was impeached by evidence of bad character, in which case it was held that the plaintiff had the right to introduce another witness to the same fact, and that it was not a good objection that the testimony of this witness was *not in rebuttal*.[1] In 1853 the practice was said to be in North Carolina, and, as the Supreme Court thought, sustained by good sense, for a party to offer as many witnesses as he might deem necessary to establish his allegation. If the other party should choose, he might rest the case upon it, or he might call witnesses in his turn; and then the first party might call witnesses in reply, and for the purpose of adding to the strength of the evidence upon which he first rested his case. That is to say, the party sustaining the burden of the proof might call as many witnesses as he might think necessary to make out a *prima facie* case, and then, after hearing the opposing testimony, if he should think it necessary, he might call other witnesses whose testimony would simply corroborate that of his first witnesses. In support of this view, a remark attributed to Lord Kenyon was quoted that "it is not worth while to jump until you get to the fence,"—"that is," said Pearson, J., "there is no use of meeting objections until they are presented, or in piling up proof until it is made necessary by what is done on the other side."[2] Thus, on an issue of *devisavit vel non*, the caveator produced and examined *thirteen* witnesses, who testified to the disputed signature, after which the proponent introduced *six* witnesses, who swore to the contrary. It was held proper for the caveator then to call his *other witnesses* in support of those who had first testified.[3]

§ 544. **Where Witnesses are Assailed in Rebuttal.**—Where the plaintiff, in rebuttal, introduces evidence in contradiction of the witnesses of the defendant, which the defendant could not

[1] John *v.* State, 16 Ga. 200.

[2] Outlaw *v.* Hurdle, 1 Jones L. (N. C.) 150.

[3] *Ibid.*

reasonably have anticipated, which evidence is offered for no other purpose than to impeach their credibility, the defendant is entitled, after the plaintiff has rested, to support their credibility by additional testimony.[1]

§ 545. In Cases where testimony of Single Witness is Insufficient.— In certain cases the testimony of a single witness is insufficient to establish the fact in issue, and therefore corroboration is necessary, and unless there be corroboration, the court will direct a verdict against the party sustaining the burden of proof.[2] This happens in cases of *treason*, *perjury*, and in some others, to enter upon which is not within the plan of this work.

§ 546. Corroboration of Accomplice Testimony. — A slight deviation may, however, be made for the purpose of merely noticing a subject of great interest and of much conflict of opinion, namely, the question of the necessity of corroboration in the case of the testimony of accomplices. There is a *conflict of opinion* as to whether a conviction of crime can be had upon the uncorroborated testimony of an accomplice. The old English[3] and some of the American[4] opinion is to the effect that it can be; but there are contrary holdings in England,[5] and the later American holdings, founded largely upon statutes, are also to the contrary.[6] But where the modern and more humane rule

[1] Wade *v.* Thayer, 40 Cal. 578.

[2] Thus, under the civil code of Louisiana, article 2257, the testimony of a single witness is not sufficient to establish a contract guaranteeing the payments of the price of goods purchased for an amount exceeding $500. Dickson *v.* Sharretts, 7 La. Ann. 54.

[3] Rex *v.* Atwood, 2 Leach C. C. 521; Jordaine *v.* Lashbrooke, 7 T. R. 601, 609; Rex *v.* Jones, 2 Camp. 131; Rex *v.* Sheehan, Jebb Cr. Cas. 54.

[4] State *v.* Wolcott, 21 Conn. 272; State *v.* Stebbins, 29 Conn. 463, 468; State *v.* Williamson, 42 Conn. 261.

[5] Rex *v.* Noakes, 5 Carr. & P. 326; Reg. *v.* Magill, Ir. Circ. Cas. 418. There is a *modified view* that the testimony of accomplices is admissible without corroboration, where they have been *kept separate* since their arrest, and have no opportunity to communicate with each other. Reg. *v.* Aylmer, 1 Crawf. & D. 116.

[6] Rap. Wit., § 226; citing Marler *v.* State, 67 Ala. 55; Lumpkin *v.* State, 68 Ala. 56; People *v.* Ames, 39 Cal. 403; People *v.* Melvane, 39 Cal. 614; People *v.* Cloonan, 50 Cal. 449; Johnson *v.* State, 4 Greene (Ia.), 65; Upton *v.* State, 5 Iowa, 465; Bowling *v.* Commonwealth, 79 Ky. 604; Craft *v.*

prevails, it is conceded that evidence necessary in order to corroborate the testimony of an accomplice, so as to authorize a conviction thereon, need not be of a *conclusive* character.[1] A statutory rule which requires the testimony of an accomplice to be corroborated, does not apply to the testimony of a *feigned accomplice*,[2] and, of course the same holding would apply in respect of the same common-law rule, of which the statute is merely declaratory.

§ 547. [CONTINUED.] PARTIES TO AN INCESTUOUS INTERCOURSE. — It has been ruled that if the female, with whom an incestuous intercourse is alleged to have been had, is shown to have knowingly, voluntarily and with the same intent which actuated the accused, united with him in the commission of the offense, she is an accomplice in the crime, and her uncorroborated testimony is insufficient to support a conviction of the accused. On the other hand, if the evidence shows that, in the commission of the incestuous act, she was the victim of force, threats, fraud or undue influence, so that she did not act voluntarily, and did not join in the commission of the act with the same intent that actuated the accused, then she is not an accomplice, and a conviction might stand even upon her uncorroborated testimony.[3]

§ 548. [Continued.] By what Evidence Corroborated. — But it is nevertheless a rule that it makes no difference as to the number of accomplices who testify without confirmation, since accomplices *cannot corroborate each other*. Although their testi-

Commonwealth, 80 Ky. 349; People *v.* Courtney, 28 Hun (N. Y.), 589; People Ryland, 28 Hun (N. Y.), 568; Lopez *v.* State, 34 Tex. 133; Wright *v.* State, 43 Tex. 170; Nourse *v.* State, 2 Tex. App. 304; Davis *v.* State, 2 Tex. App. 588; Roach *v.* State, 4 Tex. App. 46; Miller *v.* State, 4 Tex. App. 251; Powell *v.* State, 15 Tex. App. 441; Dunn *v.* State, 15 Tex. App. 560; State *v.* Howard, 32 Vt. 380; Wright *v.* State, 43 Tex. 170.

[1] Best on Ev., § 171; People *v.* Melvane, 39 Cal. 614; State *v.* Schlagel, 19 Ia. 169; Nokan *v.* State, 19 Oh. 131. By § 1111 of the California Penal Code, the evidence which is necessary to corroborate the testimony of an accomplice need not be evidence tending to establish the precise facts testified to by the accomplice, but it is sufficient if it tends to connect the defendant with the commission of the offense. People *v.* Cloonan, 50 Cal. 449.

[2] People *v.* Bollinger (Cal.), 11 Pac. Rep. 799.

[3] Mercer *v.* State, 17 Tex. App. 452, 465. See also Freeman *v.* State, 11 Tex. App. 92; Watson *v.* State, 9 Tex. App. 237; Whart. Crim. Ev., § 440.

mony is given to the same fact, it must be corroborated by evidence coming from an unpolluted source, before it will justify conviction.[1] But a *writing* delivered by one accomplice to another, in furtherance of the scheme of crime concocted between them, may be used as corroborating evidence.[2] And where an accomplice testified that he had paid a bribe to the defendant (on trial for bribery) by giving to the defendant a *check* upon a certain bank, payable to cash or bearer, which had afterwards been returned by said bank to the witness, it was competent for the State, in corroboration, to show, by the *books* and *business memoranda* of the *bank*, a credit to the defendant for a like amount, deposited by check two days after the alleged bribery.[3]

§ 549. By Evidence of Previous Consistent Declarations. — It has been reasoned that, where the witness is an accomplice, this fact alone is an attack upon his credibility, and authorizes the public prosecutor to prove that the witness, when first arrested, had given the same relation of the facts which he gave on the witness stand.[4] So, it has been ruled that, where a witness is called, who, in the commencement of his testimony, states himself to be an accomplice of the accused, it is regular, before the witness is attacked, to call on another witness to prove that the first witness had related the facts disclosed in his evidence, immediately after they happened.[5] Though, it is conceded that, after the evidence of the confessed accomplice had been freed from suspicion, such confirmatory evidence would be useless, and therefore inadmissible.[6] These holdings are based on a view which, as we shall hereafter see,[7] had a better foothold in our earlier, than in our later jurisprudence, and are therefore stated by the writer with reserve. In Massachusetts, where, on the more general question of sustaining impeached witnesses by evi-

[1] Rex *v.* Noakes, 5 Carr. & P. 326; Reg. *v.* Magill, Ir. Circ. Cas. 418.

[2] State *v.* Kellerman, 14 Kan. 135, 138.

[3] State *v.* Smalls, 11 S. C. 263, 286.

[4] People *v.* Vane, 12 Wend. (N. Y.) 78.

[5] State *v.* Twitty, 2 Hawks (N. C.), 449. Such evidence was to be considered as given substantially in reply. *Id.*

[6] *Ibid.*

[7] *Post*, § 572.

dence of their previous consistent declarations, the holdings are opposed to those in North Carolina,[1] the following ruling on this question is found: —

The defendant in a criminal case, for the purpose of impeaching the testimony of an accomplice, introduced a letter from him, admitting that his testimony in regard to the transaction in controversy, given on a former occasion, was false; and the attorney for the commonwealth, in order to show that the letter had been obtained unfairly, asked the accomplice certain questions, in answer to which he testified that the letter was part of a correspondence which had been carried on in jail, and stated the means by which the correspondence had been carried on, the relative position of the several rooms, and the arrangement of the prisoners therein. It was held that it was not competent to call witnesses to prove that the position of the rooms and the arrangement of the prisoners therein corresponded with the account given by the accomplice, in order to support his general credit. The court could not perceive how the circumstance that the witness told the truth about these public and common objects, concerning which he knew the proof was at hand, had any tendency to confirm the material parts of his testimony, involving the guilt of the defendant.[2]

§ 550. [General Rule.] **Supporting Testimony not Admissible in Chief.** — The general rule is that sustaining testimony is not admissible until the credit of the witness is in some way impeached, either upon cross-examination, or by testimony of other witnesses, and that *mere contradiction* among witnesses furnishes no basis for admitting such evidence.[3] This rule has its aptest illustration in cases where it is sought to sustain the testimony of witnesses by evidence of their *good character;*[4] but it equally applies where it is attempted to corroborate

[1] *Post*, § 573.

[2] Com. *v.* Bosworth, 22 Pick. (Mass.) 397, 400.

[3] Annesley *v.* Anglesea, 17 How. St. Tr. 1348; Fitzgerald *v.* Goff, 99 Ind. 28, 34; Johnson *v.* State, 21 Ind. 329; Presser *v.* State 77 Ind. 274; Braun *v.* Campbell, 86 Ind. 516; Braddee *v.* Brownfield, 9 Watts (Pa.), 124; Pruitt *v.* Cox, 21 Ind. 15. This is the rule under the Kentucky Code, §§ 661-663 (Bullitt's Codes, 591-599). Vance *v.* Vance, 2 Metc. *v.* (Ky.) 581.

[4] People *v.* Gay, 7 N. Y. 380; Wilder *v.* Peabody, 21 Hun (N. Y.), 376, 379; State *v.* Ward, 49 Conn. 429, 442; People *v.* Rector, 19 Wend. (N. Y.) 569.

a witness by evidence of his having made *previous statements*, similar to those delivered on the witness-stand, under a rule hereafter considered. The general rule, therefore, is that the evidence which is usually heard to sustain a witness whose credibility has been in some way impeached, other than by mere contradiction of his testimony, cannot be given in chief.[1] Upon this subject it has been well said: "If, in the multiplicity of contradictions daily occurring, each witness was permitted to bring other witnesses to sustain his general character, and they, contradicting each other, should be permitted to bring others, — the whole time of our courts would be taken up in hearing these side questions, until the matters originally in litigation would be almost lost sight of, to the great detriment of suitors." [2]

§ 551. Right to Sustain by Proof of Good Character. — But where the *direct impeachment* of a witness is attempted, it is always competent for the party, whose witness he is, to call other witnesses to prove that his character is good.[3] It has even been held that this may be done where the impeaching witness testifies that the character of the witness assailed is good, — the view being that the mere fact that his character is *questioned* by the opposite party, entitles the party, whose witness he is, to sustain it.[4] Where the plaintiff introduced evidence tending to prove declarations of the defendant unfavorable to the character of one of his own witnesses as to veracity, this was regarded as an impeachment of the witness' character, such as authorized the defendant to testify that his character was good.[5] In an action on a policy of insurance, where the defendant's evidence tended to show that the plaintiff burned his own building and committed perjury in his proof of loss, it was held that evidence of his good character was admissible.[6]

[1] Jackson *v.* Etz, 5 Cow. (N. Y.) 314, 320; People *v.* Vance, 12 Wend. (N. Y.) 78, 79, per Savage, C. J.

[2] Pruitt *v.* Cox, 21 Ind. 15, 16, opinion by Hanna, J.; reaffirmed in Brann *v.* Campbell, 86 Ind. 516.

[3] Clackner *v.* State, 33 Ind. 412; People *v.* Rector, 19 Wend. (N. Y.) 569.

[4] Com. *v.* Ingraham, 7 Gray (Mass.), 46.

[5] Prentiss *v.* Roberts, 49 Me. 127.

[6] Mosley *v.* Vermont Mutual Fire Ins. Co., 55 Vt. 142.

§ 552. **View that any Species of Assault lets in Evidence of Good Character.** — Some American courts hold that, whenever the character of a witness for truth is attacked *in any way*, it is competent for the party calling him to give general evidence of his good character for truth; and that it is immaterial whether his character is attacked by showing that he has given accounts of the matter out of court different from that given by him in court, or by cross-examination, or by general evidence of his character for truth.[1] This latter rule has been applied where the motives of the witness were assailed on a *severe cross-examination;*[2] where evidence had been admitted to *contradict* the witness on an *immaterial point;*[3] and even where an attempt was made to discredit the witness by *disproving material facts* testified to by him.[4] Where one party introduces evidence that the witness of the other party has been *suborned* and *paid* for his testimony, the party whose witness is thus assailed may, in rebuttal, introduce testimony tending to show the good character of the witness for veracity.[5] Another American court holds that, where a witness testifies to a material fact, and the opposite party calls a witness who contradicts the former witness as to such fact, and thereupon the former witness is allowed to be sustained by evidence of good character, the contradicting witness may be so sustained.[6]

§ 553. [CONTINUED.] REASONS FOR THE FOREGOING VIEW. — In a case in New York, Duer, J., while conceding the rule in that State is not as last above stated, said that, if the question were an open one, he would not hesitate to hold that evidence of the good character of a witness ought to be admitted, in every case in which the veracity of the witness, and not merely the truth of his testimony, is denied by the

[1] Paine *v.* Tilden, 20 Vt. 554; State *v.* Roe, 12 Vt. 93; Sweet *v.* Sherman, 21 Vt. 24; Isler *v.* Dewey, 71 N. C. 14; George *v.* Pilcher, 28 Gratt. (Va.) 300, 315. So held under statutes: Glaze *v.* Whitley, 5 Ore. 164; Richmond *v.* Richmond, 10 Yerg. (Tenn.) 343; Hadjo *v.* Gooden, 13 Ala. 718 (impeachment by evidence of previous inconsistent statements).

[2] Richmond *v.* Richmond, 10 Yerg. (Tenn.) 343.

[3] Newton *v.* Jackson, 23 Ala. 335.

[4] Davis *v.* State, 38 Md. 15. See also State *v.* Cherry, 63 N. C. 493.

[5] People *v.* Ah Fat, 48 Cal. 61, 64.

[6] Davis *v.* State, 38 Md. 15, 49.

adverse party. He also said: "An attack upon the moral character of a witness is permitted, because, when successful, it creates a probability that he has sworn falsely in the testimony that he has given; and it cannot be denied that an opposite probability is created, when the character of the witness, a man of integrity and truth, is fully established. It therefore seems to me that the evidence is, in its nature, corroborative, and as such, ought to be admitted in every case in which intentional falsehood, no matter upon what ground, is imputed to a witness. There is a fallacy in the assertion that, when the general character of a witness has not been impeached by the adverse party, it is admitted to be good. All that is admitted is, that his character can not be shown to be positively bad; but this is no reason for excluding evidence to show that it is positively good. Nor is it difficult to see that, in many cases, the exclusion of such evidence may be a source of error and injustice. The relation given by a witness may be very improbable in itself, yet perfectly true; for experience attests the justness of the observation that 'truth is not unfrequently stranger than fiction.' But it is obvious that the improbability of the relation may lead a jury to discredit a witness who, if it was clearly proved to them that he was a man distinguished for his probity and strict adherence to truth, they would not hesitate to believe. It is obvious that the probability that he has sworn truly, arising from the moral excellence of his character, might very reasonably outweigh, in the minds of the jury, the opposite probability, arising from the nature of the facts to which he has testified. In judging of the credit to be given to the narrative, where the facts are remarkable and unusual, we are all of us governed by the knowledge we have, or the estimate we have formed, of the moral character of the person from whom the narrative proceeds; and it is not easy to understand why the evidence that determines the judgment of every reasoning person, in the ordinary transactions of life, should be withheld from the consideration of a jury." [1]

§ 554. Witness Impeached by Contradiction Sustained by good Character. — Some American courts hold that witnesses, who have been impeached by evidence of previous contradictory statements made by them,[2] may be sustained by evidence that they are of good character for veracity.[3] But where the impeaching

[1] Leonori *v.* Bishop, 4 Duer (N. Y.), 420, 422.

[2] *Ante*, § 490.

[3] Clark *v.* Bond, 29 Ind. 555; Haley *v.* State, 63 Ala. 83; Isler *v.* Dewey, 71 N. C. 11; Glaze *v.* Whitley, 5 Ore.

party has merely laid the foundation for introducing evidence of the supposed contradictory statements, but has not introduced such evidence, the party calling the witness will have no right to introduce evidence of good character to sustain him; for until he is impeached, such evidence is premature.[1]

§ 555. [Continued.] **Contrary View.**— Many other American courts hold that evidence of the good character of the witness for veracity is admissible only when his general character, or his character for truth, has been assailed by direct evidence, or by proof on cross-examination of extrinsic facts going to his general character; and that it cannot be received where the only foundation is inconsistencies in the statements of the witness on cross-examination, or between statements made by him on the witness stand and statements made by him out of court, or upon proof being given by other witnesses of material facts irreconcilable with the facts proved by the particular witness; although the necessary consequence of the proof of such facts may be to impute fraud or falsehood to the witness.[2]

164; Burrell *v.* State, 18 Tex. 713; Paine *v.* Tilden, 20 Vt. 554. Compare Harris *v.* State, 30 Ind. 131; Stratton *v.* State, 45 Ind. 468; State *v.* Roe, 12 Vt. 93; Sweet *v.* Sherman, 21 Vt. 23.

[1] State *v.* Cooper, 71 Mo. 436, 442.

[2] People *v.* Hulse, 3 Hill (N. Y.), 300; People *v.* Gay, 7 N. Y. 378; Russell *v.* Coffin, 8 Pick. (Mass.) 143; Rogers *v.* Moore, 10 Conn. 13; Brown *v.* Mooers, 6 Gray (Mass.), 451; Heywood *v.* Reed, 4 Gray (Mass.), 574; Atwood *v.* Dearborn, 1 Allen (Mass.), 483; Boardman *v.* Woodman, 47 N. H. 120; Braddee *v.* Brownfield, 9 Watts (Pa.), 124; Wertz *v.* May, 21 Pa. St. 274; Webb *v.* State, 29 Oh. St. 351; Stamper *v.* Griffin, 12 Ga. 450, 456; Vance *v.* Vance, 2 Metc. (Ky.) 571; Frost *v.* McCargar, 29 Barb. (N. Y.) 617; Chapman *v.* Cooley, 12 Rich. L. (S. C.) 654; Starks *v.* People, 5 Denio (N. Y.), 106. The statement to the contrary by Dr. Greenleaf (1 Greenl. Ev., § 469) is in the language of a statement by Mr. Phillipps to which Mr. Phillipps cites no authority. Dr. Greenleaf cites in support of his statement the case of Rex *v.* Clarke, 2 Starkie, 241. This does not bear out the doctrine. There the prosecutrix in an indictment for an assault with intent to commit rape, having admitted, on cross-examination, that she had been sent to the House of Correction upon charges of having stolen money, and that she had been admitted into the Refuge for the Destitute and had remained there nearly two years, — it was held competent to show that her conduct, *since* being so admitted into the Refuge for the Destitute, had been good. The ruling did not relate at all to previous contradictory statements made by the prosecutrix.

§ **556. Where the Witness has committed an Offense which affects his Character.** — Where, on cross-examination, a witness admits, or where it is otherwise proved, that he has been *convicted of a crime*, or has *committed an offense* which affects his character, the person who calls him is permitted to prove that his general character, *since* being convicted of the offense, has been good.[1] Where a witness is impeached by producing the record of his conviction of a felony or infamous crime, it is not a new thing to allow his character to be sustained by witnesses who testify that his subsequent character has been good. This was allowed by Lord Holt on the trial of Henry Harrison for murder, in 1692. The record of the indictment and conviction of a witness for extortion, was produced to impeach him. Afterwards another witness, Captain Cannon, was called, who was asked by Lord Holt to tell the court of what reputation the witness was at the present time; and Captain Cannon said: "My lord, he is now of none of the clearest reputation."[2] And so, where an attempt was made to show that a certain witness had *himself committed the crime* of which the defendant stood charged, and that he had by false testimony, by his management of the case, and by improperly interfering with defendant's witnesses, attempted to *exculpate himself* by convicting an innocent man,— it was held that evidence of his good character for veracity was admissible. The court reasoned:

[1] Rex *v.* Clarke, 2 Stark. 241; Com. *v.* Green, 17 Mass. 515, 541; Webb *v.* State, 29 Oh. St. 351; Gertz *v.* Fitchburg &c. R. Co., 137 Mass. 77 (distinguishing Harrington *v.* Lincoln, 4 Gray (Mass.) 563, 568.) See also Com. *v.* Ingraham, 7 Gray (Mass.), 46. In Russell *v.* Coffin, 8 Pick. (Mass.) 143, 154, the court referred to this principle, with the observation that they did not object to it. It was also cited with approval in Braddee *v.* Brownfield, 9 Watts (Pa.), 94. It is competent to give such evidence under the *California* statute. People *v.* Amanacus, 50 Cal. 233. In Harrington *v.* Lincoln, *supra*, it was held that evidence introduced for the purpose of impeaching a witness to the effect that he has been tried for a crime in another State does not authorize the party calling the witness to sustain his testimony by evidence of his good character for truth and integrity. The question is not well reasoned, and the conclusion seems to be wrong in principle; since such evidence may fairly be supposed prejudicial to the witness in the minds of the jury.

[2] Harrison's Case, 12 How. St. Tr. 861, 862.

"While it is true evidence cannot be given to prove an infamous crime against a witness, of which he has not been convicted, for the purpose of impeaching his credit, yet where the question as to whether the witness is guilty of such a crime becomes the legitimate subject of inquiry on the trial, we think his reputation for truth may be proved to rebut any imputation against his credit which the evidence of guilt makes against him."[1] But in such a case, the character of the witness may not be sustained by showing that he was *in fact innocent*, for the *record* of the conviction is *conclusive*.[2]

§ 557. [CONTINUED.] CONTRARY AND CONFUSING VIEWS. — It is to be regretted that authority is not uniform on the question what species of assaults upon the character of a witness will authorize evidence of good character to sustain him. In a criminal case in the Supreme Court of New York, it was held that the fact that the witness admits, on his cross-examination, that he has been prosecuted and bound over, on a charge of perjury, will not authorize the party calling the witness to give evidence of his general good character,—the court reasoning that a party can only give such evidence when impeaching witnesses have been called on the other side, and that, by impeaching witnesses is meant only such witnesses as have spoken to general character for truth.[3] - - - - The court went into a great deal of learning to reason itself into a conclusion which is obviously unsound in principle. To call out, on cross-examination of a witness, the fact that he has been prosecuted, though unsuccessfully, for perjury, would ordinarily prejudice his character and testimony in the minds of the jury, and clearly the party calling him ought to be allowed thereafter to sustain his testimony by evidence tending to show his good character. - - - - Evidence tending to contradict a witness, and also to show that he has *conspired* with the party calling him, *to cheat and defraud* the opposite party, does not, it has been held on equally doubtful grounds, authorize the party calling him to introduce evidence of his character for honesty, integrity and moral worth, as well as for truth and veracity.[4]

[1] Webb *v.* State, 29 Oh. St. 351, 358.

[2] Gertz *v.* Fitchburg &c. R. Co., 137 Mass. 77; Com. *v.* Gallagher, 126 Mass. 54.

[3] People *v.* Gay, 1 Park. Cr. (N. Y.) 308; *s. c.* affirmed, 7 N. Y. 378 (Ruggles, C. J., and Willes, J., dissenting.)

[4] Heywood *v.* Reed, 4 Gray (Mass.), 574.

§ 558. [CONTINUED.] WHERE THIRD PARTIES HAVE ACCUSED THE WITNESS OF SWEARING FALSELY.—Equally untenable seems another holding of the Supreme Court of New York. A witness' character for veracity was attacked by asking him, on cross-examination, whether third persons had not accused him of swearing falsely. He answered in the affirmative. It was held that this did not operate to let in evidence showing that his character for truth and integrity had always been good.[1] The court reasoned that because the impeaching evidence was not competent, that is, because the question put on cross-examination was not competent, — and ought not to have been put and answered, the party whose witness he was, was thereby cut off from removing the disparaging effect of the answer, — and this, although the question put on cross-examination was objected to by the party calling the witness who was thus assailed.

§ 559. **Exception in the Case of a Subscribing Witness who is Dead.** — An exception to this rule has been admitted by the English judges, in the case where the subscribing witnesses to a will, or one of them, is dead, and the will is impeached on the ground of fraud, — in which case they have admitted evidence to support the characters of such deceased subscribing witnesses.[2] In so holding Lord Kenyon said: "In the great case of Jolliffe's Will, Lord Dudley and Ward, and other persons, were examined as to the character of the person by whom the will was prepared; and the legality of admitting such evidence was not doubted.[3] But Lord Ellenborough justly held that the rule has no application where the subscribing witness is not dead, and no shade is cast upon his character by the evidence.[4]

§ 560. [CONTINUED.] ILLUSTRATION.— The validity of a will was impeached on the ground of total incapacity in the testatrix to make any will at the time when it was supposed to have been made. The names of three witnesses were regularly subscribed, as attesting its execution. These were a Mr. Gale, an attorney by whom it was prepared; one Reynolds, his clerk; and one Cooperson. The two former witnesses

[1] Hannah *v.* McKellop, 49 Barb. (N. Y.) 342.

[2] Stephenson *v.* Walker, 4 Esp. 50; Provis *v.* Reed, 3 Moore & P. 4.

[3] Stephenson *v.* Walker, *supra.*

[4] Bishop of Durham *v.* Beaumont, 1 Camp. 207.

were dead. Evidence was given tending to show that, when the will was signed, the testatrix was in a state of stupor, and that the pen was guided in her hand, without her seeming to know what she did. Lord Kenyon allowed several witnesses, particularly of the legal profession, to be called and asked as to the general character of Gale and Reynolds, and whether they were persons of good reputation and likely to be guilty of such conduct as was imputed to them.[1] - - - - In another such case, imputations having been cast upon the character of the deceased attorney by whom the will was prepared, and who was one of the attesting witnesses, the evidence charging him with fraud in the execution of the will, it was held that the devisee might call witnesses to show his general good character. In so holding, Best, C. J., said: "Courts of law lay down principles according to the necessity of the case before them. Here, the character of the deceased attorney, when attacked, could only be protected by calling witnesses to show that he was not capable of the fraudulent conduct imputed to him." [2]

§ 561. EXCEPTION WHERE THE WITNESS IS A STRANGER. — In Connecticut, while the general rule is conceded that a witness cannot be supported by evidence of his general character for truth, until after a general impeachment of it, — yet an exception to the rule has been adopted in the case where the witness is in the situation of a stranger. There, they allow him to be supported by evidence of his general good character for veracity, although it has not been impeached.[3] But it is held, in applying this exception, that evidence of his good character in other respects than veracity, is not admissible for the purpose of sustaining him.[4]

§ 562. [Continued.] **Sustaining a Deaf and Dumb Prosecutrix.** — Where the prosecutrix, who was also the principal witness for the State, on the trial of an indictment for an assault with intent to ravish her, was a deaf and dumb person, it was held that the public prosecutor was entitled to support her testimony by evidence that her general character for truth was good, although no impeachment of her character had been attempted; [5] for one who

[1] Stephenson *v.* Walker, 4 Esp. 59.

[2] Provis *v.* Reed, 3 Moore & P. 4, 9.

[3] Merriam *v.* Hartford &c. R. Co., 20 Conn. 354, 364. Compare Rogers *v.* Moore, 10 Conn. 12.

[4] Merriam *v.* Hartford &c. R. Co., *supra*.

[5] State *v.* De Wolf, 8 Conn. 93, 100.

could neither hear nor speak might well be regarded as a *stranger* in the community in which she lived.

§ **563. Laying Foundation.** — But here, as in the case of the examination of impeaching witnesses, before the sustaining witness can properly testify, a foundation should be laid, by asking him if he knows the general character of the witness who is assailed (in those jurisdictions where the inquiry is as to general character), or his general character for truth and veracity (in those jurisdictions where the inquiry is thus limited), in the community where he resides or has recently resided. Until this is done, he cannot be heard;[1] after it is done, he may be allowed to say whether or not, from that reputation, he would *believe the impeached witness on oath;*[2] but without this foundation, he cannot so testify.[3] But where, without the asking of this specific question, a witness, whose deposition was taken, stated that the general character of the impeached witness was good and that he was entitled to full credit on oath, this was deemed sufficient.[4]

§ **564. Negative Evidence of Character.** — Negative evidence of character, by which is meant that the witness has long been acquainted with the person whose character is in issue and has never heard it questioned, — is competent, and it has been held error to exclude it.[5] The reason is that the fact that a person's character is not questioned is, on grounds of common experience, excellent evidence that he gives no occasion for censure, or, in other words, that his character is good.[6]

[1] Cook *v.* Hunt, 24 Ill. 536, 550; Clay *v.* Robinson, 7 W. Va. 350, 363.

[2] Clay *v.* Robinson, *supra; ante*, § 532.

[3] Lyman *v.* Philadelphia, 56 Pa. St. 488, 502; *ante*, § 529.

[4] McCutchen *v.* McCutchen, 9 Port. (Ala.) 650; Paine *v.* Tilden, 20 Vt. 554; Sweet *v.* Sherman, 21 Vt. 23.

[5] State *v.* Lee, 22 Minn. 407; Lemons *v.* State, 4 W. Va. 755; State *v.* Nelson, 58 Iowa, 208; Bucklin *v.* State, 20 Oh. 18; Taylor *v.* Smith, 16 Ga. 7, 10; People *v.* Davis, 21 Wend. (N. Y.) 309, 315; Morss *v.* Palmer, 15 Pa. St. 51, 57; Davis *v.* Franke, 33 Gratt. (Va.) 414.

[6] State *v.* Lee, *supra*, opinion by Berry, J. A similar reason was given by Berkshire, J., in Lemons *v.* State, *supra*. See the following authorities, as showing the extent to which the old rule in this regard has been relaxed: Reg. *v.* Rowton, 2 Benn. & H. Cr.

§ 565. [CONTINUED.] REASONS AND ILLUSTRATIONS. — "A very sensible and commendable instance of the relaxation of the old and strict rule, is the reception of negative evidence of good character, — as for example, the testimony of a witness who swears that he has been acquainted with the accused for a considerable time, under such circumstances that he would be more or less likely to hear what was said about him, and has never heard any remark about his character; the fact that a person's character is not talked about at all being, on grounds of common experience, excellent evidence that he gives no occasion for censure, or, in other words, that his character is good."[1] In like manner, it was ruled in Pennsylvania, that it is competent evidence in support of character, that a witness, acquainted with the witness assailed and living in his neighborhood, never heard his character for truth spoken against or questioned. The court, speaking through Rogers, J., said: "It is certainly some proof that a person against whom the tongue of slander has never been heard to wag, is not so destitute of truth and sincerity as that he ought not to be believed on his oath. The evidence is not easily reconcilable with the charge that he is totally unworthy of credit. The presumption is, if the charge be true, it must have been heard by those who lived near, and were in daily intercourse with him.[2] In like manner, in a case in New York, where the sustaining witness testified that he had never heard the character of the impeached witness for truth and veracity spoken of, but who also testified that he knew the witness and the persons with whom he associated,—it was held that he might properly be asked whether he would believe the impeached witness on oath. Nelson, C. J., said: "If such a question might not be permitted, the most respectable man in the community might fail in being supported, if his character for truth should happen to be attacked. Living all his life above suspicion, his truth would rarely be the subject of remark. A neighbor might be obliged to admit, as in this case, that he had never heard it spoken of,

Cas. 333 and note; Gandolfo *v.* State, 11 Oh. St. 114; 1 Tayl. Ev. (8th ed.), § 350; 1 Bish. Cr. Proc., § 489. But under the provisions of the Georgia Code (Ga. Code 1873, §§ 3873, 3874), it is held that "if the sustaining witness is not able to say that the general character of the impeached witness is not bad, he should at least be required to state that it is not such as to render him unworthy of credit on his oath, before he can give his own declaration that, from his character, he would not believe him under oath." Artope *v.* Goodall, 53 Ga. 318, 324.

[1] State *v.* Lee, 22 Minn. 407, 409, opinion by Berry, J. To the same doctrine see Gandolfo *v.* State, 11 Ohio St. 114, 117.

[2] Morss *v.* Palmer, 15 Pa. St., 51, 57.

and yet undoubtedly be competent to sustain him."[1] The same view has been taken by the Supreme Court of Georgia, in an opinion in which it is said: "Certainly, the sort of silent respect and consideration with which one is treated and received by those who know him, is some index of what they think of him as a man of veracity. And, indeed, if he is a person whom they think very highly of, that is about the only index. The character for truth of such person is never discussed — questioned — spoken of. To discuss, question, or even perhaps to speak of one's reputation for truth, is to admit that two opinions are possible on the point. Suppose the question were, what was the character of Washington among his neighbors for truth, could the answer be anything but this: 'I never heard it questioned — discussed — spoken of; and yet I know it to have been excellent.'"[2] It was therefore held that the testimony of witnesses to the effect that they were acquainted with the character of the impeached witness for truth in their neighborhood, and that from their acquaintance, thence derived, they would believe him on his oath, although they had never heard his character spoken of, was proper to be considered by the jury.[3] So, in a civil case in Virginia, a witness was asked whether he knew the general character of the plaintiff for truth and veracity. He replied that he had known the plaintiff six or seven years, and knew his general character for truth and veracity as well as any other man's character against whom he had never heard anything alleged, and that he had never heard his character called in question. It was likewise held that this was proper evidence to go to the jury.[4]

§ 566. **Distance of Time and Place.** — It has been ruled that evidence in support of the character of an assailed witness need not be confined to the same neighborhood, or to the same time spoken of by the assailing witness, but that the party attempting to sustain the witness may prove his character for veracity years previously, and in a different county, in which he has resided. The reasons in support of this conclusion were thus stated by Rogers, J.: "It is contended that the testimony in support of character must take no wider range, but must be confined to the

[1] People *v.* Davis, 21 Wend. (N. Y.) 309, 315.

[2] Taylor *v.* Smith, 16 Ga. 7, 10, opinion by Benning, J.

[3] *Ibid.*

[4] Davis *v.* Franke, 33 Gratt. (Va.) 414.

same neighborhood and the same time. It must be observed that witnesses have rights, as well as parties. It is too often the case that they are set up as marks to be shot at, and sometimes are compelled to defend themselves against sudden ruthless assaults, of which they had no previous notice. However, a correct and proper rule has been adopted, that greater latitude is allowed in support, than in attacking character.[1] * * * If the party making the assault is allowed to choose his own neighborhood and his own time, it may be difficult, in many cases, to parry the attack. It allows him an unjustifiable advantage, of which the witness, who is most interested, would have great right to complain. The not coming from what is termed his immediate neighborhood, may lessen its weight, but certainly does not destroy the competency of the evidence. The same may be said, with equal force, as to time. It is sometimes convenient for a party to rid himself of a troublesome witness, deposing to facts on which the cause turns; it is sometimes easy to excite a prejudice against him, in the town, village, or neighborhood where he resides. To confine him, in vidication, to the same place where the atmosphere has been polluted by sinister arts, no man's character would be safe."[2]

§ 567. **Right to Impeach an Impeaching Witness.** — The rule is that the general character, or general character for veracity, of *every witness* who testifies in a case, may be impeached by the opposite party. It hence follows that a witness called to impeach the character of another witness, may himself be impeached by the same method.[3] It is said by the late Judge Taylor, in speaking of a witness whose general character for veracity has been impeached: "The party calling him may re-establish his credit by attacking the general character of the impeaching witnesses. How far this plan of *recrimination* may be carried at common law is not yet determined, though in courts of equity the practice is in conformity with the rule of the civil law."[4] The rule of the civil law, here alluded to, permitted the

[1] Citing Chess *v.* Chess, 1 Penn. 41.

[2] Morss *v.* Palmer, 15 Pa. St. 51, 56.

[3] Starks *v.* People, 5 Denio (N. Y.), 106; State *v.* Cherry, 63 N. C. 493.

[4] 2 Tayl. Ev. (8th ed.), § 1473.

discrediting witness himself to be discredited by other witnesses, but allowed the recrimination to extend no further.

§ 568, **Cross-Examination of Sustaining Witness.**— Where a witness deposes to good character of an assailed witness, he may be asked, on cross-examination, whether the impeached witness has been reputed to have been arrested for felony,[1] and whether he has not heard neighbors of such party testify, in a previous action against the party, that his reputation was bad.[2] A prisoner on trial for highway robbery called a witness who deposed that he had known the prisoner for years, during which time the prisoner had borne a good character. On cross-examination, it was proposed to ask the witness whether he had not heard that the prisoner was suspected of having committed a robbery, which had taken place in the neighborhood some years before. This was objected to as raising a collateral issue, but Mr. Baron Parke overruled the objection, saying: "The question is not whether the prisoner was guilty of that robbery, but whether he was suspected of having been implicated in it."[3] So, in a prosecution for murder, a witness swore that he knew the general character of the prisoner for peace and quietude in the neighborhood, and that it was good. On cross-examination, he was asked whether he had not heard that defendant had killed a man in the State in Georgia. He was allowed, against objection, to answer this question. It was held that in this the court committed no error. Stone, J., in giving the opinion of the court, said: "In estimating character the shadings, as well as the brighter hues, should be considered. They all go to make up character — reputation — the estimation in which the person is held. But it is only character, and not the particulars or details of independent acts which can be inquired into."[4]

[1] Wachstetter *v.* State, 99 Ind. 290; *s. c.* 50 Am. Rep. 94. The same court in a previous case held it incompetent to ask a sustaining witness on cross-examination if he had heard his neighbors say that the sheriff had come to arrest him for larceny. Oliver *v.* Pate, 43 Ind. 132. But this case was "distinguished" in the subsequent case of McDonel *v.* State, 90 Ind. 320. Compare Holland *v.* Barnes, 53 Ala. 83; *s. c.* 25 Am. Rep. 595.

[2] Hutts *v.* Hutts, 62 Ind. 240.

[3] Rex *v.* Wood, 5 Jur. 225; cited in Best Ev., § 261.

[4] Ingram *v.* State, 67 Ala. 67, 72.

§ **569. Re-examination.** — If sustaining witnesses admit, on cross-examination, that there are reports in the neighborhood unfavorable to the character of the witness assailed, it is competent, on re-examination, to interrogate them concerning the nature of those reports, *e.g.*, to ask them whether they are not in respect of drinking and horse-trading. This is necessary, in order that the jury may judge in what respect the reports affect the character of the witness, and whether they are of such a nature as to impair his credibility.[1]

§ 570. [GEORGIA.] WHAT SUSTAINING WITNESS MUST SWEAR TO. — Under the Code of Georgia, to impeach a witness by proof of general bad character, the impeaching witness should be first asked as to his knowledge of the general character of the witness; next, as to what that character is; and lastly, whether, from that character, he would believe him on his oath.[2] By another section, "the witness may be sustained by similar proof of character."[3] It would seem that these provisions are merely declaratory of the common law. Construing them, the Supreme Court of that State has said: "If the sustaining witness is not able to say that the general character of the impeached witness is not bad, he should, at least, be required to state that it is not such as to render him unworthy of credit on his oath, before he can give his own declaration, that, from this character, he would believe the other on his oath."[4]

§ **571. [General Rule.] Declaration out of Court not admissible to Sustain Declaration in Court.** — The general rule is that the previous declaration of a witness out of court is not admissible to sustain his evidence given in court.[5] Thus, it has been ruled that a party who, in the progress of a trial, makes use of a deposition, may not be allowed to strengthen it by a so-called *disclosure* of the same witness, made at the time of taking the poor debtor's oath, before two justices of the peace and quorum.[6] So, as a general rule, what a party *swore to on a*

[1] Stape *v.* People, 85 N. Y. 390.

[2] Georgia Code 1873, § 3873.

[3] *Ibid*, § 3874.

[4] Artope *v.* Goodall, 53 Ga. 319, 325.

[5] Riney *v.* Vanlandingham, 9 Mo. 816; People *v.* Finnegan, 1 Park. Cr. (N. Y.) 147; Nichols *v.* Stewart, 20 Ala. 358; Stolp *v.* Blair, 68 Ill. 541; State *v.* Thomas, 3 Strobh. L. (S. C.) 269; Bailey *v.* State, 9 Tex. App. 98; People *v.* Hulse, 3 Hill (N. Y.), 309 (Cowen, J., dissenting).

[6] Smith *v.* Morgan, 38 Me. 468.

former occasion, cannot be given in evidence in his favor, though it may be against him.[1] Where a witness — a deaf-mute — was discredited by evidence tending to show that she had no knowledge of a Supreme Being or of the obligations of an oath, and the party whose witness she was, tendered evidence to the effect that she had related the same transaction to which she testified, in a similar manner, to a friend of hers, — it was held that evidence of these statements was rightly rejected, as being no more than hearsay evidence; "and because, in the case of a witness already laboring under suspicion, they are rarely calculated to increase, in any degree, the confidence due to his testimony."[2] It has been well said that: "To extend the doctrine to witnesses who are not impeached, would result in making a witness' credibility depend more upon the number of times he had repeated the same story, than upon the truth of the story itself, and tend to render the proceedings on each trial interminable."[3]

§ 572. OLD RULE THAT FORMER CONSISTENT DECLARATIONS MAY BE SHOWN IN CORROBORATION.— It was early held in Pennsylvania that, where a witness is impeached by evidence as to his character for veracity, and is also contradicted, it is competent to give evidence of what he swore to on a former trial, for the purpose of corroborating his testimony.[4] An early case in Maryland supported the same view. The action was ejectment, and the question became material, whether a certain child had been born alive or dead. The deposition of a doctor of medicine was read, to the effect that he assisted at the accouchment, and that the child was born alive. To overthrow this, testimony was given to the effect that the deponent was not present at the accouchment at all. The party offering the deposition then offered to prove, for the purpose of corroborating the testimony of the deponent, that he had, two or three days after the birth of the child and before the date of the deposition, declared the same facts to which he had deposed. It was held that this evidence should have been admitted,— the court saying: "Where the credibility of the witness is attacked by the opposite party, his prior declarations may be given in evidence to

[1] Robertson *v.* Caw, 3 Barb. (N. Y.) 410.

[2] Munson *v.* Hastings, 12 Vt. 346.

[3] Bailey *v.* State, 9 Tex. App. 98, 100, opinion by White, P. J.

[4] Henderson *v.* Jones, 10 Serg. & R. (Pa.) 322.

show his consistency."[1] One decision is found which goes to the wild length of holding that, where evidence is adduced which *contradicts* a witness upon an *immaterial point*, the party calling him may introduce witnesses to sustain his general character, although the opposite party disclaims any intention of discrediting him.[2] These conceptions take root in some early English authority, which will now be explained. In an old case, William Maynard, a witness, was, as appeared by his own evidence, guilty of a felony, to wit, robbery, together with others, which robbery was the subject of the action, which was an action of trespass. He had not been joined with the other defendants, in order that he might be a witness for the plaintiff. He was allowed to testify, and afterwards several witnesses were received and allowed to prove that William Maynard did, at several times, discuss and declare the same things, and to the like purpose, that he testified now; and my Lord Chief Baron said: "Though a hearsay ought not to be allowed as direct evidence, yet it might be made so to this purpose, viz., to prove that William Maynard was consistent to himself, whereby his testimony was corroborated."[3] Mr. Justice Buller, in his work called Nisi Prius, citing the last named case, said: "But, though hearsay be not allowed as direct evidence, yet it has been admitted in corroboration of a witness' testimony, to show that he affirmed the same thing before, on other occasions, and that he is still consistent to himself,"[4] —without offering any opinion as to the propriety of the rule. In like manner, it was said by Mr. Serjeant Hawkins: "What a witness hath been heard to say at another time may be given in evidence, in order, either to invalidate or confirm the testimony which he gives in court."[5] Chief Baron Gilbert, in his work on evidence, in treating of hearsay evidence, says: "But although hearsay is not allowed as direct evidence, yet it may, in corroboration of a witness' testimony, to show that he affirmed the same thing on other occasions, and that the witness is still consistent with himself; for such evidence is only in support of the witness that gives his testimony upon oath."[6] So, on the trial of Sir John Friend for treason, Lord Chief Justice Holt allowed Bertham, a witness, to testify that Captain Blair had told him, for two years past, that Sir John Friend was to have a regiment of horse which was to be raised and lie posted about the town, that Cap-

[1] Cooke *v.* Curtis, 6 Harr. & J. (Md.) 93.

[2] Newton *v.* Jackson, 23 Ala. 335.

[3] Lutterell *v.* Reynell, 1 Mod. 282.

[4] Bull. N. P. 294 *b*.

[5] Hawk. P. C., bk., 2, ch. 46, § 14.

[6] Gilb. Ev. 890.

tain Blair was to be lieutenant-colonel of the regiment, and that the witness was to be lieutenant to Captain Blair in his troop. Lord Holt said: "That is not evidence against Sir John Friend. He [the witness] is only called to confirm the testimony of Captain Blair,— that Blair spoke of it long before he gave his evidence, and so it is not a new thing invented by him."[1] In another case, such confirmatory evidence was offered and admitted in chief, which would not now be allowed.[2] For, notwithstanding these decisions and *dicta*, it is well settled that such evidence is not receivable to confirm the testimony of a witness, until it has been assailed by evidence of previous inconsistent statements made by him; since, to receive it would involve the solecism of attempting to support testimony given upon oath, by statements made not on oath, which are mere hearsay.[3]

§ 573. Witness Impeached by Previous Inconsistent Statements not Sustained by Previous Consistent Statements.— By the weight of authority, where the testimony of a witness is discredited by evidence that he has made statements out of court inconsistent with his sworn testimony, it is not competent, for the purpose of sustaining him, to prove that, at other times, he has made, out of court, statements which are consistent with his sworn testimony.[4] *A fortiori*, such testimony is not admissible to confirm the testimony of *another witness* testifying to the same fact.[5] Thus, where the prisoner was on trial for the crime of robbery committed upon the person of one Terhune, it was held that the statements which Terhune had made to a witness, immediately after the alleged robbery, con-

[1] Friend's Case, 13 How. St. Tr. 32, 33.

[2] Harrison's Case, 12 How. St. Tr. 861.

[3] This was distinctly ruled in Rex *v.* Parker, 3 Dougl. 242, where the doctrine of Lutterell *v.* Reynell, *supra*, was declared not to be the law.

[4] Nichols *v.* Stewart, 20 Ala. 358; Com. *v.* Jenkins, 10 Gray (Mass.), 485, 489; Ware *v.* Ware, 8 Me. 42; State *v.* Vincent, 24 Ia. 570, 575; Ellicott *v.* Pearl, 1 McLean (U. S.), 206; *s. c.* 10 Pet. (U. S.) 412; Butler *v.* Truslow, 55 Barb. (N. Y.) 293; Reed *v.* Spaulding, 42 N. H. 114; Smith *v.* Stickney, 17 Barb. (N. Y.) 489; Robb *v.* Hackley, 23 Wend. (N. Y.) 50; United States *v.* Holmes, 1 Cliff. (U. S.) 98, 105; People *v.* Doyell, 48 Cal. 85; Dushon *v.* Merchants' Ins. Co., 11 Metc. (Mass.) 199. So held in Com. *v.* Wilson, 1 Gray (Mass.), 337; Com *v.* Jenkins, 10 Gray (Mass.), 489.

[5] State *v.* Parish, 79 N. C. 610.

sistent with his statements made as a witness, were not admissible for the purpose of corroborating his statements as a witness.[1] But in one jurisdiction, the case of a woman swearing to a rape committed upon her[2] has been held to form no exception to the foregoing rule. On the trial of an indictment for such an offense, alleged to have been committed on board a vessel, the prisoner attempted to discredit the testimony of the prosecutrix, — 1. By showing, on her cross-examination, that her story was improbable in itself. 2. By disproving some of the facts to which she testified. 3. By evidence that her conduct, while on board the vessel and afterwards, was inconsistent with the idea of the offense having been committed. 4. By calling witnesses to show that the account which she had given of the matter out of court, did not correspond with her statements under oath. It was held, that this was not an attack upon the complainant's general character, and therefore, that evidence of her good character was not admissible in reply. Cowen, J., dissented, holding that evidence of the complainant's contradictory statements out of court affected her general character, and consequently that evidence of her good character became admissible.[3]

§ 574. Recognized Exceptions to the Rule. — There are certain recognized exceptions to the foregoing rule, as to which all the authorities agree. Thus, where the witness is charged with testifying under the influence of some motive prompting him to make a false statement, it may be shown that he made similar statements at a time when the imputed motive did not exist, or when motives of interest would have induced him to make a different statement from that which he actually made.[4]

[1] People *v.* Finnegan, 1 Park. Cr. (N. Y.) 147.

[2] *Post*, § 577.

[3] People *v.* Hulse, 3 Hill (N. Y.), 309.

[4] Gates *v.* People, 14 Ill. 433, 438; Stolp *v.* Blair, 68 Ill. 541, 544; Hayes *v.* Cheatham, 6 Lea (Tenn.), 2; Hotchkiss *v.* Germania Fire Ins. Co., 5 Hun (N. Y.), 90; State *v.* Petty, 21 Kan. 54, 60. See also People *v.* Moore, 15 Wend. (N. Y.) 419; State *v.* De Wolf, 8 Conn. 93; Wright *v.* DeKlyne, 1 Pet. C. C. (U. S.) 199; Henderson *v.* Jones, 10 Serg. & R. (Pa.) 332; Packer *v.* Gonsalus 1 Serg. & R. (Pa.) 526; People

Accordingly a *confession* by an *accomplice*, given before he had received a promise of personal exemption if he would become a State's witness, may well be received, as corroborating the testimony given by him on the witness stand.[1]

§ 575. [**Continued.**] **Change of Relation Necessary to Admit such Evidence.** — In such a case, denying the general right to admit such evidence, it has been said: "To make the former statements of the witness competent in his own favor, it should ordinarily be made to appear that, at the time he made the statements, he stood in some different relation to the cause or party from what he now occupies, and that the change in his position has been such that, though his present statement is in favor of his interest, yet that the former one, at the time it was made, must have been, or at least must have appeared to be, directly against his interests. And any such statements by a witness, made at any time, and offered as evidence in his own favor, after he has been impeached, should be received with great caution."[2]

§ 576. [**Another Exception.**] **Fabrication of Recent Date.** So, in contradiction of evidence tending to show that the witness' account of the transaction was a fabrication of a recent date, it may be shown that he gave a similar account, before

v. Vane, 12 Wend. (N. Y.) 419; Clapp *v.* Wilson, 5 Den. (N. Y.) 286. This rule was thus stated in an opinion drawn up by Miller, J., in the Court of Appeals of New York, but not reported, because not concurred in fully by all the members of the court: "As a general rule, such evidence is inadmissible, as the witness cannot be allowed to corroborate his statement in court by what was said by him out of court. There are, however, exceptions to this rule. In case an attempt is made to discredit the witness on the ground that his testimony was given under the influence of some motive prompting him to make a false or colored statement, then, he may be allowed to show in reply, that he has made similar declarations, at a time when the motive imputed to him did not exist." Railway Co. *v.* Warner (memorandum in 62 N. Y. 651); quoted and followed in Herrick *v.* Smith, 13 Hun (N. Y.), 446, 448.

[1] See the reasoning of Bronson, J., in Robb *v.* Hackley, 23 Wend. (N. Y.) 50.

[2] Reed *v.* Spaulding, 42 N. H. 114, 123, opinion by Sargent, J.

its effect and operation could be foreseen.[1] Thus, where it was proved, with a view to discredit a witness, that he had given, on other occasions, a week or ten days after the time of the transaction of which he testified, a very different account from what he had given on the stand, — it was held admissible to support him, by showing that, immediately after the transaction, he had given the same account which he had given upon the stand.[2]

§ 577. [**Another Exception.**] **Statements made immediately after the Occurrence.** — A modified rule has been thus laid down in a recent decision in Kansas: "If a witness be impeached by proof of his having previously made statements out of court, inconsistent with his testimony in court, he may then be corroborated by evidence of other statements made by him out of court, in harmony with his testimony, if made *immediately after the occurrence* of which he has testified took place, and made before he has had any reason or ground for fabricating an untrue or false statement; and such corroborating evidence is not limited to those statements made by him before the time when his statements, given in evidence to impeach him, were made, but may be extended to other statements made by him afterwards." [3] Thus, in an action by husband and wife for a personal injury upon the wife, Lord Holt admitted evidence of what the wife had said, immediately upon receiving the hurt, and before she had time to devise or contrive anything for her own advantage.[4] So, on a trial for *rape*, where the testimony of the prosecutrix was impeached by proof of inconsistent statements made by her on the preliminary trial before a justice of the peace, it was competent for the prosecution, in corroboration to prove the declarations of such witness on the day following

[1] Gates *v.* People, 14 Ill. 433, 438, per Treat, C. J.; Stolp *v.* Blair, 68 Ill. 541, 544, per Sheldon, J.; State *v.* Petty, 21 Kan. 54; Bronson, J., in Robb *v.* Hackley, 23 Wend. (N. Y.) 50, 54; Ellicott *v.* Pearl, 10 Pet. (U. S.) 412, 439, per Story, J.; Hester *v.* Com., 85 Pa. St. 140, 158; Henderson *v.* Jones, 10 Serg. & R. (Pa.) 323. See also State *v.* Hendricks, 32 Kan. 559.

[2] French *v.* Merrill, 6 N. H. 465 (with which compare Spaulding *v.* Reed, 42 N. H. 114.)

[3] State *v.* Hendricks, 32 Kan. 559, 563.

[4] Thompson *v.* Trevanion, Skin. 402.

the commission of the crime.[1] The reader will here recall the doctrine of *immediate outcry* applicable to such prosecutions. "Upon accusations for rape, where the forbearance to mention the circumstance within a reasonable time is in itself a reason for imputing fabrication, unless repelled by other considerations, the disclosure made of the fact, upon first opportunity after its commission, and the apparent state of mind of the party who has suffered the injury, are always regarded as very material, and the evidence of them is constantly admitted without objection."[2] It has been held, on doubtful grounds, in a case in admiralty, that the protest of the captain and crew of the vessel, made the morning after the collision, may be considered as evidence corroborative of the testimony of the witnesses in court, when, as to *all* material facts, they correspond.[3]

§ 578. [**Continued**] **Not Admissible when made subsequently to the Inconsistent Statements.** — It has been ruled that, while evidence of previous inconsistent declarations may, such a case, be admissible, when made *prior* to the date of the inconsistent ones, yet the rule is otherwise where they are made *subsequently*, — the reason, as stated by Mr. Justice Woodbury, being, "that they must be made at least under circumstances when no moral influences existed to color or misrepresent them." "But," continued he, "when they are made subsequent to other statements of a different character, as here, it is possible, if not probable, that the inducement to make them is for the very purpose of counteracting those first uttered. This impairs their force and credibility, when, if made before the others, they might tend to sustain the subsequent evidence cor-

[1] State *v.* Laxton, 78 N. C. 564, 570.

[2] Sir W. D. Evans in his notes to Pothier on Obligations, vol. 2, p. 251.

[3] The Pacific, 1 Newb. (U. S.) 9. The New York rule seems to be that, in order to let in evidence of good character for the purpose of sustaining a witness, his general character must have been assailed, either by impeaching witnesses or by proof of extrinsic facts of a disparaging nature. Leonori *v.* Bishop, 4 Drue, (N. Y.), 420; People *v.* Hulse, 3 Hill (N. Y.), 309; People *v.* Gay, 7 N. Y. 378; Starks *v.* People, 5 Denio (N. Y.), 106.

responding with them."[1] The reason was thus stated by McKinney, J.: "To allow consistent statements, for the purpose of giving support to the credit of the witness, made after the contradictory representations by which it is sought to impeach him, would be to put it in the power of every unprincipled witness to bolster his credit, and, perhaps, escape the just consequences of his own falsehood and tergiversation."[2]

§ 579. [Contra.] Impeached by Contradictory Statements, confirmed by Consistent Statements. — In the view of other American courts, where a witness has been assailed by evidence of having made previous statements, inconsistent with his testimony on the stand, he may be confirmed by evidence of having made previous statements consistent with such testimony.[3] This rule is *differently stated* in different jurisdictions. In one it is laid down that when the credibility of a witness is attacked from the *nature of his evidence*, from his *situation*, on the ground of *bad character*, by proof of *previous inconsistent statements*, or by *imputations* directed against him on *cross-examination*, the party who has introduced him may prove other consistent statements, for the purpose of corroborating him.[4] In another, it is stated in a much modified form, by saying that statements made by a witness corroborating his evidence upon the trial, made soon

[1] Conrad *v.* Griffey, 11 How. (U. S.) 480, 491; Queener *v.* Morrow, 1 Coldw. (Tenn.) 124, 135; State *v.* Petty, 21 Kan. 54. See also Ellicott *v.* Pearl, 10 Pet. (U. S.) 412, 438, where it was held generally that such evidence was inadmissible; but the court found an additional reason for supporting the decision of the trial court in excluding it, in the fact that the conversations, testified to by the sustaining witnesses, were *subsequent* to those testified to by the impeaching witnesses. *Contra*, Brookbank *v.* State, 55 Ind. 169.

[2] Queener *v.* Morrow, 1 Coldw. (Tenn.) 124, 135.

[3] Hoke *v.* Fleming, 10 Ired. L. (N. C.) 263; State *v.* George, 8 Ired. L. (N. C.) 324; Johnson *v.* Patterson, 2 Hawks (N. C.), 183; March *v.* Harrell, 1 Jones L. (N. C.) 329; Brookbank *v.* State, 55 Ind. 169; Dailey *v.* State, 28 Ind. 285; Coffin *v.* Anderson, 4 Blackf. (Ind.) 395; Hayes *v.* Cheatham, 6 Lea (Tenn.), 2, 10; Third Nat. Bk. *v.* Hall, 1 Baxt. (Tenn.) 479; Perkins *v.* State, 4 Ind. 222; Dodd *v.* Moore, 92 Ind. 397; Coffin *v.* Anderson, 4 Blackf. (Ind.) 395; Beauchamp *v.* State, 6 Blackf. (Ind.) 299; Dailey *v.* State, 28 Ind. 285; Dossett *v.* Miller, 3 Sneed (Tenn.), 72; Lyles *v.* Lyles, 1 Hill Ch. (S. C) 76.

[4] March *v.* Harrell, 1 Jones L. (N.C.) 329; Isler *v.* Dewey, 71 N. C. 14.

after the transaction to which it relates, or when he was not under the influence of any motive to relate the transaction untruthfully, are competent, where it is shown that he had given a different relation of the occurrence, or that he testified under the influence of a motive calculated to induce him to testify falsely.[1] According to one view, evidence of such statements made, in harmony with the testimony given by the witness in court, is not limited to such declarations as were made *prior* to the time when his conflicting declarations, given in the impeaching evidence, are claimed to have been made.[2]

§ 580. [ILLUSTRATION.] WHERE THE WITNESS ON A PREVIOUS OCCASION TESTIFIED LESS POSITIVELY.— A novel illustration of this principle is furnished in a case in Vermont, where, on the trial of an indictment for crime, the respondent, to weaken the force of the evidence of certain witnesses as to his identity with the criminal, introduced evidence tending to show that, at a preliminary examination of the respondent, they testified less positively on that point; but it also appeared that the same witnesses, directly after the commission of the offense, asserted positively the identity of the respondent with the person whom they saw commit the crime, and at the same time caused his arrest. It was held that such statements and such action on the part of the witnesses, so near the time of the commission of the offense, tended to corroborate their testimony as to identity, and that the judge committed no error in making this suggestion to the jury.[3]

§ 581. Distinction between the Case where the Previous Inconsistent Declarations are established, and where they are left in Dispute. — A distinction has been taken between a case where the witness concedes, or where other testimony conclusively establishes, the fact of his having made prior statements inconsistent with his testimony on the witness stand, and the case where the fact of his having made such prior statements is left by the testimony in doubt or in dispute. In the former case, the Supreme Court of Michigan concede that evidence of his

[1] Hotchkiss *v.* Germania Fire Ins. Co., 5 Hun (N. Y.), 90, 95; Robb *v.* Hackley, 23 Wend. (N. Y.) 50.

[2] Brookbank *v.* State, 55 Ind. 169

[3] State *v.* Dennin, 32 Vt. 158.

prior consistent declarations would not be admissible in corroboration, while in the latter case such evidence would be admissible.[1] In the opinion of the court, given by Mr. Justice Cooley, the following language occurs: "If it were an established fact that the witness had made the contradictory statements, we should say that the supporting evidence here offered was not admissible. If a witness has given different accounts of an affair on several different occasions, the fact that he has repeated one of these accounts oftener than the opposite one, can scarcely be said to entitle it to any additional credence. A man untruthful out of court is not likely to be truthful in court; and where the contradictory statements are proved, a jury is generally justified in rejecting the testimony of the witness altogether. But in these cases, the evidence of contradictory statements is not received until the witness has denied making them, so that an issue is always made between the witness sought to be impeached and the witness impeaching him. The jury, therefore, before they can determine how much the contradictory statements ought to shake the credit of the witness, are required first, to find, from conflicting evidence, whether he made them or not; and the question we now are to decide is whether, upon an issue of this character, evidence like that received by the circuit judge was admissible. The proper test for the admissibility of evidence ought to be, we think, whether it has a tendency to effect belief in the mind of a reasonably cautious person, who should receive and weigh it with judicial fairness. Now, there are many cases in which, if evidence is given of statements made by a witness in conflict with those he has sworn to, his previous statements should not only be received in support of his credit, but would tend very strongly in that direction. If, for instance, the witness is himself the prosecutor, and has already made sworn complaint, there can be no doubt, we suppose, that the pendency of this complaint, its contents, and the relation of the witness to it, might be put in evidence, and that they would raise a strong probability that the testimony to conflicting accounts as having

[1] Stewart *v.* People, 23 Mich. 63 (Campbell, C. J., dissenting on both points).

been given about the same time, was either mistaken or corrupt. Suppose a man to be testifying in a case in which he had spent a considerable period of time and a large sum of money in pursuing an alleged criminal to conviction, and he is confronted with evidence of his own conflicting statements; the rule would be exceedingly unjust, as well as unphilosophical, which should preclude his showing, at least by his own evidence, such circumstances of his connection with the case as would make the impeaching evidence appear to be at war with all the probabilities. And other cases may readily be supposed in which, under the peculiar circumstances, the fact that the witness has always previously given a consistent account of the transaction in question, might well be accepted by the jury as almost conclusive that he had not varied from it in the single instance testified to, for the purposes of impeachment. It is impossible to lay down any arbitrary rule which could be properly applied to every case in which this question could arise; but we think there are some cases in which the peculiar circumstances would render this species of evidence important and forcible. The tender age of the principal witness might sometimes be an important consideration, and the fact that the previous statement was put in writing, — as it was in this instance, — at a time when it would be reasonably free from suspicion, might very well be a controlling circumstance. We think the circuit judge ought to be allowed a reasonable discretion in such cases, and that, though such evidence would not generally be received, yet that his discretion in receiving it ought not to be set aside, except in a clear case of abuse." [1]

§ 582. **General Character not Supported by Previous Declarations.**—It has been ruled in Vermont that, where a witness has been discredited by evidence of his having given a different relation, even when this evidence appeared from his own cross-examination, he might be sustained by evidence of general good character.[2] But the same court holds that the converse of this

[1] Stewart *v.* People, 23 Mich. 63, 74.

[2] State *v.* Roe, 12 Vt. 110; *ante*, § 552.

proposition, that when his general character is impeached, he may be sustained by proof of prior statements consistent with his testimony, — is not the law.[1] Where *a party testifies in his own behalf*, evidence of previous inconsistent declarations are admissible against him, without laying any foundation for the introduction of the same by cross-examining him; merely because they are declarations against his interest, and such declarations are always original evidence against a party.[2] The mere fact that evidence of such declarations has been given, does not, it has been held, authorize the party to introduce witnesses in support of his general character.[3]

[1] Gibbs *v.* Linsley, 13 Vt. 208.

[2] Blossom *v.* Barrett, 37 N. Y. 434, 438.

[3] Owens *v.* White, 28 Ala. 413.

CHAPTER XXII.

OF THE EXAMINATION OF EXPERTS.

ARTICLE I. — DIRECT EXAMINATION.
ARTICLE II. — CROSS-EXAMINATION.

ARTICLE I. — DIRECT EXAMINATION.

SECTION
587. Expert Witnesses, how Examined.
588. Laying the Foundation.
589. Opinion based on the Personal knowledge of the Expert.
590. Medical Opinion based on Statements of Patient.
591. Medical Opinion upon Symptoms stated by Unsworn Persons.
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593. Witness not to Decide Disputed Questions of Fact.
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599. [Contra. When the Evidence may be Submitted to Experts.
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615. Whether Expert can give Opinion upon the Whole Case.
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617. What if the Answers go beyond the Question.
618. Reasons on Examination-in-Chief.
619. Opinions founded upon Books.
620. Experiments in the Presence of the Jury.
621. Medical Opinions as to the Permanency of Physical Injury.

§ 587. **Expert Witnesses, how Examined.** — Expert witnesses are generally examined upon *hypothetical questions*, assuming the existence of facts which there is substantial evidence tending to prove.[1] They are sometimes allowed to give their opinions upon evidence which they have heard detailed by witnesses.[2] They often give their opinion based upon their own *knowledge* of the facts of a particular case.[3] *Medical experts* are sometimes permitted to give an opinion based upon facts *communicated* to them *by their patient*, and by them communicated to the jury.[4] Experts are sometimes, though rarely, allowed to make *experiments* in the presence of the jury.[5]

§ 588. **Laying the Foundation.** — A witness cannot be permitted to give his opinion as an expert, until it appears, by a preliminary examination, that he is a person of skill in the particular department of science or special matter in which his opinion is desired. So, too, where he is called upon to testify from his own knowledge, it must appear that he has trustworthy information or knowledge of the facts involved, and upon which his opinion is to be founded, before he can testify as an expert.[6]

[1] *Post* § 594.
[2] *Post*, § 599.
[3] *Post*. § 589.
[4] *Post*, § 590.
[5] *Post*. § 620.
[6] Heald *v* Thing, 45 Me. 392 Accordingly, where it was not shown that an attorney at law called as a witness on the question of the value of another attorney's services had any personal knowledge of the case in which the services were claimed to have been rendered, or of the amount and character of such services, the party calling him had no right to ask him, *e.g.* "from what you know of this case, what do you think would be a fair amount for Todd's services?" Williams *v*. Brown, 28 Oh. St. 547.

Questions which are directed to him for the purpose of laying this *foundation*, present a preliminary question of fact for the decision of the judge.[1] In questioning a medical expert with this end in view, it is obviously proper to ask him *what experience* he has had with the particular disease or physical injury which is the subject of the investigation; and where he has been afflicted with the disease himself, it has been held that he may state that fact to the jury; since the fact would render it more probable that he had made the disease the subject of a special study and investigation.[2]

§ 589. Opinions based on the Personal Knowledge of the Expert. — Expert witnesses are allowed to give opinions based upon their personal knowledge.[3] This is seen every day in our trial courts in actions for damages for *physical injuries*, where the physician who has attended upon the plaintiff is allowed to give his opinion as to the duration and probable extent of the injuries complained of. The opinion of a physician, who has personal knowledge of the conduct and habits of a person, is competent evidence as to the *sanity* of such person;[4] so, in fact, is the opinion of a non-expert. On an issue of sanity, physicians

[1] *Ante*, § 323.

[2] Thus, in a late case in Illinois, an expert witness, a physician of thirty years standing, introduced by the plaintiff in an action for physical injury, was allowed to testify "I am paralyzed on the left side, — my arm and leg. Have no practical use of them, but I can move the leg along." The court refused the defendant's motion to strike out this evidence. It was a controverted question whether or not the plaintiff was paralyzed in her left leg and arm by the injury which she had received. It was held that no error was committed in the ruling. Mr. Justice Sheldon, in giving the opinion of the court, said: "It is true that the witness' paralysis was not within the issue; and yet it was not a wholly unimportant fact. It tended to add strength to the witness' testimony as an expert in being calculated to excite in him a peculiar interest, and lead him to give special study to that subject of injury. We see no just ground of complaint on defendant's part in not excluding this evidence." Chicago &c. R. Co. *v.* Lambert (Sup. Ct. Ill.), 10 North E. Rep. 219; *s. c.* 119 Ill. 256.

[3] Pelamourges *v.* Clark, 9 Iowa 1; State *v.* Stickley, 41 Iowa, 232; 1 Redf. Wills, 137; Louisville &c. R. Co. *v.* Falvey, 104 Ind. 409, 418; Burns *v.* Barenfield, 84 Ind. 43; Lawson Exp. & Op. Ev. 144; Boardman *v.* Woodman, 47 N. H. 120, 135.

[4] People *v.* Lake, 12 N. Y. 358.

may be asked whether, from the circumstances of the patient and the symptoms which they observed, they are capable of forming an opinion of the soundness of his mind; and if so, whether they can thence conclude that his mind is sound or unsound; and in either case, they are properly required to state the circumstances or symptoms from which they draw their conclusions, to the end that the jury may the better judge of the value of the same.[1]

§ 590. Medical Opinion based on Statements of Patient. — The opinion of a medical expert may rest in part on statements made to him by his patient, and by him communicated to the jury. Upon this subject the authorities are in harmony, though there is some difference of opinion as to whether statements of past symptoms may be taken into consideration.[2]

§ 591. Medical Opinion upon Symptoms stated by other Unsworn Persons. — On an issue of insanity a physician who has visited the person whose sanity is in question, in consultation with his attending physician, is not permitted to give in evidence the declarations made to him at the time, either by the defendant's wife, physician, or other attendant, as to his previous symptoms or condition. Such statements are properly excluded as hearsay.[3] Nor will such a witness be permitted to give his opinion of the mental condition of the person in question, based upon the representations thus made to him, in connection with the symptoms which he discovered by personal observation and examination. His opinion should be formed entirely from his own observation and examination of his patient's symptoms and

[1] Hathorn *v.* King, 8 Mass. 371.

[2] Louisville &c. R. Co. *v.* Falvey, 104 Ind. 409, 419; Carthage Turnp. Co. *v.* Andrews, 102 Ind. 138; Elkhart *v.* Ritter, 66 Ind. 136; Barber *v.* Merriam, 11 Allen (Mass.), 322; Thompson *v.* Trevanion, Skinner, 402; Aveson *v.* Kinnaird, 6 East, 188; Bacon *v.* Charlton, 7 Cush. (Mass.) 581; Denton *v.* Bate, 1 Swan (Tenn.), 279; Illinois &c. R. Co. *v.* Sutton, 42 Ill. 438; State *v.* Gedicke, 43 N. J. L. 86; Eckles *v.* Bates, 26 Ala. 655; Quaife *v.* Chicago &c. R. Co., 48 Wis. 513; *s. c.* 33 Am. Rep. 821; Brown *v.* N. Y. &c. R. Co., 32 N. Y. 597; Towle *v.* Blake, 48 N. H. 2.

[3] Heald *v.* Thing, 45 Me. 392.

condition.[1] The reason of the rule which excludes the declarations as incompetent, excludes also an opinion, based in whole or in part thereon.[2]

§ 592. **Facts and Opinion Mingled.** — On an issue of sanity or insanity, a witness, who has had opportunities of knowing and observing the person in question, may not only depose to the facts which he knows, but he may also give his opinion or belief as to his sanity or insanity.[3]

§ 593. **Witness not to decide Disputed Questions of Fact.** — Expert witnesses cannot be called upon to decide disputed questions of fact, thereby assuming the office of the jury.[4]

§ 594. **But Examined on Hypothetical Facts.** — The proper mode of examination is upon facts hypothetically stated;[5] or, as it is sometimes said, upon a hypothethical case, stated to them and so proved as to resemble, as near as may be, the case under consideration.[6]

§ 595. **Not to give Opinions based upon Hearing the Evidence.** — The general rule is that it is not the province of an expert witness *to draw inferences from the evidence* of other witnesses, unless the facts testified to are clear and uncontroverted, or to take into consideration such facts as he can recollect as having been testified to, and thus form an opinion; but he should

[1] Heald *v.* Thing, 45 Me. 392.

[2] *Ibid.*

[3] Clary *v.* Clary, 2 Ired. L. (N. C.) 78; *ante*, § 589.

[4] Hitchcock *v.* Burgett, 38 Mich. 501; Craig *v.* Noblesville &c. R. Co., 98 Ind. 109; Burns *v.* Barenfield, 84 Ind. 43; Livingston *v.* Com., 14 Gratt. (Va.) 592; United States *v.* McGlue, 1 Curtis C. C. 1. To the like effect see Heald *v.* Thing, 45 Me. 392; 1 Greenl. Ev., § 440; Redf. Am. Cas. on Law of Wills, 40; 1 Whart. Ev., § 452. It is, therefore, improper to take down the testimony of the witnesses and read it over to the experts, to enable them to express an opinion as to the sanity or insanity of the accused in a criminal trial. Choice *v.* State, 31 Ga. 424.

[5] Spear *v.* Richardson, 37 N. H. 24; Woodbury *v.* Obear, 7 Gray (Mass.), 467; United States *v.* McGlue, 1 Curt. (U. S.) 1; Guitterman *v.* Liverpool &c. Steamship Co., 83 N. Y. 358; Davis *v.* State, 35 Ind. 496; Livingstone *v.* Com., 14 Gratt. (Va.) 592.

[6] Boardman *v.* Woodman, 47 N. H. 120, 135.

have full knowledge of the ascertained or supposed state of facts, on which his opinion is desired.[1] It is therefore improper, in most cases, and therefore error, to submit to him the testimony detailed by the witnesses in their hearing, and to ask him his opinion thereon.[2]

§ 596. [CONTINUED.] OBSERVATIONS ON THE ABOVE RULE.— In the celebrated *case of M'Naghten*, the following question was put by the lords to the judges: "Can a medical man, conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing the act, that he was acting contrary to law, or whether he was laboring under any, and what delusion at the time?" To this the judges, speaking through Tindal, C. J., answered: "In answer thereto, we state to your lordships, that we think the medical man, under the circumstances supposed, cannot in strictness, be asked his opinion in the terms above stated; because each of those questions involves the determination of the truth of the facts deposed to, which is for the jury to decide, and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But, where the facts are admitted or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right."[3] This decision, in the highest judicial tribunal of Great Britain, is generally regarded as having established the modern law upon the question. - - - - On a trial for murder, subsequently occurring, evidence was called on the prisoner's behalf, to prove his insanity. A physician, who had been in court during the whole trial, was then called, on the part of the prosecution, and asked whether, having heard the whole evidence, he was of opinion that the prisoner, at the time he committed the alleged act, was of unsound mind. It was held, notwithstanding the opinion of the judges in the case of McNaghten, that such a question ought not

[1] Guitterman *v.* Liverpool &c. Steamship Co., 83 N. Y. 358.

[2] Woodbury *v.* Obear, 7 Gray (Mass.), 467; Jameson *v.* Drinkald, 12 Moore, 148; The Clement, 2 Curt. (U. S.) 363, 369; McMechen *v.* McMechen, 17 W. Va. 684, 694; Reg. *v.* Frances, 4 Cox Cr. Cas. 57.

[3] M'Naghten's Case, 10 Cl. & Fin. 200, 211.

to be put, but that the proper mode of examination was to take particular facts, and, assuming them to be true, to ask the witness whether, in his judgment, they were indicative of insanity on the part of the prisoner at the time the alleged act was committed.[1] - - - - "This," said Chief Justice Shaw, "would be especially irregular, where the evidence is conflicting, because it puts it in the power of the expert to give an opinion upon the credibility of the testimony and the truth of the facts, which is purely a question for the jury; and then, upon the value and efficacy of the facts and circumstances, in his opinion thus proved, upon the question of soundness of mind."[2]

§ 597. [CONTINUED.] NOT TO GIVE OPINIONS UPON DEPOSITIONS SUBMITTED TO THEM. — Experts called in a case in admiralty cannot give their opinions upon depositions submitted to them, but they must be examined upon a hypothetical state of facts submitted to them by the court, which facts the trier of the facts finds to be established by the evidence.[3] - - - - Upon the trial of an action brought to recover damages for the breach of a charter-party, the principal question was whether or not the ship, which had been disabled by a storm while near the port of Vera Cruz, could have put into any of the ports of the Gulf of Mexico or the Southern Atlantic States. Upon the trial, experts, called on behalf of the plaintiff, were asked, against the defendant's objection and exception, the following question: "Under the state of facts mentioned in that deposition, what ports could the captain have made in the Gulf of Mexico?" They were also asked other questions of a similar import. It was held error to admit these questions, since they required each witness to determine for himself what facts were proved by the deposition, and thus to usurp the functions of a jury.[4]

§ 598. [CONTINUED.] FURTHER ILLUSTRATIONS. — So, in a contest touching the validity of a will, it is not admissible to ask a medical expert whether, after having heard the evidence, he is or is not of opinion that the testator was of sound mind.[5] - - - - Nor can he, in such a case be

[1] Reg. *v.* Frances, 4 Cox Cr. Cas. 57.

[2] Woodbury *v.* Obear, 7 Gray (Mass.), 467, 471.

[3] The Clement, 2 Curt. (U. S.) 363, 369.

[4] Dolz *v.* Morris, 10 Hun (N. Y.), 201.

[5] Woodbury *v.* Obear, 7 Gray (Mass.), 467; Butler *v.* St. Louis Life Ins. Co., 45 Iowa, 93. See further, Phillips *v.* Star, 26 Iowa, 349; State *v.* Felter, 25 Iowa, 67; 1 Greenl. Ev. § 440. See also Freeman *v.* Lawrence, 11 Jones & Sp. (43 N. Y. Sup.,) 288.

asked to give his conclusion, in view of the testimony, as he has heard it, in connection with his own personal knowledge of the testator.[1] - - - - It was so held where a physician examined as an expert was asked a question in these words: "Now, then, you will state to the jury if the symptoms and indications testified to by the witnesses were proved, and if the jury were satisfied of the truth of them, — I wish you to state whether, in your opinion, having heard all the symptoms and indications, Joseph Hickenbottom was of sound or unsound mind, and if unsound, what is the nature and character of that unsoundness?"[2] - - - - So, where on a trial for murder, a physician, who stated that he had heard the statements of the witnesses as to the circumstances which immediately preceded the illness of the deceased, the appearance of the body after death, the condition of the limbs, etc., and could therefrom offer an opinion as to the cause of death, was permitted to testify what, in his opinion, was the cause of the death, — this was error.[3] - - - - So, in an action for damages growing out of a maritime collision, it was held improper to ask a nautical expert whether he thought, having heard the evidence in the case, that the conduct of the captain was correct or not.[4] - - - - In an action against a common carrier by sea, to recover damages for injury to the freight by a collision with a collier, after a protest or statement as to the circumstances attending the injury and the management of the vessel had been given in evidence, and after witnesses had testified in reference thereto, there being a discrepancy

[1] Thus, on a question respecting insanity of a deceased person, an expert witness had given his opinion based on his personal observation and treatment of the deceased. Afterwards, in answer to certain questions propounded to him, he stated that he had heard all the testimony that had been given in the case. The plaintiff's counsel then propounded to him the following questions: "Q. I will put this question. In view of the testimony as you have heard it, and in connection with your own knowledge of the state of Mr. Butler at the time he was in the asylum in 1847, in your opinion, was he or not, at that time, insane?" A. "That opinion I have already expressed — that he was not insane — based upon my own personal knowledge." The Court: "He is giving you a hypothetical case." Q. (to the same as before). "I want the opinion now with your own individual observation from what has reached you in the testimony?" A. "The testimony has not served to induce me to change my opinion already expressed." It was held that the ruling of the court in allowing these questions to be put, against objection, was prejudicial error. Butler *v.* St. Louis Life Ins. Co., 45 Iowa, 93.

[2] Smith *v.* Hickenbottom, 57 Iowa, 733, 738.

[3] State *v.* Bowman, 78 N. C. 509.

[4] Sills *v.* Brown, 9 Car. & P. 601.

between the protest and some of the testimony, and the evidence covering a great variety of facts, a witness called as an expert by the plaintiff, after having testified that he had heard the testimony read to the jury on the previous day, and the protest, and had heard the testimony of one or two of the witnesses and the circumstances as detailed by them,— was asked, "under the circumstances detailed by these witnesses and in the protest," and under certain circumstances which were specified, "what, in your opinion, should have been done by the persons in charge of the steamship?" It was held, applying the foregoing principle, that the question was incompetent.[1]

§ 599. [Contra.] **When the Evidence may be Submitted to Experts.** — Contrary to the foregoing, there is considerable judicial opinion, apparently following the lead of *M'Naghten's Case*[2] to the effect that the cases where the expert cannot be asked to give his opinion upon the testimony as he has heard it detailed by the witnesses, are those in which the *facts are controverted*.[3] Upon this subject it has been reasoned: "Where the facts stated are not complicated, and the evidence is not contradictory, and the terms of the question require the witness to assume that the facts stated are true, he is not, [where he is called upon to give an opinion upon the evidence which he has heard,] required to draw a conclusion of fact."[4]

§ 600. [Continued.] In Actions for the Value of Services. — In an action for work and labor, after plaintiff had testified as to the character of the services rendered, he called a witness who was asked: "What were his services, as he describes them, worth a month?" This was objected to, upon the ground that it was not competent for the witness to give an opinion based on the plaintiff's statement. The objection was overruled. It was held that this was not error, since the question did not call upon the witness to determine the truth of the

[1] Guitterman *v.* Liverpool &c. Steamship Co., 83 N. Y. 358 (denying Fenwick *v.* Bell, 1 Car. & K. 312, and distinguishing Transportation Line *v.* Hope, 95 U. S. 297).

[2] 10 Cl. & Fin. 200, 211; *ante*, § 596.

[3] This seems to have been assumed in United States *v.* McGlue, 1 Curt. (U. S.) 1; and in Guitterman *v.* Liverpool &c. Steamship Co., 83 N. Y. 358; and in Davis *v.* State, 35 Ind. 496. Compare Fairchild *v.* Bascomb, 35 Vt. 398.

[4] Hunt *v.* Lowell Gaslight Co., 8 Allen (Mass.), 169, opinion by Chapman, J.

plaintiff's evidence, but was simply asking him what were the services worth, assuming that they were rendered as described, and leaving the jury to determine that question.[1] - - - - A physician who had testified to his knowledge of cases of *cancer* and of the value of services in caring for them, who also testified that he had heard the evidence of other physicians who had treated and who described the cancer in question, and had heard the testimony of the plaintiff's wife read, but who had no personal knowledge of the case, was asked: "What would be the value of the services rendered by her in nursing and dressing the cancer?" This was objected to, and the answer was received under exception. It was held that this mode of interrogation was erroneous; since the question called upon the witness to assume the correctness of, and to draw inferences from the evidence of other witnesses, and that his opinion should have been obtained by stating to him a hypothetical case.[2] - - - - But in such a case, a physician who knows the value of such services, and who is also acquainted with the particular case, may give his opinion as to the value of the services sued for.[3]

§ 601. [Continued.] Other Instances where this has been Done. — Cases are found where medical experts, who have heard the evidence, have been allowed to give their opinion based thereon. Thus, in a criminal case where the prisoner's defense was insanity, a medical man, who had sat through the trial, might, it was held by Park, J., be asked whether the facts proved showed symptoms of *insanity*.[4] - - - - An expert who was present at the trial and who heard all the testimony of the witnesses on the part of the defendant, in regard to the sanity of the party, was asked: "Upon the hypothesis that the testimony given by the witnesses in this case, etc., *is all true*, then what would be your opinion" of the *sanity* of the party. It was held that this question was substantially correct, as it was in effect putting a hypothetical state of case to the witness, from which his opinion was to be given.[5] - - - - In an action against a gaslight company, for a negligent injury caused by an escape of gas from its main pipe into the public street, exceptions to the following question, put to three medical experts, were held not well taken: "Having heard the evidence, and assuming the statements made by the plaintiffs to be true, what, in your opinion, was their *sickness*, and do

[1] McCollum *v.* Seward, 62 N. Y. 317.

[2] Reynolds *v.* Robinson, 64 N. Y. 589.

[3] Reynolds *v.* Robinson, *supra*.

[4] Rex *v.* Searle, 1 Mood. & Rob. 75.

[5] Negro Jerry *v.* Townshend 9 Md. 145, 159.

you see any adequate cause for the same?" [1] - - - - So, where, in an action for *malpractice* by a surgeon, an expert had heard the testimony of a particular witness as to the manner in which the operation had been performed, and was thereafter questioned as follows: "Suppose his statement relative to the amputation and its subsequent treatment to be truthful, was, or was not, the amputation well performed? Was the subsequent treatment of the patient proper or improper? And, in your opinion, was, or was not, the death of the patient the result of any neglect or want of skill in the surgeon?"— it was held that the court erred in rejecting these questions, though, as the testimony of the witness had been put to the expert as a supposed case, the error was without prejudice.[2] - - - - So, it has been held, in an action for work and labor, where the *value of the services* is in question, that it is competent for a witness, who has heard the testimony of another witness as to the *nature* and *extent* of the *services* rendered, to give an opinion as to their value. The court said: "The question directed the attention of the witness to the testimony of a single witness upon a single subject, and was not other in effect than it would have been, if the counsel had recited the statement of services rendered by the party, and, on that statement, asked an opinion of their value." This was equivalent to a question, "assuming that the services rendered were as described by the witness, what were they worth?" [3]

§ 602. [Continued.] **What if the expert has not heard all the Testimony.** — A medical expert called as a witness is not qualified to express an opinion, based on previous testimony in the case, where he has not heard all the testimony which may have been material to the subject of the inquiry.[4] Thus, it is not competent for a medical witness who has not heard all the testimony, given in a case of murder, tending to show the mental condition of the defendant, where the defense is insanity, to give an opinion founded upon the portion heard by him, as to his sanity.[5]

§ 603. [Continued.] **Opinion founded on an Opinion.** — It has been said that an expert may give his opinion to the *facts*

[1] Hunt *v.* Lowell Gaslight Co., 8 Allen (Mass.), 169.

[2] Wright *v.* Hardy, 22 Wis. 348.

[3] Seymour *v.* Fellows, 77 N. Y. 178.

[4] Carpenter *v.* Blake, 2 Lans. (N. Y.) 206; People *v.* Lake, 12 N. Y. 358; *s. c.* 1 Park. Cr. (N. Y.) 495.

[5] People *v.* Lake, *supra*.

testified to by the witnesses, but not upon their — *opinions*, which means that an expert's opinion cannot be founded upon an opinion.[1]

§ **604. Hypothetical Questions, how Framed.** — The rule, then, is that the hypothetical questions must be based either upon the hypothesis of the truth of all the evidence, or upon a hypothesis specially framed, of certain facts *assumed to be proved*, for the purpose of the inquiry. Such questions leave it for the jury to decide, in the first case, whether the evidence is true or not, and in the second case, whether the particular facts assumed are or are not proved.[2] It should exclude any opinion of the witness as to the way in which disputed facts should be found.[3]

§ **605. [Continued.] Must not embrace Matters within Ordinary Experience.** — The hypothetical questions must not embrace matters within the range of ordinary human experience; because, as to such matters, the opinions of the twelve men in the jury box are better, in the eye of the law, than those of the experts.[4]

§ **606. Must be Based on the Evidence.** — Hypothetical questions must present facts which the evidence *tends to prove;* if the facts embraced in them are not proved or attempted to be proved, they are to be excluded by the court upon objection.[5] There must be testimony *tending to prove* every supposed state of fact embraced therein.[6] The hypothesis must be *clearly stated*, so that the jury may know with certainty upon precisely

[1] Walker *v.* Fields, 28 Ga. 237.

[2] Gottlieb *v.* Hartman, 3 Col. 53, 63; adopting Carpenter *v.* Blake, 2 Lans. (N. Y.) 206.

[3] Livingstone *v.* Com., 14 Gratt. (Va.) 592.

[4] State *v.* Anderson, 10 Ore. 448, 455; Hill *v.* Portland &c. R. Co., 55 Me. 439.

[5] State *v.* Anderson, 10 Ore 448, 455; Williams *v.* Brown, 28 Oh. St. 547; Bomgardner *v.* Andrews, 55 Ia. 638; Hurst *v.* Railway Co., 49 Ia. 76; Goodwin *v.* State, 96 Ind. 550, 554; Bishop *v.* Spining, 38 Ind. 143; Haish *v.* Payson, 107 Ill. 365.

[6] Hathaway *v.* National Life Insurance Co., 48 Vt. 336.

what state of assumed facts the expert bases his opinion.[1] Mere *fanciful questions*, where there is no evidence at all in support of the facts assumed, or questions assuming facts which are wholly *irrelevant* to the subject of the investigation, should be excluded.[2] But where there is evidence, either directly proving the facts assumed, or evidence from which such facts may be inferred, the court cannot invade the province of the jury and decide the facts. "It is," said Elliott, J., "only where there is *no evidence at all* in support of the facts assumed, or where the question is clearly *irrelevant*, or where it is merely *speculative*, or where it is *improperly framed*, that the court may interfere.[3] Within this rule, whether the facts are all proved, upon which the hypothetical question is based, or to what extent they are proved, is a question, not for the court, but for the jury.[4] In fine, there should be evidence in support of the hypothesis, of such probative strength that, according to the principles prevailing in the particular jurisdiction, the judge would be warranted in submitting such facts to the jury for their finding. In general, it is sufficient that there is *substantial evidence* tending to establish the hypothesis; for the judge cannot say, before the question reaches the jury, whether or not it has been established.[5]

§ 607. **Latitude in Framing them.** — It was said in one case that "some latitude must necessarily be given, in the examination of medical experts, and in the propounding of hypothetical questions for their opinion, the better to enable the jury to pass upon the questions submitted to them. The opinion is the opinion of the expert, and if the facts are found by the jury, as the counsel, by his questions, assumes them to be, the opinion may have some weight; otherwise, not. It is the privilege of the counsel, in such cases, to assume, within the limits of the evi-

[1] McMechen *v.* McMechen, 17 W. Va. 684.

[2] People *v.* Augsbury, 97 N. Y. 501. See also Fairchild *v.* Bascomb, 35 Vt. 398; Williams *v.* Brown, 28 Oh. St. 547.

[3] Louisville &c. R. Co. *v.* Falvey, 104 Ind. 409, 420.

[4] *Ibid.*

[5] Nave *v.* Tucker, 70 Ind. 15, 18.

dence, any state of facts *which he claims the evidence justifies*, and have the opinion of experts upon the facts thus assumed." [1]

§ 608. **No Objection that they contain Errors.** — It is no objection to a hypothetical question that the state of facts which it assumes is erroneous, if within the possible or probable range of the evidence; since the judge cannot decide, as a preliminary question on an objection to evidence, whether it is erroneous or not, — the question being for the jury.[2]

§ 609. **Not Necessary to State Facts as Proved.** — It is generally said in the books that, in putting hypothetical questions to an expert witness, counsel may assume the facts in accordance with *his theory* of them; it is not essential that he state them to the witness as they have actually been proved.[3] In discussing this question, it was said by Folger, J.: "The claim is, that a hypothetical question may not be put to an expert, unless it states the facts as they exist. It is manifest, if this is the rule, that, in a trial where there is a dispute as to the facts, which can be settled only by the jury, there would be no room for a hypothetical question. The very meaning of the word is that it supposes, assumes something, for the time being. Each side, in an issue of fact, has its theory of what is the true state of the facts, and assumes that it can prove it to be so, to the satisfaction of the jury; and, so assuming, shapes hypothetical questions to experts accordingly." [4]

§ 610. **Need not embody all the Facts.** — In general, it is not necessary that hypothetical questions should embody all the facts exhibited by the evidence; it is sufficient, on the contrary, that they embody such a state of facts, fairly within the range of the evidence, as the counsel propounding them deem to have

[1] Filer *v.* New York &c. R. Co., 49 N. Y. 42, 46.

[2] Hartnett *v.* Garvey, 66 N. Y. 641.

[3] Lovelady *v.* State, 14 Tex. App. 545, 560; Guitterman *v.* Liverpool &c. Steamship Co., 83 N. Y. 358; Cowley *v.* People, *Id.* 464.

[4] Cowley *v.* People, 83 N. Y. 464, 470; *s. c.* 38 Am. Rep. 464.

been proved.[1] But where the facts are not in dispute, it is proper to require that the hypothetical question shall embrace them all, and that the witness shall take them all into consideration, in giving his answer.[2] Where, however, the *evidence is conflicting*, or the facts are in dispute, the party examining an expert witness is at liberty to frame a hypothetical state of facts, within the limits of the evidence, according to *his theory* of what the evidence tends to prove, or of what the finding of the jury should be; and it will be no objection that it is partial, and does not cover all the evidence in the case, or all the ultimate facts which there is evidence tending to prove.[3]

§ 611. [CONTINUED.] DICTA UPON THIS SUBJECT. — Thus, in a case in Indiana, it was said by Elliott, J.: "A doctrine which requires a prosecutor to assume and embody in one question conflicting testimony, cannot be defended on any ground consistent with sound reason. It would operate unjustly in practice, because it would impose upon an examining counsel the necessity of assuming as true that which he denies in fact, and thus the jury would be confused and perplexed by an apparent admission of facts antagonistic to the theory of the prosecution. It would require the court, whenever an objection was interposed, to determine what facts were proved, and what were not, and thus compel an invasion of the province of the jury. It would produce endless wrangling and confusion, darken and obscure the investigation of the recondite subject of mental capacity, and place the falsest testimony and the absurdest statements on an equality with the truest and most reasonable. On the other hand, no harm can be done the accused by holding that the examining counsel may assume such a case as the evidence, in his judgment, makes out, and which keeps within the range of the relevant testimony, because the prisoner's counsel may, on cross-examination, add to the hypothetical case supposed by the prosecutor, such facts as he deems the evidence to have established, or subtract from it such facts as he supposes to have been disproved, or not to have

[1] Goodwin *v.* State, 96 Ind. 550, 554 (denying People *v.* Thurston, 2 Park. Cr. (N. Y.) 49); Louisville &c. R. Co. *v.* Falvey, 104 Ind. 412; Elliott *v.* Russell, 92 Ind. 526; Vanvalkenberg *v.* Vanvalkenberg, 90 Ind. 433, 437; Fulwider *v.* Ingels, 87 Ind. 414; Guetig *v.* State, 66 Ind. 94; *s. c.* 32 Am. Rep. 99; Nave *v.* Tucker, 70 Ind. 15; Bishop *v.* Spining, 38 Ind. 143; Davis *v.* State, 35 Ind. 496; *s. c.* 9 Am. Rep. 760.

[2] Davis *v.* State, 35 Ind. 496.

[3] Davis *v.* State, 35 Ind. 496.

been proved." [1] In like manner it is said by Worden, C. J., in an earlier case in the same State: "The party seeking an opinion in such case may, within reasonable limits, put his case hypothethically, as he claims it to have been proved, and take the opinion of the witness thereon; leaving the jury, of course, to determine whether the hypothetical case put is the real one proved." [2] Upon the same subject the Supreme Court of Wisconsin has said: "The rule in that respect must be that, in propounding a hypothetical question to the expert, the party may assume as proved, all facts which the evidence in the case tends to prove, and the court ought not to reject the evidence, on the ground that, in his opinion, such facts are not established by the preponderance of evidence. What facts are proved in the case, when there is evidence to prove them, is a question for the jury, and not for the court. The party has the right to the opinion of the expert witness on the facts which he claims to be the facts of the case, if there be evidence in the case tending to establish such claimed facts, and the trial judge ought not to reject the question because he may think such facts are not sufficiently established." [3] In short, the rule seems to be that a physician testifying as an expert cannot be permitted to decide upon the credibility of witnesses, or to take into consideration facts known to him and not communicated to the jury; but after having communicated such facts in his testimony, he may take them into consideration in forming his opinion.[4]

§ 612. Long Hypothetical Questions Objectionable. — The giving of long hypothetical questions, which assume the existence

[1] Goodwin *v.* State, 96 Ind. 550, 554.

[2] Bishop *v.* Spining, 38 Ind. 143. To the same effect see Guitterman *v.* Liverpool &c. Co., 83 N. Y. 358; Davis *v.* State, 35 Ind. 496; *s. c.* 9 Am. Rep. 760; Guetig *v.* State, 66 Ind. 94; Nave *v.* Tucker, 70 Ind. 15. It is said by a recent writer on this subject: "If framed on the assumption of certain facts, counsel may assume the facts in accordance with his theory of them, it not being essential that he should state the facts as they actually exist." Rogers' Expert Test. 39. Another recent writer thus states the rule: "It is the privilege of the counsel in such case to assume, within the limits of the evidence, any state of facts which he claims the evidence justifies, and have the opinion of experts upon the facts thus assumed." Lawson Exp. & Op. Ev. 153.

[3] Quinn *v.* Biggins, 63 Wis. 664, 670.

[4] Koenig *v.* Globe Mutual Life Ins. Co., 10 Hun (N. Y.), 558; Hunt *v.* Lowell Gaslight Co., 8 Allen (Mass.), 169; Van Zandt *v.* Mutual Benefit Ins. Co., 55 N. Y. 169; *s. c.* 14 Am. Rep. 215; Bush *v.* Jackson, 24 Ala. 273; Bennett *v.* Fail, 26 Ala. 605; Louisville &c. R. Co. *v.* Falvey, 104 Ind. 409, 419.

of a multitude of facts, is *erroneous*.[1] The reason of this rule is thus stated by Mr. Justice Campbell: "In most cases it asks the witness to usurp the functions of the jury, and may often lead them to disregard their own functions and accept conclusions which they should form for themselves. But it may also be observed that another result, even where the question involves science, is nearly as dangerous. No opinion of a scientific question can be of any service to a jury, either in giving them direct knowledge, or in enabling them to compare opinions, unless they know just what elements enter into the opinion. Human memory is not usually so tenacious that a question of such great length, involving many distinct facts or elements, can be fully remembered by the witness to whom it is propounded on the stand; and it is practically unlikely, if not impossible, that when he answers it, he answers it with a view of all these separate elements. He necessarily answers it by assuming for himself what is material and what is immaterial, and if he were at the same time to show what matters he has eliminated, there could be no difficulty in ascertaining what is needed, and testing all witnesses by the same standard. But where this process is repeated by

[1] People *v.* Brown, 53 Mich. 531; Haish *v.* Payson, 12 Bradw. (Ill.) 539, 546; *s. c.* affirmed on this point, 107 Ill. 365, 371. This case furnishes a strikingly fantastic illustration of an abuse of the rule in this regard. The so-called hypothetical question was long enough to fill two and a half pages of a book of standard law reports. It was, according to the description of the appellate court, "replete with absolute assertions of facts and even extended into the domain of pure speculation." It was "a high-sounding prologue;" it "abounded with strong adjectives," and with "now and then a rhetorical expletive," and "embodied a rather vigorous argument to prove the magnitude of the victory, which the plaintiffs had won for the defendant; his immediate gains, his rescue from impending perils, the superior advantages which he thereby acquired over other persons with whom he had no connection; a victory, whose stupendous results to the defendant, the argument traced down through the next succeeding fourteen years of the uncertain future, showing that the defendant might realize, as a crowning result of the plaintiff's services, the great sum of $1,120,000, if he would but attend to his business during that time." And although it was put to *six expert lawyers* on a question of the *value of professional services*, it was drawn in such a manner as obliged the court to assume that even *they* would not be able to understand it, and it was therefore held bad.

different witnesses, they may not all act on the same basis, and conflicts of opinion will appear, which are more apparent than real. In science, as everywhere else, all inquiries should be brief and clear enough to leave out all rubbish and direct attention to tangible results." [1] There is another, and, within certain limits, an obviously sound view, which was thus expressed in a late opinion of the Supreme Court of the United States, given by Mr. Justice Field: "The length of hypothetical statements presented to a witness to ascertain his opinion upon any matter growing out of the facts supposed, will necessarily depend upon the simple or complicated character of the transactions recited, and the number of particulars which must be considered for the formation of the opinion desired; and this subject, like the extent to which the examination of a witness may be allowed, must, in a great degree, be left to the *discretion* of the court." [2]

§ 613. Whether Witness concurs in the Testimony of Another Expert.— An expert who has heard the testimony of another expert, may not properly be asked whether he concurs therein, and if not, wherein he differs from it. Such a mode of eliciting the opinion of the witness may have the merit of being expeditious, but it may be attended with unfairness toward the witness himself, as well as toward the opposite party. "Witnesses called upon to testify professionally should be left free to give their own individual opinion, upon the facts involved, unconnected with, and untrammeled by the opinions of others who may have been examined." [3]

§ 614. [CONTINUED.] INSTANCES OF PROPER HYPOTHETICAL QUESTIONS.— In an action for damages against a druggist for selling opium to the plaintiff's wife, whereby she became sick, emaciated, etc., the following question was put to a doctor of medicine: "In your judgment, speaking from your experience as a physician and surgeon, what would the natural result of three of these bottles of opium, called laud-

[1] People *v.* Brown, 53 Mich. 531, 535.

[2] Forsythe *v.* Doolittle, 7 Sup. Ct. Rep. 498; *s. c.* 120 U. S. 73.

[3] Horne *v.* Williams, 12 Ind. 325, 329, opinion by Worden, J.

anum, be upon Mrs. Hoard, as you know the woman, and her situation and constitution, and all that?" It was held that the question was clearly proper. The court, speaking through Foster, J., said: "If it had been based upon the evidence which had then been given, there is good ground for holding that it should have been excluded, because the witness would have been called upon to determine as to the truth or the falsity of all of the evidence, and he would have also to found his conclusions as to the effect to be given to it, both of which belong exclusively to the jury; while, in the form in which the question was put, if the jury found that the facts proved did not warrant any or all of the assumptions of the hypothetical question, they would treat the answer of the doctor as not relevant to the case. The true rule is to state a hypothetical case to the witness."[1] - - - - The following form was approved in a case where it was deemed proper to take the opinions of witnesses upon the evidence, as they had heard it:[2] "Suppose all the facts stated, by the several witnesses to be true, was Mr. Woodbury laboring under an insane delusion, or was he of an unsound mind?"[3] - - - - In another case the same court ruled that the proper question to be put to a medical witness was this: "If the symptoms and indications testified to by the other witnesses are proved, and if the jury are satisfied of the truth of them, whether in his opinion, the party was insane, and what was the nature and character of the insanity; what state of mind did they indicate, and what he would expect to be the conduct of such person in any supposed circumstances."[4]

§ 615. **Whether Expert can give Opinion upon the whole Case.**— It has been ruled, and the decision followed, that, where scientific men are called as witnesses, they are not entitled to give their opinions as to the merits of the case, but only as to the facts as proved at the trial.[5] This is undoubtedly the general rule, as shown by the cases in the next section. It is equally true that great difficulty must arise in applying it, where the issue is whether a certain person was, at the doing of a certain

[1] Hoard *v.* Peck, 56 Barb. (N. Y.) 203, 210.

[2] *Ante*, § 599.

[3] Woodbury *v.* Obear, 7 Gray (Mass.), 467, 468.

[4] Com. *v.* Rogers, 7 Metc. (Mass.) 500, 505.

[5] Jameson *v.* Drinkald, 12 Moore, 148; People *v.* Lake, 12 N. Y. 358, per Hand, J. See also Rex *v.* Wright, Russ. & Kir. 456; Norman *v.* Wells, 17 Wend. (N. Y.) 136, 161; Mayor *v.* Pentz, 24 Wend. (N. Y.) 668; Fish *v.* Dodd, 4 Denio (N. Y.), 311.

act, *sane or insane*,[1] and it is believed that in most of these cases the question is so framed — and unavoidably so — as to call for the opinion of the expert upon the very fact in issue. What else can he generally answer in such a case? Moreover, the view, already shown,[2] that, in certain cases, experts may be permitted to give their opinions upon the evidence as they have heard it detailed by the witnesses, would seem to carry with it the conclusion that the opinions which they are to give are opinions upon the main issue. Accordingly, we find that it has been held not a good objection that the question goes to the whole merits, and that the witness is required to give an opinion upon the very question which the jury are to determine. It was so held, where a person, skilled in the art of navigation, was asked *to what the loss was attributable*.[3] But, in general, the hypothetical questions may and must be so framed as to call for the opinion of the witness upon an assumed state of facts, without requiring him *in form* (though it may require him *in substance*) to decide the whole controversy. Perhaps a good instance of this is afforded by a case where the action was against a carrier by water, to recover damages for a loss of goods alleged to have occurred through the negligence of the defendant's servants and agents, while towing the plaintiff's barge from Jersey City to New Haven, through Long Island Sound. It was held that no error was committed by asking an expert: "With your experience, would it be safe or prudent for a tug boat on Chesapeake Bay, or any other tide water, to take three boats abreast, with a high wind?"[4]

§ 616. [CONTINUED.] INSTANCES OF QUESTIONS BAD BECAUSE CALLING FOR A DECISION OF THE WHOLE CASE. — But, in an action to recover damages for injuries alleged to have been sustained by the plaintiff's *canal-boat*, through the *negligence* of the defendant, it was held improper to ask a witness for the defendant as follows: "Did Mr. Carpenter (the plaintiff), in your opinion as a canal-boat man, in any way omit or neg-

[1] People *v.* Lake, *supra*. Compare White *v.* Bailey, 10 Mich. 155.

[2] *Ante*, § 599.

[3] Walsh *v.* Washington Marine Ins. Co., 32 N. Y. 427, 443.

[4] Transportation Line *v.* Hope, 95 U. S. 297.

lect to do anything which he might have done to save his boat?" [1] The court said: "An expert may be asked whether certain acts, which are proven, are *seamanlike* and proper, under a given state of circumstances; but he cannot be allowed to express an opinion as to what was, or was not done as matter of fact." [2] - - - - So, in an action for damages against a *railway company*, grounded upon *negligence*, it is not competent for the defendant to ask a witness, who is an experienced railroad man, whether or not, in his opinion, certain signals "were reasonable or unreasonable," "prudent or extraordinary;" or whether or not similar signals are given by other railway corporations. Such questions sought to obtain from the witness answers to questions which the jury were to answer, where the facts were of a character equally within the knowledge and comprehension of the jury as of the witnesses. They asked for mere naked expressions of opinion as to the character and quality of acts which were open to common observation.[3] - - - - So, on the trial of an action for *damages resulting in death*, the deposition of a medical man was read, containing the following question and answer: "Do you think that, with different, or in the exercise of greater care, he would probably have recovered?" Answer: "The treatment and care of Laughlin were, in my opinion, prudent. I believe a change in either would not have produced any different results." It was held that this should have been excluded. The court said: "This question and answer put the witness in the place of the jury, to determine the ultimate fact, and it was therefore error to admit them. The witness might properly state what facts he knew respecting the treatment and care, and then give his medical opinion upon such facts; or he might be asked his opinion upon an assumed state of facts, which the testimony of the other witnesses tended to establish. But such a question, as asked, was improper, because the witness might base his opinion upon facts which *he assumed*, but which the jury might not find, or which had no existence in the case. A medical man's opinion is very competent when the facts upon which it is based are testified to by himself, or by others; but his opinion, without the facts, is not competent, because he is not authorized to find or assume the facts at his pleasure; they are to be found by the jury, and if they do not exist as he assumes them, his opinion may go for naught." [4] - - - - So, in an action

[1] Carpenter *v.* Eastern Transportation Co., 71 N. Y. 574.

[2] Carpenter *v.* Eastern Transportation Co., 71 N. Y. 574, 579.

[3] Hill *v.* Portland &c. R. Co., 55 Me. 439.

[4] Muldowney *v.* Illinois Cent. R. Co., 39 Ia. 616, 622.

against a *surgeon* for the *negligent and unskillful treatment* of a dislocated arm, the defendant claimed "consecutive luxation," or a displacement after an actual reduction. It was held that it was not competent to ask a surgical witness, "Do you believe, from what you have heard of the testimony in this case, that this arm has been the subject of consecutive luxation?"—since this required the witness to perform the function of the jury.[1] - - - - A medical witness having testified to seeing the decedent, some two or three months before the making of the will, which was challenged on the ground of a *want of testamentary capacity*, was asked: "From what you saw, what was his mental capacity?" This question was understood as referring to his mental capacity to make a will, and it was held incompetent, because presenting to the witness a question of law, and not of medical science,[2]—a conclusion which does not seem to be sound.

§ **617. What if the Answers go beyond the Questions.** — It is no objection to the answers of the experts, that they include considerations not referred to in the questions, as constituting the basis of the opinions given, provided they are such as the testimony tends to prove, and such as might properly have been included in the questions.[3]

§ **618. Reasons on Examination-in-chief.** — An expert may give the grounds and reasons of his opinion, on his examination-in-chief, as well as the opinion itself; it is not necessary that he should wait to have them drawn out on cross-examination.[4]

§ **619. Opinions founded upon Books.** — While medical books, which are stated by medical witnesses to be works of authority, cannot be put in evidence upon an issue upon which they might speak, yet medical witnesses may be asked their judgment, and the grounds of it, upon the question; and it is no objection to their answers that they are in some degree founded upon these books, as a part of their general knowledge.[5]

[1] Carpenter *v.* Blake, 2 Lans. (N. Y.) 206.

[2] White *v.* Bailey, 10 Mich. 155.

[3] Hathaway *v.* National Life Ins. Co., 48 Vt. 336.

[4] Keith *v.* Lathrop, 10 Cush. (Mass.) 454; Com. *v.* Webster, 5 Cush. (Mass.) 295, 301; Collier *v.* Simpson, 5 Car. & P. 73.

[5] Collier *v.* Simpson, 5 Car. & P. 73.

§ 620. **Experiments in the Presence of the Jury.** — These are generally discountenanced, owing to the liability which exists of the jurors being imposed upon by skillful manipulation or jugglery.[1] On the other hand, experiments coming within the range of ordinary knowledge or experience may well be permitted, and circumstances can be imagined under which the refusal to permit them would be error. Such a case arose in Iowa. The action involved the genuineness of the signature to a note. The clerk of the court was called by the defendant as an expert. He testified that, in his opinion, certain signatures were not made with the same ink. Being recalled by the plaintiff, he stated that, since his examination by the defendant, he had examined writings upon the court record made with the same ink, which apparently differed in color. He accounted for this difference by the fact that a blotting pad had been used in the one case and not in the other. Being asked to point out the difference on the record, and illustrate the effect of the blotting pad, an objection of the defendant thereto was sustained. This was held error.[2]

§ 621. **Medical Opinion as to the Permanency of Physical Injury.** — In every action for damages for a physical injury, all the damages accruing from the injury, past, present and prospective, must be included in the one recovery.[3] It is therefore competent, in order to assist the jury in arriving at a conclusion as to the character of an injury and the probability of its permanency, to take the opinion of medical experts on the subject.[4]

[1] See *post*, ch. XXVII.

[2] Farmers' &c. Bank *v.* Young, 36 Iowa, 45.

[3] Elkhart *v.* Ritter, 66 Ind. 136; North Vernon *v.* Voegler, 103 Ind. 314; Louisville &c. R. Co. *v.* Falvey, 104 Ind. 409, 422.

[4] Finney *v.* New Jersey Steamboat Co., 12 Abb. Pr. (N. S.) (N. Y.) 1; Filer *v.* N. Y. &c. R. Co., 49 N. Y. 42; Wilt *v.* Vickers, 8 Watts (Pa.), 227; Kent *v.* Lincoln, 32 Vt. 591; Johnson *v.* Central &c. R. Co., 56 Vt. 707; Hoard *v.* Peck, 56 Barb. (N. Y.) 202; Montgomery *v.* Scott, 34 Wis. 338; Toledo &c. R. Co. *v.* Baddeley, 54 Ill. 19; *s. c.* 5 Am. Rep. 71; Anthony *v.* Smith, 4 Bosw. (N. Y.) 503; Louisville &c. R. Co. *v.* Falvey, *supra*.

ARTICLE II. — CROSS-EXAMINATION.

SECTION

625. Incompleteness of Hypothesis of one Party remedied by Cross-Examination.
626. Facts and Reasons on Cross-Examination.
627. Questions going beyond the Scope of the Evidence.
628. Scope allowed in Cross-Examining a Medical Expert.
629. [Illustration.] What a Doctor would Think if he should Find a Man Dead with Certain Appearances.
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631. Irrelevant Facts admissible for the Purpose of Testing Knowledge of Expert.
632. [Continued.] Illustration — Cross-Examination as to Age.
633. Reading Books of Science to Expert to test his Knowledge.
634. Questions affecting Credibility.
635. Instance of an Improper Cross-Examination under the American Rule.

§ 625. Incompleteness of Hypothesis of one Party remedied by Cross-examination.— When the witness has expressed an opinion based upon facts assumed by the party whose witness he is, the other party may cross-examine him, by taking his opinion, based upon any other state of facts assumed by him to have been proved by the evidence, provided that such hypothetical state of facts is within the scope of the evidence. Such a cross-examination, to reach its true value, should develop fully the reasons upon which the expert bases his opinion. The cross-examining counsel should be allowed to call the attention of the expert to any and every view of the facts which will tend to test the correctness of his opinion. This right of cross-examination has been justly characterized as of the utmost importance to the defendant in a criminal trial, especially where the experts are introduced and examined *in rebuttal*, so that the defendant cannot introduce them as his own witnesses at that stage of the case, or bring others to overcome their evidence.[1]

§ 626. Facts and Reasons on Cross-examination. — A familiar illustration of the rule that the expert is to give, on cross-

[1] Davis *v.* State, 35 Ind. 496.

examination, the *reasons for his opinion*, is found in a proposition already stated,[1] that where a witness has given his *opinion as to value*, he may be asked, even on his examination-in-chief, the facts and reasons on which his opinion is founded.[2]

§ 627. **Questions going beyond the Scope of the Evidence.** — Such being the scope of the cross-examination, it is obvious that it will not be a good objection to a question, that it goes beyond the scope of evidence; since questions propounded for the purpose of eliciting the *reasons* upon which the expert bases his opinion, or the extent of his knowledge, may often go beyond the evidence. Thus, in an action for injuries causing death, where the injury happened in a steamboat explosion and the body was subsequently found in the water, it was held that a medical witness, who had examined the body and testified that death was caused by drowning, might properly be asked, "What would have been the indications if a person had been suffocated first, and had afterwards fallen into the water?" — although there was no evidence that this was the fact.[3]

§ 628. **Scope allowed in cross-examining a Medical Expert.** — In a case in Indiana it is said by Elliott, J.: "In cross-examining a medical expert, counsel have a right to assume the facts as they believe them to exist, and to ask the expert's opinion upon the facts thus assumed. An examination-in-chief cannot be so conducted as to compel the cross-examining counsel to merely follow the line of questions that are asked; but when a general subject is opened by an examination-in-chief, the cross-examining counsel may go further into details, and may put the case before the expert witness in various phases. Each side has a right to take the opinion of the witness upon his theory of the facts established by the evidence. While it is true that a cross-examination must be confined to the subject of the examination-in-chief, it is not true that the cross-examining party is confined

[1] *Ante* § 413.

[2] Dickenson *v.* Fitchburg, 13 Gray (Mass.), 546.

[3] Erickson *v.* Smith, 2 Abb. App. Dec. (N. Y.) 65.

to any particular part of the subject. He has a right, in such a case as this, to leave out of the hypothetical question facts assumed by the counsel on the direct examination, if he deems them not proved; and he also has a right to add to the question such facts as he thinks the evidence establishes." [1]

§ 629. [ILLUSTRATION.] WHAT A DOCTOR WOULD THINK IF HE SHOULD FIND A MAN DEAD WITH CERTAIN APPEARANCES. — Where a medical expert testified, on a trial for manslaughter, which was committed by striking the deceased upon the head with a stone, that the appearances disclosed upon a *post mortem* examination of the head of the deceased, as described by another witness, were those of apoplexy,— it was held that he might be asked on cross-examination, what he would think to be the cause of death, if he should find a man dead, and a *post mortem* examination should disclose similar appearances to those described, and it should be proved that he had been struck violently upon the head with a stone.[2]

§ 630. Cross-examination of Medical Experts who have examined the Body of the Plaintiff.— In an action for personal injuries, "where medical experts are ordered to examine a plaintiff, and they are called and questioned by the defendant as to the result of their examination, the plaintiff has a right to ask, on cross-examination, how the examination was conducted, and this necessarily includes the right to ask what questions were propounded to the plaintiff. If it were otherwise, the plaintiff could not get fully before the jury, the method of investigation pursued by the medical experts; and to deny this would be an unjustifiable restriction of the important right of cross-examination." [3] Another reason adduced in support of the same view is the rule that, where a party gives evidence of a *part of a transaction*, his adversary has a right to *full details* of the transaction.[4]

[1] Louisville &c. R. Co. *v.* Falvey, 104 Ind. 409, 421. See also Davis *v.* State, 35 Ind. 496; *s. c.* 9 Am. Rep. 760; Rogers Exp. Test., 46.

[2] Com. *v.* Mullins, 2 Allen (Mass.), 295. This mode of interrogation was regarded as within the rule laid down in Woodbury *v.* Obear, 7 Gray (Mass.), 467.

[3] Louisville &c. R. Co. *v.* Falvey, 104 Ind. 409, 417.

[4] *Ibid.*

§ 631. **Irrelevant Facts admissible for the purpose of testing Knowledge of Expert.**— It is laid down by Mr. Justice Stephen in his work on evidence that, "facts not otherwise relevant, are deemed to be relevant, if they support, or are inconsistent with the opinions of experts, when such opinions are deemed to be relevant." [1] The reason given for this rule is that it is a proper rule to be resorted to, in order to test the capacity of the witness, and to ascertain the reasonableness, or establish the unreasonableness of his opinion.[2] It is therefore admissible, on the cross-examination of an expert witness, to state hypothetical cases to him, and to ask his opinion thereon, for the purpose of testing his knowledge and skill.[3]

§ 632. [CONTINUED.] ILLUSTRATION — CROSS-EXAMINATION AS TO AGE.— In an action by a lady against a railroad company for a physical injury, a witness for the defendant was asked, among other questions, what the apparent age of the plaintiff was. To this he answered: "In my opinion she was twenty-two or twenty-three, say twenty-four or twenty-five; from twenty-three to twenty-five in appearance." On cross-examination the plaintiff's counsel pointed out a bystander and asked the witness: "How old do you think he is." The witness answered: "Well, I think he is about fifty-five." In giving evidence in rebuttal the plaintiff called the bystander, who testified that his age was forty-six. It was held, applying the above rule, that in allowing this to be done the court committed no error. It was competent, for the purpose of showing that the witness was not capable of judging of the age of a person by his appearance.[4]

§ 633. **Reading Books of Science to Expert to test his Knowledge.**— Where a physician testified as to the symptoms of a disease of which a person died whose life was insured, and pronounced it *delirium tremens*, induced by the use of intoxicating liquors, it was held that paragraphs treating of that disease

[1] Steph. Ev., art. 50.

[2] Louisville &c. R. Co. *v.* Falvey, 104 Ind. 409, 424; Folkes *v.* Chadd, 3 Doug. 157; Davis *v.* State, 35 Ind. 496; *s. c.* 9 Am. Rep. 760.

[3] Louisville &c. R. Co. *v.* Falvey, 104 Ind. 409; Davis *v.* State, 35 Ind. 496, 498; *s. c.* 9 Am. Rep. 760; Rogers' Exp. Test. 50.

[4] Louisville &c. R. Co. *v.* Falvey, 104 Ind. 409, 423.

might be read to him, and that he might be asked, on cross-examination, whether he agreed with the authors, as one of the means of testing his knowledge, and that this was in no just sense reading books of science to the jury. At the same time the court, speaking through Scott, J., said: "The rule announced may be liable to abuse. Great care should always be taken by the court to confine such cross-examination within reasonable limits, and to see that the quotations read to the witness are so fairly selected as to present the author's views on the subject of the examination." [1]

§ **634. Questions Affecting Credibility.**— It is competent to cross-examine an expert witness as to the *fee which has been paid him* for attending at the trial in the character of an expert. Nevertheless, as there is nothing discreditable to the party or the witness, in the one paying and the other receiving a reasonable fee, it is proper for the court, on request, or even without request, to say so to the jury, in *instructing* them. [2]

§ 635. Instance of an improper Cross-examination under the American rule. — In a case in California, where the American rule of strict cross-examination[3] obtains, an expert witness, called on behalf of the plaintiff, had testified that he had made a *post mortem* examination of the body of George W. Gridley, and as to the condition of the brain, pelvic viscera, and particularly the kidneys and bladder and the prostate gland and urethra; that he had found nitrate of urea in crystals in washing the membranes of the brain and crystals of urea in the arachnoid sac, etc.; that the kidneys were apparently in a normal state, except that they were engorged with blood; that the membranes of the brain, the *pia mater*, the arachnoid and *dura mater* were "thickened, discolored, adherent, and matted together;" and that the prostate gland was enlarged, thickened, and indurated, and its walls pressed together. In his opinion, the deceased must have been of unsound mind for five years prior to his death, by reason of the facts that the condition of the prostate gland had obstructed the elimination of urea, causing it to enter into

[1] Conn. Mut. Life Ins. Co. *v.* Ellis, 89 Ill. 516.

[2] Alford *v.* Vincent, 53 Mich. 555.

[3] *Ante*, § 432 *et seq.*

the circulation and poisoning the branial membranes, and that the patient had died of uraemic convulsions, thus produced; that the thickened condition of the brain coverings established insanity, and that the thickening produced by the chronic uraematic poisoning must have been gradual, continuing several years. One B., called as an expert witness, by the defendant, after stating that he had been a practicing physician and surgeon since 1864 (about 17 years), that he was a graduate of certain medical schools, and that he had been superintendent about two years of an insane asylum in Lancashire, England, proceeded to testify, in effect, that he had never known crystals of urea to be found in the brain or any of its surroundings; that nitrate of urea is perfectly soluble in water; that uric and urea are specifically different. He added, that taking the condition of the coverings of the brain and the brain itself, and of the kidneys, the bladder, the prostate gland, and the urethra, as described by M. and by Dr. C. [who had assisted at the *post mortem* examination], he could not understand how any such condition of his brain, or of its membranes could be attributed to *uraemic* poisoning, without disease of the kidneys antedating it; and declared that disease or unsoundness of mind could not be predicated on the condition of the coverings of the brain as described by M. and C. On cross-examination of B. the plaintiff wished to put to him a hypothetical question, in all respects similar to such questions propounded to the plaintiff's witness on direct examination. It was held that, since the testimony of B. on direct examination was confined to a contradiction of the theory of M. as to the mental unsoundness of Gridley produced by slow *uraemic* poisoning, the question was not proper on cross-examination; as the answer of the witness thereto, if it sustained the plaintiff's views, would have constituted part of her case, which should have been made out before she rested. Nor was the question proper as testing the capacity of B., as an expert; for if the answer of B. had been the same as that given by the plaintiff's experts, it would have strengthened the plaintiff's affirmative case; if different, it would have tended no more to prove the incompetency of B. than to prove the incompetency of the plaintiff's experts.[1] - - - - In another jurisdiction it has been held that where a witness has testified, but *not* as an expert, under the so-called American rule, it is not competent to put to him questions on cross-examination which would be only admissible in case of an expert witness; the cross-examining party must call him as his own witness.[2]

[1] Gridley *v.* Boggs, 62 Cal. 191. [2] Olmstead *v.* Gere, 100 Pa. St. 127.

CHAPTER XXIII.

OF THE ACCUSED AS WITNESSES.

SECTION
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§ **640. Competency.** — Defendants in criminal cases were incompetent as witnesses at common law,[1] but have been made competent by enabling statutes in most American jurisdictions;[2] and, in other jurisdictions where legislation has not progressed so far, statutes exist, as seen in the next chapter, allowing the accused to make an unsworn statement. The enabling legislation of the States did not empower defendants in the Federal courts, to testify in their own behalf;[3] though this defect has been lately remedied by Federal legislation.[4] The effect of such en-

[1] Deloohery *v.* State, 27 Ind. 521 (defendant in a proceeding for surety for the peace incompetent); United States *v.* Black, 12 Nat. Bk. Reg. 340 (in a criminal proceeding under the late Bankrupt Act); Stevick *v.* Com., 78 Pa. St. 460 (where a count for felony was joined with one for misdemeanor); Hunter *v.* Com., 79 Pa. St. 503 (same subject).

[2] See the statutes in Rap. Wit., chap. 258 *et seq.* See also as to such statutes and the extent to which they enable the prisoner to testify, Hoagland *v.* State, 17 Ind. 488.

[3] United States *v.* Hawthorne, 1 Dill. C. C. (U. S.) 422.

[4] 2 Rev. Stat. U. S., Sup. vol. 1, p. 312.

abling statutes will be, unless their terms are restrained, to make the accused in a criminal case competent, even under circumstances where another witness would not be competent. Thus, it was held, construing the statute of New York, that a prisoner was a competent witness in his own behalf, although he had been sentenced upon a conviction for felony, and was unpardoned.[1] Where a prisoner, testifying in his own behalf, stated on cross-examination, that he had been in the State prison and had served out his term, it was held error for the court to instruct the jury to disregard his testimony for that reason.[2]

§ **641. In the Case of Persons jointly Indicted.** — In the case of persons jointly indicted, if there has been a severance, one defendant may call his late co-defendant as his own witness, as a matter of right,[3] and it has been held that he may do so, under such a statute, where there has been no severance.[4] This is an exception to the rule of the common law[5] that persons jointly indicted are not competent witnesses for each other.

§ **642. Subject to the same Rules of Examination as other Witnesses.**— It has been held in several jurisdictions that, where the defendant in a criminal case offers himself as a witness in his own behalf, he is subject to the same rules as to examination, cross-examination and impeachment as other witnesses.[6] Ac-

[1] Delamater *v.* People, 5 Lans. (N. Y.) 632; Newman *v.* People, 63 Barb. (N. Y.) 630.

[2] Newman *v.* People, *supra*.

[3] State *v.* Nash, 10 Ia. 81.

[4] State *v.* Gigher, 23 Ia. 318.

[5] Patterson *v.* People, 46 Barb. (N. Y.) 625; Taylor *v.* People, 12 Hun (N. Y.), 212.

[6] State *v.* Cohn, 9 Nev. 179; State *v.* Huff, 11 Nev. 17, 27; State *v.* Red, 53 Ia. 69; State *v.* Miller, 53 Ia. 209; Brandon *v.* People, 42 N. Y. 265; Fralich *v.* People, 65 Barb. (N. Y.) 48; McGarry *v.* People, 2 Lans. (N. Y.) 227; People *v.* Carey, 17 Alb. L. J. 432; State *v.* Witham, 72 Me. 531; People *v.* McGungill, 41 Cal. 429; State *v.* Ober, 52 N. H. 459; *s. c.* 13 Am. Rep. 88; Norfolk *v.* Gaylord, 28 Conn. 309; Fletcher *v.* State, 49 Ind. 124; *s. c.* 19 Am. Rep. 673; Mershon *v.* State, 51 Ind. 14; Morrison *v.* State, 76 Ind. 335; State *v.* Clinton, 67 Mo. 380; *s. c.* 29 Am. Rep. 506; note to State *v.* White, 19 Kan. 445; 27 Am. Rep. 140; Com. *v.* Nichols, 114 Mass. 285; Com. *v.* Reynolds, 122 Mass. 454; State *v.* Wentworth, 65 Me. 234; Connors *v.* People, 50 N. Y. 240; Stover *v.* People, 56 N. Y. 315; 1 Greenl. Ev. (13th ed.), § 451 and cases in note; Whart. Crim. Ev.

cordingly, it is within the sound discretion of the trial court, not only to allow State's counsel to *cross-examine* him, but also to recall him after he has left the stand for the purpose of *further cross-examination*.[1] His counsel may interrogate him, as in the case of any other witness, and it is error for the judge to deny this right and to direct the prisoner to make a general statement.[2] He has a right to explain any circumstance in evidence which works to his prejudice, the same as a party testifying in a civil case would have.[3]

§ **643. And to the same Modes of Impeachment.** — While the general proposition is true that the *moral character* of the accused in a criminal case is not in issue, unless he chooses to bring it into question by first offering evidence in support of it,[4] it has become the rule in some jurisdictions that, if he avails himself

(8th ed.), §§ 470, 669 and notes; People *v.* Reinhart, 39 Cal. 449; Com. *v.* Bonner, 97 Mass. 587; Com. *v.* Morgan, 107 Mass. 199. In *Maine* the following language was used by Peters, C. J., in discussing this question: "When the accused volunteers to testify in his own behalf at all, upon the issue whether the alleged crime has been committed or not, he volunteers to testify in full. His oath in such case requires it. If he waives the constitutional privilege at all, he waives it all. He cannot retire under shelter when danger comes. The door opened by him is shut against his retreat. The object of all examinations is to elicit the whole truth, and not a part of it. Under our rule, the cross-examination of a witness is not confined to the matters inquired of in chief. A party testifying as his own witness can be examined just as any other witness could be, in any respect material and relevant to the issue. To some extent more may be elicited from him than from a common witness, because his statements are admissions as well as testimony. Any other construction would render the statute a shield to crime and criminals." State *v.* Witham, 72 Me. 531, 533.

[1] State *v.* Cohn, 9 Nev. 179, 188.

[2] Clark *v.* State, 50 Ind. 514; Donohue *v.* People, 56 N. Y. 208 (construction of a statute authorizing a convict to be sworn, and making him "a competent witness against any fellow-prisoner, for any offense actually committed while in prison)."

[3] Thus, on the trial of an indictment for murder, the State gave in evidence the fact of a *whispered conversation*, two days after the homicide, between the defendant and the wife of the murdered man, she being jointly indicted with him. It was held that he had a right to testify as to what was said in that conversation. Morrow *v.* State, 48 Ind. 432.

[4] Fletcher *v.* State, 49 Ind. 124; Knight *v.* State, 70 Ind. 375; Morrison *v.* State, 76 Ind. 335, 337.

of the privilege of testifying, he testifies under the same rules, and may be impeached in the same manner, as other witnesses.[1] The fact of his having been previously *convicted of crime*, may be proved for this purpose;[2] though it has been held that this fact cannot be drawn from him on cross-examination, since it is provable by the *record* only,[3] that being the best evidence.[4] The State may afterwards examine witnesses to prove his general bad character or reputation.[5]

§ 644. Whether taking the Stand waives Privilege against Self-crimination. — It is a sound view, in the interpretation of such statutes, that they do not, by enabling the prisoner to testify in his own behalf, place him in a *worse position* than that which another witness would occupy. By electing to take the stand, he does not waive his privilege against self-crimination, so as to be obliged to answer a question, the answer to which

[1] Mershon *v.* State, 51 Ind. 14; State *v.* Beal, 68 Ind. 345; Morrison *v.* State, 76 Ind. 335; State *v.* Clinton, 67 Mo. 380; *s. c.* 29 Am. Rep. 506; Brandon *v.* People, 42 N. Y. 265; Connors *v.* People, 50 N. Y. 240; Fletcher *v.* State, 49 Ind. 124; *s. c.* 19 Am. Rep. 673; Mershon *v.* State, 51 Ind. 14; Fletcher *v.* State, 49 Ind. 124. In *Missouri* the law is in this shape, that in a criminal trial where the defendant offers himself as a witness in his own behalf, it is not error to allow the State, over his objection, to examine witnesses touching his general moral character. He may be impeached as any other witness, except that, on his cross-examination, he can only be examined as to matters in respect of which he has testified on his examination-in-chief. State *v.* Bulla (Mo.), 6 West. Rep. 440. On the last point see State *v.* Palmer (Mo.), 5 West. Rep. 387; State *v.* Grant, 79 Mo. 113; State *v.* Clinton, 67 Mo. 380. We understand the Missouri rule to mean that, while such a witness may be impeached by independent testimony, yet it is not competent to lay a foundation for impeaching him by asking questions on his cross-examination as to his former antecedents declarations, etc., as may be done in the case of other witnesses. But he may be impeached by disproving facts stated by him, the same as any other witness may. State *v.* Rider (Mo.), 6 West. Rep. 458, 461.

[2] People *v.* Reinhart, 39 Cal. 449, per Rhodes, J.

[3] People *v.* Reinhart, *supra*.

[4] Newcomb *v.* Griswold, 24 N. Y. 298; People *v.* Herrick, 13 Johns. (N. Y.) 82; Rex *v.* Inhabitants &c., 8 East, 77; Carpenter *v.* Nixon, 5 Hill (N. Y.), 260.

[5] State *v.* Clinton, 67 Mo. 380; State *v.* Beaty, 25 Mo. App. 214; People *v.* Beck, 58 Cal. 212. Under the California statute, the inquiry extends to his character for *truth*, *honesty* and *integrity*. Cal. Code Civ. Proc., § 2051; Cal. Penal Code, § 1102.

might furnish evidence which would subject him to, or which could be used against him in, another criminal prosecution.[1] We find, however, that some courts have taken the view that the defendant, by taking the stand as a witness in his own behalf, waives the privilege which another witness would have in respect of self-crimination.[2]

§ 645. Jury entitled to draw Inferences from Witness' Demeanor. —If such a witness refuses to answer proper and competent questions, the refusal is a circumstance from which the jury are at liberty to draw inferences unfavorable to him.[3]

§ 646. And the State's Counsel may comment on the same. —While the mere *failure* of the prisoner to take the witness stand in his own behalf is not, under most statutes, the subject of observation by the State's counsel in the presence of the jury,[4] yet if he *does* exercise his privilege by taking the witness stand, his testimony is the subject of *fair comment*, precisely like the testimony of any other witness.[5] This right of fair comment extends to his conduct, demeanor and appearance while so testifying.[6] "The same rights exist in favor of the district attorney, to comment upon his testimony, or his refusal to answer any proper question, or to draw all proper inferences from his failure to testify upon any material matter within his knowledge, as with other witnesses."[7]

[1] People *v.* Brown, 72 N. Y. 571.

[2] Com. *v.* Lannan, 13 Allen (Mass.), 564; Com. *v.* Price, 10 Gray (Mass.), 472; State *v.* Ober, 52 N. H. 459. Compare Foster *v.* Pierce, 11 Cush. (Mass.) 437; Low *v.* Mitchell, 18 Me. 372, 374; Roddy *v.* Finnegan, 43 Md. 490; State *v.* Fay, 43 Iowa, 651. It has been held that, where a party *in a civil action* testifies in his own behalf, he thereby waives the privilege of refusing to answer pertinent questions on the ground of self-crimination. Este *v.* Wilshire, 44 Oh. St. 636 (Owen, C. J. dissenting).

[3] State *v.* Witham, 72 Me. 534. So in a *civil case:* Andrews *v.* Frye, 104 Mass. 234; Whart. Ev., §§ 533, 546, 1266; Hanof *v.* State, 37 Oh. St. 178.

[4] *Post*, § 1004.

[5] State *v.* Anderson (Mo.), 8 Crim. Law Mag. 519; *s. c.* 89 Mo. 312.

[6] State *v.* Graynor (Mo.), 6 West. Rep. 207.

[7] State *v.* Harrington, 12 Nev. 125. See also People *v.* Tyler, 36 Cal. 522; People *v.* McGungill, 41 Cal. 429; State *v.* Huff, 11 Nev. 27.

§ 647. **Testimony Evidence against him on a Subsequent Trial.** — If the accused waives his privilege and takes the witness stand in his own behalf, at any stage of the prosecution, he waives it for every subsequent stage. Thus, if he gives testimony on his preliminary examination, the same may be put in evidence against him on the trial.[1] So, if he takes the stand as a witness on his own behalf on one trial, what he so testifies may be put in evidence against him on a subsequent trial.[2] These decisions proceed upon the obvious principle that statements or admissions, voluntarily made by a party, are always evidence against him.

§ 648. **May testify as to his Intent or Motive.** — As already seen,[3] it is competent for a party testifying as a witness to state what his intent was in doing a particular act, whenever the question of intent is material to the issue.[4] This rule of evidence is of great value to persons accused of crime who may elect to testify in their own behalf; since in most crimes and misdemeanors intent is a necessary ingredient of the offense. Under this rule, the accused, when so testifying, is competent to state what the intent was, with which he did the act imputed to him as a crime.[5] He may explain what he *meant by words* shown to have been used by him.[6] Where the charge is murder and the accused sets up the so-called "plea of *self-defense*," he is entitled to testify whether, at the moment when he committed the fatal act, he did or did not really believe that he was in danger of death or great bodily harm at the hands of the deceased.[7] Where the charge is assault and battery with *intent to ravish*, he may testify that the

[1] People *v.* Kelley, 47 Cal. 125; State *v.* Glass, 50 Wis. 218. Compare People *v.* Gibbons, 43 Cal. 557.

[2] Com. *v.* Reynolds, 122 Mass. 454.

[3] *Ante*, § 383.

[4] Greer *v.* State, 53 Ind. 420 (overruling Zimmerman *v.* Marchland, 23 Ind. 474, and qualifying Columbus *v.* Dahn, 36 Ind. 330); Thurston *v.* Cornell, 38 N. Y. 281; White *v.* State, 53 Ind. 595; Van Sickle *v.* Brown, 68 Mo. 627, 634; Thacher *v.* Phinney, 7 Allen (Mass.), 146; Snow *v.* Paine, 114 Mass. 520.

[5] Bolen *v.* State, 26 Oh. St. 371; Kerrains *v.* People, 60 N. Y. 221; State *v.* Banks, 73 Mo. 592; *s. c.*, reversed on another point, 10 Mo. App. 111; Babcock *v.* People, 15 Hun (N. Y.), 347.

[6] People *v.* Farrell, 31 Cal. 577.

[7] State *v.* Harrington, 12 Nev. 126.

assault was made with a different intent;[1] and where the charge is *larceny*, he may testify as to what his intention was in respect of the goods, at the time when they came into his possession.[2]

§ 649. View that he may be Cross-Examined as any other Witness.—There is a difference of view as to the scope of cross-examination, where the accused in a criminal case offers himself as a witness. One view is that, unless the language of the statute is restrained, it places him, in respect of his cross-examination, in the same situation as that of any other witness.[3] So, where a party in a *civil action* becomes a witness in his own behalf, he thereby subjects himself to all the rules regulating the direct and cross-examination of other witnesses.[4] According to this view, his cross-examination is subject to the same rules, and the same questions may be put to him for the purpose of affecting his credibility.[5] Questions calling for facts in his history, which would disgrace him or disparage his character, may be put to him, where they might be put to any other witness.[6] Under this view, he may refuse to answer a question which would disgrace him,[7] under the same circumstances which would entitle any other witness to exercise that privilege.[8] But this is his privilege *as a witness*, and not as a party.[9] He therefore cannot, through his counsel, object to a question put to him on the witness stand, upon this ground; but if he does not wish to answer it, he must claim his privilege.[10] But this view is very much *discarded*, as we shall presently see, and some of the cases cited in this section must be regarded as *overruled* in the same jurisdictions.

§ 650. [Continued.] Interrogated as to former Arrests and Convictions. — Under this view, whether a witness, or de-

[1] Greer *v.* State, 53 Ind. 420.
[2] White *v.* State, 53 Ind. 595.
[3] Connors *v.* People, 50 N. Y. 240; Fralich *v.* People, 65 Barb. (N. Y.) 48; People *v.* Reinhart, 39 Cal. 449; State *v.* Abrams, 11 Ore. 169, 173; State *v.* Ober, 52 N. H. 459; *s. c.* 13 Am. Rep. 88; State *v.* Efler, 85 N. C. 585.
[4] Clark *v.* Reese, 35 Cal. 89.
[5] Gill *v.* People, 5 Thomp. & C. (N. Y.) 308.
[6] Brandon *v.* People, 42 N. Y. 265.
[7] *Ante*, § 287.
[8] People *v.* Reinhart, 39 Cal. 449.
[9] *Ante*, § 306.
[10] People *v* Reinhart, *supra*.

fendant in a criminal trial testifying in his own behalf, may be asked on cross-examination touching his commission of another crime, for the purpose of affecting his credibility, is a matter resting largely within the *discretion* of the trial court. "The limits to which a witness may be cross-examined on matters not relevant to the issue for the purpose of judging of his character and credit from his own voluntary admissions, rest in the sound discretion of the court trying the cause. Such questions may be allowed where there is reason to believe it will tend to the ends of justice; but they ought to be excluded when a disparaging course of examination seems unjust to the witness and uncalled for by the circumstances of the case."[1]

§ 651. [CONTINUED.] ILLUSTRATIONS OF THIS VIEW. — For instance, where the prosecution is for the *unlawful selling of intoxicating liquors*, he may be asked whether he has not recently been tried and convicted several times for the unlawful selling of such liquors.[2] - - - - So, it has been held within the discretion of the trial court to allow a witness to be asked, "Are you not now under indictment for murder in the second degree in this court?"[3] - - - - So, where, on the trial of an indictment for murder in the first degree, the accused took the stand as a witness in his own behalf, it was held within the discretion of the trial court to allow the State's counsel to ask him, on cross-examination, whether he had not once before been arrested for an assault with intent to kill.[4] - - - - So, it was held that a prisoner, testifying in her own behalf, might properly be asked whether she had ever been arrested for theft,[5] the question being one which the court, in the exercise of its discretion, might

[1] Wroe *v.* State, 20 Oh. St. 460; Hanoff *v.* State, 37 Oh. St. 178, 181; State *v.* Pfefferle, 36 Kan. 90; State *v.* Lawhorn, 88 N. C. 634; State *v.* Patterson, 2 Ired. L. (N. C.) 346; State *v.* Garrett, Busbee (N. C.), 357. Compare State *v.* Davidson, 67 N. C. 119; People *v.* Clark (N. Y.), 8 N. East Rep. 38. By the statute of Maine the record of a previous conviction of a criminal offense is made competent to affect the credibility of a witness. Rev. Stat. Me., chap. 82, § 94; State *v.* Watson, 63 Me. 128. Such a record may be offered in a case where the accused testifies as a witness in his own behalf. State *v.* Watson, 65 Me. 74, 79. And it is not admissible for the accused to give evidence to contradict it; it imports absolute verity. *Ibid:* State *v.* Lang, 63 Me. 215.

[2] State *v.* Pfefferle, 36 Kan. 90.

[3] Wroe *v.* State, 20 Oh. St. 460.

[4] Hanoff *v.* State, *supra.* Compare Lee *v.* State, 21 Oh. St. 151; People *v.* Crapo, 76 N. Y. 288.

[5] Brandon *v.* People, 42 N. Y. 265.

allow in the case of another witness.[1] - - - - Where a witness was on trial for a felonious assault and elected to testify as a witness in his own behalf, it was held that the people might ask him, on cross-examination, "How many times have you been arrested?"[2]

§ 652. View that Cross-Examination is Confined to Examination-in-Chief. — The other, and more widely prevailing view is that the cross-examination of the accused is confined to those matters which were touched upon in his examination-in-chief, and that it cannot extend beyond this, although the questions may pertain to the issues.[3] If the trial court permit a more extensive cross-examination, the constitutional privilege of not being a witness against himself is violated.[4] Irrespective of the terms of the statute, or of the considerations touching the privilege of the accused, this would be the view where the American rule of strict cross-examination, already considered,[5] prevails;[6] whereas in those jurisdictions where the English rule prevails, the defendant, by taking the witness stand in his own behalf, might subject himself to the hazards of a general cross-examination.[7] In any view, the accused may be interrogated as to any matter concerning which he has testified on his direct examination.[8] In one jurisdiction, which follows the so-called American rule, the defendant in a criminal prosecution testified that two of the prosecuting witnesses had a grudge against him. It was held inadmissible for his counsel to ask him to state the grounds of the grudge, for the reason that such evidence would introduce collateral issues.[9]

[1] LeBeau *v.* People, 34 N. Y. 223; Great Western &c. R. Co. *v.* Loomis, 32 N. Y. 127; *ante*, § 464.

[2] Connors *v.* People, 50 N. Y. 240.

[3] State *v.* Chamberlain, 89 Mo. 129; *s. c.* 1 S. W. Rep. 145; State *v.* McGraw, 74 Mo. 573; State *v.* Turner, 76 Mo. 350; State *v.* McLaughlin, 76 Mo. 320; State *v.* Porter, 75 Mo. 171; State *v.* Douglass, 81 Mo. 231; State *v.* Patterson, 88 Mo. 88; State *v.* Lurch, 12 Ore. 99; State *v.* Saunders, 14 Ore. 300. Under a former Missouri statute the rule was otherwise. State *v.* Clinton, 67 Mo. 330; State *v.* Cox, 67 Mo. 392; State *v.* Rugan, 68 Mo. 214; State *v.* Testerman, 68 Mo. 408.

[4] People *v.* O'Brien, 66 Cal. 602 (McKee, J., dissenting).

[5] *Ante*, § 432.

[6] As in California: People *v.* McGungill, 41 Cal. 429.

[7] Com. *v.* Mullen, 97 Mass. 545.

[8] People *v.* Russell, 46 Cal. 121.

[9] Chelton *v.* State, 45 Md. 564.

§ 653. [Continued.] **Previous Arrests, Convictions, etc., not inquired into.**— As already seen,[1] it is a general rule applicable to the cross-examination of witnesses, that it is within the discretion of the court to allow collateral facts affecting the credibility of the witness, to be inquired into, subject to another rule, that his answers are conclusive and cannot be contradicted. Under this view, as also seen, the witness may be questioned concerning previous arrests and convictions for crime. But under the view stated in the preceding section, where the accused, on a criminal trial, avails himself of the privilege afforded by the enabling statute, and takes the witness stand in his own behalf, he cannot be interrogated as to previous arrests, convictions, or other disparaging circumstances in his history. He cannot be examined, against his objection, as to former indictments against him for other offenses not pertaining to the issue to be tried.[2] He cannot be required to answer such a question as, "Did you not belong to Jesse James' gang?"[3] He cannot be required to answer questions, the answers to which would *disgrace* him and disparage his character.[4] He cannot be required to write his own name, or that of another person, in the presence of the jury, in order that they may compare it with the signature on a note, which he is charged with having uttered knowing it to be forged — the reason being that such a course violates the prisoner's right of not giving criminating evidence against himself.[5] He cannot be asked whether he has been convicted of crime, — the reason that, in a criminal cause, a witness cannot be impeached or sustained by proof of general moral character,[6] and, *a fortiori*, by proof of an is olated

[1] *Ante*, §§ 464, 465.

[2] Smith *v.* State, 79 Ala. 21.

[3] Clarke *v.* State, 78 Ala. 474. In the opinion in this case the court quote the following observation of Campbell, J., in People *v.* Thomas, 9 Mich. 314: "But, perhaps, the worst thing would be the degradation of our criminal jurisprudence by converting it into an inquisitorial system, from which we have been thus far happily delivered."

[4] Hayward *v.* People, 90 Ill. 492; Gifford *v.* People, 87 Ill. 210; People *v.* Hamblin, 68 Cal. 101; People *v.* Elster (Cal.), 3 West Coast Rep. 33, 37.

[5] State *v.* Lurch, 12 Ore. 99.

[6] Fletcher *v.* State, 49 Ind. 124. This, though the rule *in Indiana*, is not the universal rule. *Ante*, § 552.

act of good or bad conduct.[1] He cannot be asked, on cross-examination, whether he had killed a man in another State, or how often he had been without a pistol, or whether he had not been at target practice most of the time at a particular place, — the reason being that, to compel a prisoner thus to testify as to his whole life on the witness stand, would not merely discredit him as a witness, but would prejudice the jury against him and against his defense in a particular case.[2] But his examination should be limited to matters pertaining to the issue, in order to prevent a conviction of one offense by proof that the accused may have been guilty of another.[3] To require the prisoner, as the price of taking the witness stand in his own behalf, to run the gauntlet of being interrogated as to every disparaging fact connected with his past history, is deemed to deprive him in a large measure of the privilege conferred by the enabling statute, and also to violate his constitutional privilege against self-crimination. The reason given for the conclusion of the foregoing cases, by Chief Judge Church, of the Court of Appeals of New York, has been frequently quoted with approval by other courts: "By taking the stand as a witness, while he may subject himself to the rules applicable to other witnesses, he is not thereby deprived of his rights as a party; and it follows that his counsel, while he is in the witness box, has a right to speak for him, and that an error committed by the court against him may inure to his benefit as a party. Especially ought this protection to be afforded to persons on trial for criminal offenses, who often, by a species of moral compulsion, are forced upon the stand as witnesses; and being there, are obliged to run the gauntlet of their whole lives on cross-examination, and every immorality, vice or crime of which they may have been guilty or suspected of being guilty, is brought out, ostensibly to affect credibility, but practically used to produce a conviction for the particular offense for which the accused is being tried, upon evidence which otherwise would be deemed insufficient. Such a result is manifestly un-

[1] Parley *v.* State, 57 Ind. 331.

[2] State *v.* Saunders, 14 Ore. 300.

[3] People *v.* Brown, 72 N. Y. 571; Clarke *v.* State, 78 Ala. 474, 481.

just, and every protection should be afforded to guard against it." [1]

§ 654. **Crimes not Affecting Credibility.** — For stronger reasons, an accused person who takes the witness stand in his own behalf, cannot be interrogated as to other offenses, or acts of misconduct, which do not necessarily affect his credit or veracity.[2] In so holding, it was said by Mr. Chief Judge Church, in giving the opinion of the New York Court of Appeals: "The discretion which courts possess, to permit questions of particular acts to be put to witnesses for the purpose of impairing credibility, should be exercised with great caution, when an accused person is a witness on his own trial. He goes upon the stand under a cloud; he stands charged with a criminal offense, not only, but is under the strongest possible temptation to give evidence favorable to himself. His evidence is therefore looked upon with suspicion and distrust; and if, in addition to this, he may be subjected to a cross-examination upon every incident of his life, and every charge of vice or crime which may have been made against him, and which have no bearing upon the charge for which he is being tried, he may be so prejudiced in the minds of the jury as frequently to induce them to convict, upon evidence which otherwise would be deemed insufficient. It is not legitimate to bolster up a weak case by probabilities based upon other transactions. An accused person is required to meet the specific charge made against him, and is not called upon to defend himself against every act of his life. * * * No rule of law is violated, in requiring that, to entitle questions to be put to accused persons, which are irrelevant to the issue, and are calculated to prejudice him with the jury, they should at least be of a character, which clearly go to impeach his general moral character, and his credibility as a witness. The old rule, not to allow

[1] People *v.* Brown, 72 N. Y. 571, 574 (distinguishing People *v.* Brandon, 42 N. Y. 265; People *v.* Connors, 50 N. Y. 240; People *v.* Real, 42 N. Y. 270.)

[2] People *v.* Crapo, 76 N. Y. 288, 289, 293; People *v.* Brown, 72 N. Y. 571; State *v.* Huff, 11 Nev. 17, 26. See 24 N. Y. 299; Gale *v.* People, 26 Mich. 159.

irrelevant questions to such persons, would be preferable, and more in accordance with sound principles of justice; but it is unnecessary in this case to go beyond the requirement that the answer must tend directly to impeach him." [1] In an earlier case in the same State it was said, on obvious grounds, by Jewett, J., that, "the single fact that he [the witness] had been complained of and held for trial, for the commission of a crime, did not affect his moral character." [2]

§ 655. [CONTINUED.] ILLUSTRATIONS. — Thus, it has been held that a prisoner, on trial for *burglary* and *larceny*, who elects to take the stand as a witness in his own behalf, cannot be asked, on cross-examination, whether he has been arrested on a charge of *bigamy*.[3] - - - - On the same principle, it has been held that, where the defendant, on trial for *murder*, takes the witness stand, he cannot be cross-examined as to *assaults* and *batteries;* since, while this might carry the inference that he was a violent and dangerous man, it would not tend to prove that he was a *liar*. Accordingly, the following line of cross-examination of the defendant in such a case, permitted by the court against the objection of the defendant's counsel, was held prejudicial error: "Q. How many times have you been arrested in Virginia City for *unlawfully beating* men and women? A. Three times, I believe. Q. Were you convicted each time? A. Yes, sir. Plead guilty twice and was tried two times. Q. What was the name of that woman you were arrested for beating? A. Katie Devine. Q. Was that one of the persons that you assaulted, and was convicted of the offense? A. I believe it was. Q. Do you know Mr. Robey? A. Yes, sir. Q. You were arrested and charged with beating him and cutting off his beard? A. I was. Q. And convicted? A. I was. Q. Were you arrested for striking a man with a monkey wrench? A. No. Q. You threw it at him and was convicted of assault and battery? A. I was." [4] For like reasons, it has been held error to allow the State to ask the prisoner, on the witness stand, "How many times have you been arrested?" [5] - - - - But the same court, in a

[1] People *v.* Crapo, 76 N. Y. 288, 289, 293; Folger and Earl, JJ., dissented. The Chief Judge, in his opinion, distinguishes People *v.* Brandon, 42 N. Y. 265, and People *v.* Connors, 50 N. Y. 240, on the ground that the objection did not involve the point under consideration.

[2] People *v.* Gay, 7 N. Y. 378.

[3] People *v.* Crapo, 76 N. Y. 288.

[4] State *v.* Huff, 11 Nev. 17, 26.

[5] People *v.* Brown, 72 N. Y. 571.

later decision, has declared a rule which seems much better calculated to subserve the rights of society and to develop the real object of a judicial inquiry, the ascertaining of the truth. It is, that it is within the sound *discretion* of the trial court how far the examination of a prisoner, who elects to take the stand in his own behalf, may be carried with reference to his *past history* and *mode of life*.[1]

[1] People *v.* Clark (N. Y. Ct. of App.), 8 N. East. Rep. 38.

CHAPTER XXIV.

OF THE UNSWORN STATEMENT OF THE ACCUSED.

SECTION

660. Right to make a Statement at Common Law.
661. Unsettled State of the Law.
662. [Continued.] Prisoner's Counsel not allowed to make it.
663. Under American Statutes.
664. In the Nature of Evidence.
665. Rebutting such Statement.
666. Omission to make Statement.
667. Prisoner, how Assisted by his Counsel.
668. [Continued.] Observations on this Question.
669. Cross-Examination on the Statement.
670. Not Subject to Impeachment.

§ 660. Right to make a Statement at Common Law. — At common law the defendant was often accorded the right to make an unsworn statement to the jury in his own behalf, at least in capital cases. The right has been more recently allowed in England in cases not capital, the authorities in that country not being united as to whether it may be exercised only in cases where the defendant has not the aid of counsel.[1] How far the prisoner is allowed to make an unsworn statement of facts, by the rules of procedure in American courts, in the absence of a statute authorizing it, is perhaps a matter of doubt. In most of the American constitutions there is a provision that "in all criminal prosecutions the accused has a right to be *heard* by himself and counsel, or either."[2] It has been supposed that such a constitutional provision does not extend so far as to require the court to allow the prisoner to make an unsworn statement of the facts, beyond giving his explanation of the inculpatory evidence which has been adduced against him. He cannot, it

[1] Whart. Crim. Ev., § 427. And see the next section, *infra*.

[2] Ala. Const. 1875., art. 1, § 7.

has been ruled, make an unsworn statement in the nature of substantive evidence.[1]

§ 661. UNSETTLED STATE OF THE LAW IN ENGLAND. — There has been, unless within a very recent period, no settled rule on this subject in England. In one case where, at the close of the case of the prosecutor, counsel for the prisoner proposed that the prisoner should make his own statement before the counsel addressed the jury, Baron Gurney, having conferred with Baron Alderson, said: "My brother Alderson informs me that he allowed it to be done in the instance which has been referred to, which was a very peculiar case; and as it has been already permitted before at these assizes, I will not refuse to allow it in this instance; but I think that it ought not to be drawn into a precedent." The prisoner then read a written statement to the jury, which did not aid him much, for the verdict was guilty.[2] In the "very peculiar case" where Baron Alderson allowed such a statement to be made, counsel for the prisoner, in commencing his address to the jury, expressed regret that, as the prisoner was defended by counsel, he could not be allowed to make his own statement. Baron Alderson replied: "I see no objection in this case to his doing so; I have read the statement he made before the magistrate. I think it is right that a person should have an opportunity of stating such facts as he may think material, and that his counsel should be allowed to comment on that statement, as one of the circumstances of the case. On trials for high treason, the prisoner is always allowed to make his own statement, after his counsel has addressed the jury. It is true that the prisoner's statement may often defeat the defense intended by his counsel; but if so, the ends of justice will be furthered. Besides, it is often the genuine defense of the party, and not a mere imaginary case invented by the ingenuity of counsel." The prisoner then made the same statement as he had done before; that the prosecutor had, in the first instance, threatened to shoot him, and had snapped the gun at him. His counsel then addressed the jury and commented on his statement, as according with the evidence, and only supplying what was otherwise deficient in it. The indictment was for maliciously wounding with intent to do grievous bodily harm; the verdict was guilty of an assault merely.[3] Another English judge seems to have conceived the rule to be that if, in a case of felony, the prisoner's counsel had addressed the jury, the

[1] State *v.* McCall, 4 Ala. 643.

[2] Reg. *v.* Walking, 8 Carr. & P. 243.

[3] Reg. *v.* Malings, 8 Carr. & P. 242.

prisoner himself would not be allowed to address the jury also. Thus where, in such a case, the prisoner's counsel had addressed the jury, at the conclusion of his speech the prisoner wished to make a statement, but Coleridge, J., said: "Prisoner, your counsel has spoken for you. I cannot hear both." [1]

§ 662. [CONTINUED.] PRISONER'S COUNSEL NOT ALLOWED TO MAKE IT. — But, while the prisoner would not be allowed to make a statement where he had counsel who addressed the jury for him, the prisoner's counsel was not allowed to detail the prisoner's account of the matter to the jury for the prisoner. In a case of felony, the prisoner's counsel, in addressing the jury, was proceeding to tell them that he was instructed by the prisoner that the oats, which were the subject of the larceny charged in the indictment, had been delivered to the prisoner by one Dunn, and that the prisoner was ignorant of their having been stolen. But Coleridge, J., said: "I cannot permit a prisoner's counsel to tell the jury anything which he is not in a situation to prove. If the prisoner does not employ counsel, he is at liberty to make a statement for himself and tell his own story; which is to have such weight with the jury, as, all circumstances considered, it is entitled to; but if he employs counsel, he must submit to the rules which have been established with respect to the conducting of cases by counsel." In summing up Coleridge, J., also said: "The counsel for the prisoner cannot be allowed to state the prisoner's story, unless he is able to confirm it by evidence; as the prosecutor and prisoner, if they employ counsel, must be put in the same situation." [2] This question came up in the *trial of O'Donnell*, before Mr. Justice Denman, in 1883, who refused to allow Mr. Russell, of counsel for the prisoner, to rehearse the statement of the circumstances of the homicide, as the prisoner had stated them to him. The discussion of the subject led to a correspondence between the Attorney-General and Lord Coleridge, the Lord Chief Justice of England, which developed the fact that, on November 26, 1881, all the judges of England liable to try prisoners, had held a meeting in the room of the Queen's Bench Division, which had resulted in passing the following resolution, with the concurrence of all present except Hawkins and Stephen, JJ., who dissented, — nineteen judges having concurred therein: "That, in the opinion of the judges, it is contrary to the administration and practice of the criminal law, as hitherto allowed, that counsel for prisoners should

[1] Reg. *v.* Boucher, 8 Carr. & P. 141. [2] Reg. *v.* Beard, 8 Carr. & P. 142.

state to the jury, as alleged existing facts, matters which they have been told in their instructions, on the authority of the prisoner, but which they do not propose to prove in evidence." [1] It thus appears that, by relaxing the rigor of the old rule which denied a prisoner the benefit of counsel except to argue questions of law to the court, the prisoner was, in a very important respect, placed in a worse position than that in which he stood before.

§ 663. **Under American Statutes.** — Statutes exist in several American jurisdictions, allowing the defendant, in a criminal trial, to make an unsworn statement of facts to the jury; though in most States, enabling acts exist (considered in the preceding chapter) under which the prisoner has the option of being sworn as a witness in his own behalf.[2] Such statutes, being just and humane in purpose, should receive a construction which will give them full effect.[3]

§ 664. **In the Nature of Evidence.** — While there is judicial opinion to the effect that such a statement, when the subject of *argument*, should be dealt with as a statement, and not confounded with *testimony*,[4] yet the general opinion is that it is in the nature of evidence, and that the jury are to give it such weight as they think it entitled to.[5] They are to consider its probability or improbability with reference to the situation of the defendant, his demeanor in making the statement, its intrinsic character, its harmony with the other evidence in the case, and the like circumstances.[6] It is said that it is subject to the

[1] See 18 Am. Law Rev. 97.

[2] In People *v.* Thomas, 9 Mich. 314, it was decided that Statute 125 of 1861, enacted in that State, did not extend so far as to allow a defendant in a criminal case to be sworn in his own behalf, but only allowed him to make an unsworn statement to the jury.

[3] Annis *v.* People, 13 Mich. 511, 519.

[4] Brown *v.* State, 60 Ga. 210.

[5] People *v.* Arnold, 40 Mich. 710; Durant *v.* People, 13 Mich. 351; Annis *v.* People, 13 Mich. 511, 519. See also Washburn *v.* People, 10 Mich. 372; People *v.* Thomas, 9 Mich. 314; Reich *v.* State, 63 Ga. 616; Pease *v.* State, 63 Ga. 631.

[6] Blackburn *v.* State, 71 Ala. 319; *s. c.* 46 Am. Rep. 323; Chappell *v.* State, 71 Ala. 322; People *v.* Arnold, 40 Mich. 710; Miller *v.* State, 15 Fla. 577; Barber *v.* State, 13 Fla. 675, 681; Bond *v.* State, 21 Fla. 738; Brown *v.* State, 60 Ga. 210; Ross *v.* State, 59 Ga. 248.

ordinary intrinsic tests of credibility governing the sworn testimony of witnesses, such as the character of the defendant, his demeanor on the witness stand, his intelligence, the accuracy of his memory, the inherent probability of his statement, its consistency with itself and with the other circumstances of the case; or the lack of these elements of veracity, together with many other considerations liable to affect its credibility, or afford any reasonable presumption of its probability or improbability.[1] Upon this principle it is held error for the court to charge the jury in respect of its probative value.[2] Being in the nature of evidence and a subject for the consideration of the jury as such, it is the privilege of the defendant's counsel to *comment upon it in argument*, and the denial of this privilege is error.[3] It may be regarded as *evidence against him*, as well as evidence for him. In other words, so far as it confesses or admits anything, it stands on the same footing as any other *confession* or *admission*.[4] It is therefore generally,[5] though not always,[6] held error for the court to *instruct* the jury that it is not to be considered as evidence.

§ 665. Rebutting such Statement. — After the prisoner has made his statement, it is competent for the prosecution to give evidence rebutting the facts therein stated. It was justly said that, if the contrary view were to be taken of the statute, "the legislation, which has proved in so high a degree beneficent and just, might easily, in the case of the most dangerous offenders, become a protection to crime, instead of the shield to innocence it was designed to be."[7]

[1] Blackburn *v.* State, 71 Ala. 319; *s. c.* 46 Am. Rep. 323.

[2] *Ibid.*

[3] Beasley *v.* State, 71 Ala. 328. So held in England, under the common-law practice of allowing the prisoner to make a statement. Reg. *v.* Malings, 8 Carr. & P. 242.

[4] See reasoning in Brown *v.* State, 58 Ga. 212.

[5] Barber *v.* State, 13 Fla. 675, 681; reaffirmed in Miller *v.* State, 15 Fla. 577.

[6] Ross *v.* State, 59 Ga. 248. As to the manner of *instructing juries* with reference to the value of such statement, see *post*, §§ 2448–2450.

[7] Burden *v.* People, 26 Mich. 162, 166.

§ 666. **Omission to make Statement.** — The *omission* of a defendant to avail himself of the statutory privilege of making a statement to the jury, is not matter which they are entitled to consider, in determining the question of his guilt. It is, therefore, error for the court to instruct them, that they may take that into consideration, and give it such weight as they may think fit, with the other evidence.[1]

§ 667. **Prisoner, how Assisted by his Counsel.** — In delivering his unsworn statement, the accused is *not examined as a witness*, and his counsel has no right to put questions to him; though it is supposed that this might be allowed in the *discretion* of the court;[2] and he may receive *suggestions* from his counsel, first submitted *in writing* to the court,[3] provided they are not *leading* in their form.[4]

§ 668. [Continued.] Observations on this Question. — In a case arising under the Michigan statute, the question was presented whether the prisoner was entitled to any aid from counsel in making his statement. The case was an indictment for larceny, and one of the defendants went upon the witness stand, and without being interrogated, made a statement under the statute;[5] but in such statement said nothing upon the subject of his knowledge of the mare, which was alleged to have been stolen, but did make a statement in reference to other material points in the case. Whereupon the counsel for the defendants proposed to call the attention of this defendant, while upon the stand, to a subject which he had omitted in the following words: "I call your attention to the subject of your knowledge of the stolen mare, so that you may make a statement in reference to it or not;" which proposition was made in writing and submitted to the court and to the prosecuting attorney, without being made known to the defendant or to any other person. The prosecuting attorney objected, on the ground that the statement to be made by the defendant must be made without interrogation by counsel, while he was upon the stand. The circuit judge sustained the objection, and the defendant left the stand. But he afterwards requested the court to let him make a further statement,

[1] Bird *v.* State, 50 Ga. 585.

[2] Brown *v.* State, 58 Ga. 212; Annis *v.* People, 13 Mich. 511.

[3] Annis *v.* People, 13 Mich. 511, 519.

[4] People *v.* Morrigan, 29 Mich. 5, 8.

[5] Mich. Laws 1861, p. 168.

which request was granted; whereupon he went upon the stand and stated as follows: "I know nothing about the stealing, and had nothing to do with it." Upon these facts two questions were presented to the Supreme Court for decision: (1) whether the court erred in the ruling, and if so, then (2) whether the error was cured by the defendant afterwards going upon the stand and making the statement he did. It was held, on plausible grounds, that the trial court erred in the ruling, and, on very doubtful grounds, that the error was not cured by the prisoner afterwards going upon the stand and amending his statement. Cooley, J., in giving the opinion of the court, after recurring to the reason and policy of the statute, as already stated,[1] and to the propriety of giving it a just and humane construction, said: "The defendant, when he goes upon the stand, may fairly be supposed to understand what facts, within his knowledge, will have a bearing upon the case, and will tend to remove any suspicion which the sworn evidence has cast upon him. There is no propriety, therefore, in his counsel being allowed to question him as a witness is questioned, and the statute which allows him to 'make a statement' evidently does not contemplate that his knowledge of the case shall be drawn from him by questions in the usual form. But to hold that, the moment the defendant is placed upon the stand, he shall be debarred of all assistance from his counsel and left to go through his statement as his fears or his embarrassment may enable him, in the face of the consequences which may follow from imperfect or unsatisfactory explanation, would, in our opinion, be to make what the statute designed as an important privilege to the accused, a trap into which none but the most cool and self-possessed could place himself with much prospect of coming out unharmed. An innocent man charged with a heinous offense, and against whom evidence of guilt has been given, is much more likely to be overwhelmed by his situation and embarrassed, when called upon for explanation, than the offender who is hardened in guilt; and if he is unlearned, unaccustomed to speak in public assemblies, or to put together his thoughts in consecutive order anywhere, it will not be surprising if his explanation is incoherent, or if it overlooks important circumstances. The weak in mind and body are precisely the class most needing the protection of the statute, and they are the very classes who, in most cases, would receive no benefit from it, if the construction adopted by the circuit judge is correct. The fact is illustrated in the case before us. The defendant went upon

[1] *Ante*, §§ 663, 664.

the stand and made a statement in reference to some material facts, but left it without saying a word about the property he was accused of having stolen. This omission could not fail to have its effect against him in the minds of the jury; and if, in fact, he was an innocent man, we can only attribute the omission to some embarrassment springing from the unaccustomed, and to him momentous, circumstances surrounding his attempt at explanation. The manner in which the counsel sought to call his attention to the subject to which he should direct his explanation was quite unobjectionable, and was well calculated to secure to the defendant the benefits intended by the law, without endangering public justice. The defendant, through embarrassment, defect of memory, or other reason, having failed to make his explanation full, the counsel proposed to call his attention to the topics he had omitted, that he might make further explanation in regard to them if he saw fit. This was not done, however, by the way of question addressed directly to the defendant, but the proposition was delivered in writing to the judge, that it might have his approval before the prisoner should be informed what it was. This precaution was eminently proper, and, if adopted, as we think it should generally be, will prevent the privilege being abused and being made a means by which counsel may indicate to a prisoner what they desire to have him say. And the judge, although allowed to pass upon the propositions and reject such as are improper, should not be regarded as possessing unlimited power to reject at discretion, but as bound to allow all that are made in good faith, and with a view only to call the attention of the defendant to the subjects to which he should address himself. The error in this case was not cured by the prisoner going upon the stand and making a further statement. The last statement was as defective as the first, and could scarcely have been made by any man in the form it was, unless he was laboring under great embarrassment. The prisoner needed the aid which counsel proposed to give, as much aid this time as he had needed it before; and the ruling which the court had made, and which was sweeping in its extent, excluded all such aid." [1]

§ **669. Cross-Examination on the Statement.** — Under the statute of Michigan allowing defendants to make such statements,[2] the defendant "may be cross-examined upon any such

[1] Annis *v.* People, 13 Mich. 511, 519, 521.

[2] Comp. Laws Mich. 1871, § 5957.

statement."[3] The statute does not state whether the statement is to be under oath or not, but the rulings under it are that it is made *without oath*.[1] But under the Alabama statute, it is held that the defendants, thus making statements, not being witnesses, and their statements not being strictly evidence, it results, that they are not subject to examination or cross-examination as witnesses are.[2] Under the Michigan statute, the cross-examination is not allowed to go beyond the statement, and to extend over the entire issue, as it might if the defendant were a general witness; neither will it be allowed to go into any of the collateral inquiries whereby a witness' credit or memory is sometimes tested.[3]

§ 670. **Not Subject to Impeachment.** — From the same reasoning as to the effect of the Alabama statute, the conclusion has been reached that while the statement may be subject to all the tests for ascertaining truth which spring out of the proof in the case, the consistency or probability, *vel non*, of the statements

[1] Durant *v.* People, 13 Mich. 351; People *v.* Jones, 24 Mich. 215; De Foe *v.* People, 22 Mich. 224; People *v.* Arnold, 40 Mich 710.

[2] Chappell *v.* State, 71 Ala 322, 327.

[3] People *v.* Thomas, 9 Mich. 314, 321. The court add that: "While his constitutional right of declining to answer questions cannot be removed, yet a refusal by a party to answer any fair question, not going outside of what he has offered to explain, would have its proper weight with the jury." Reaffirmed in Gale *v.* People, 26 Mich. 157, 160. In the latter case Cooley, J., in giving the opinion of the court, after remarking on the beneficent purpose of the statute, said: "Few men, however innocent, could safely go upon the stand, to answer a criminal charge, if they must, at their peril, be prepared to give satisfactory answers to questions regarding their whole former life, or, if they decline to do so, have their triers informed that the information they decline to give, it was proper for the prosecution to call out, and that the refusal to respond to the questions justly subjected them to unfavorable inferences. Such would be the practical result of a refusal to answer an interrogatory which the court had sustained after objection was made. A review of the evidence in this case suggests very forcibly that, however full may be the explanations, a list of questions which assume the existence of damaging facts may be put in such a manner and with such persistency and show of proof, as to impress a jury that there must be something wrong, even though the prisoner fully denies it, and there is no other evidence." Gale *v.* People, *supra*.

made, the defendant's manner in making them, the interest he must feel in the result, — the defendant making such a statement cannot be *impeached* as a witness, either by proof of bad character, upon cross-examination, or by other proof of extrinsic facts introduced for such purpose.[1]

[1] Chappell *v.* State, 71 Ala. 322, 327.

CHAPTER XXV.

OBJECTIONS TO EVIDENCE AND EXCEPTIONS TO THE RULINGS THEREON.

ARTICLE I.—TENDERS OF EVIDENCE.
ARTICLE II.—OBJECTIONS TO EVIDENCE AND EXCEPTIONS.
ARTICLE III.—STRIKING OUT AND WITHDRAWING.

ARTICLE I. — TENDERS OF EVIDENCE.

SECTION

675. Court Rules upon all Offers of Evidence.
676. Evidence to be admitted if Prima Facie Relevant.
677. [Continued.] Illustrations.
678. Offer must show Materiality.
679. [Continued.] Counsel required to state the Substance of the Offer.
680. [Continued.] *Aliter* on Cross-examination.
681. Tender of Witness Competent as to some Matters only.
682. When Witness presumed Material.
683. Questions must be Specific.
684. Question must be Relevant at the Time.
685. Counsel must have Witnesses ready to sustain Offer.
686. Must not repeat Offer after Adverse Ruling.
687. When Offer not made in Hearing of Jury.

§ 675. Court Rules upon All Offers of Evidence. — At the outset it is to be observed that it is for the court to rule upon all offers of evidence, and to decide, when necessary, all questions of fact which are involved in the question whether the evidence is admissible.[1]

§ 676. Evidence to be admitted if Prima Facie Relevant.— Where an instrument of evidence is offered, and its relevancy is

[1] *Ante*, chap. XIII.; Currier *v.* Bank of Louisville, 5 Cold. (Tenn.) 460; Tabor *v.* Stanniels, 2 Cal. 240; Robinson *v.* Ferry, 11 Conn. 460; Harris *v.* Wilson, 7 Wend. (N. Y.) 57; Cliquot's Champagne, 3 Wall. (U. S.) 114; Prall *v.* Hinchman, 6 Duer (N. Y.), 351.

supported by other testimony, the judge will admit it, when sufficient supporting evidence has been heard to warrant the jury in inferring the existence of the fact upon which its relevancy depends.[1] This is not a negation, but is an affirmation of the principle already discussed, that questions of fact involved in preliminary offers of evidence are first to be decided by the judge. Where proof of one fact is necessary to let in proof of another fact, and there is evidence *conducing to prove* the preliminary fact, the court should not, as a general rule, exclude the main evidence from the jury.[2] The rule under this head was thus stated by Marshall, C. J., in the Kentucky Court of Appeals: "If the fact on which the relevancy of the disputed evidence depends be merely preliminary, and not otherwise essential than as it may lay the foundation for receiving the evidence in question, then it may, perhaps, in all cases, be proper to make the admissibility of the disputed evidence depend upon the judge's opinion as to the sufficiency of the proof to establish the preliminary fact. But where the preliminary fact is otherwise material in the cause, and essentially involved in the issue, the general practice is, to admit the evidence, if, in the opinion of the judge, there be evidence conducing to prove the preliminary fact, and from which a jury might rationally infer it. A contrary practice would, in many instances, as in this, take the whole case from the jury, and subject it to the decision of the judge upon the weight of the evidence, thus destroying the established distinction between their respective functions. When it is necessary to prove a deed, the instrument is assumed to be read to the jury, upon evidence conducing to prove its execution. Could a judge afterwards exclude it on motion, on the ground that the proof of its execution was not fully satisfactory to his mind? Or could he have rejected it on this ground, even in the first instance? The execution of the deed, being a material fact in the the issue, the judge does not decide it peremptorily, though it is in one aspect a preliminary fact; but, having decided that there is evidence conducing to prove it, he places the whole

[1] Winslow *v.* Bailey, 16 Me. 319.

[2] Swearingen *v.* Leach, 7 B. Mon. (Ky.) 287.

question before the jury. We are satisfied that, in this and similar cases, where the relevancy of one fact depends upon another material fact in the cause, the admissibility of the evidence in support of the dependent or secondary fact, depends not upon the absolute proof of the principal fact, but upon there being such evidence as conduces to prove it, and as would authorize the jury to find it." [1] This is agreeable to the view taken by another court, that, where the preliminary proof is clear and uncontradicted, the court will decide the question of admissibility; but if it is doubtful, it will submit the matter to the jury, and let them decide the doubt, when such doubt depends upon a question of fact,[2] — that is, will admit the evidence. But as already seen,[3] the judge can never allow the jury to say, in the first instance, whether an objection to evidence shall be sustained. Thus, where a party offers to prove a contract by parol evidence, and it is objected that the contract was reduced to writing, and a witness is introduced to show that there was a writing, he must state the contents of it *to the court*, so that the court may judge whether it relates to the same contract or to something else; and it is error to leave this fact to the jury.[4] While the authorities leave this question in a state of embarrassment, yet in view of what has already been said,[5] the following propositions may be safely affirmed: 1. The judge will never submit to the jury, in the first instance, whether an objection to testimony shall be sustained — to do this is error. 2. Where the evidence fairly tends to support the preliminary proposition of fact, the existence of which is necessary to the admission of the evidence, the judge will admit it, and let the jury say what weight and effect they will give to it; and it is error to withhold it from them. 3. The decision of the judge in admitting evidence, where it has been necessary to decide a preliminary question of fact, will not be overthrown by a reviewing court, where there is any substantial evidence to support his conclusion.

[1] Swearingen *v.* Leach, 7 B. Mon. (Ky.) 287.

[2] Funk *v.* Kincaid, 5 Md. 405.

[3] *Ante*, § 318.

[4] Ratlif *v.* Hurtley, 5 Ired. L. (N. C.) 545.

[5] *Ante*, ch. XIII.

§ 677. [Continued.] **Illustrations.** — This corresponds to what has already been observed,[1] that, where the fact which the judge must decide on a preliminary offer of evidence involves the *decision of the whole case*, the judge merely decides, and so cautions the jury, that the fact has been *proved to him*. Where the fact involved in the preliminary offer decides the whole case, and there is substantial evidence in support of it, it is error for the judge to reject the evidence; since this ruling, by withholding the question from the ultimate decision of the jury, has the effect of usurping their province. This is well illustrated by a case where the defendant, in an action of trespass, justified under an execution issued by a magistrate and assigned to such defendant. The plaintiff objected to the admission of the execution in evidence, and offered to prove that the plaintiff therein was dead before it was issued. The court received evidence touching the question of the death, and decided that the execution was not admissible under the circumstances. It was held that this was error, since it had the effect of withdrawing the question from the jury.[2] So, in an action of ejectment, the plaintiff claimed under a conveyance from husband and wife, and insisted that the defendants were the tenants of the wife, and therefore estopped from disputing his title; but the tenancy was denied, and the defendants offered to prove, by the former husband of the wife, her alleged former marriage, and the court admitted this evidence. It was held: 1. That this evidence was admissible, if there was no tenancy, and that, by admitting it without qualification, the court decided that there was none, which the court had no right to do, it being a question of fact for the jury, and there being testimony to show that there was a tenancy. 2. That, if the evidence rendered the question of tenancy or no tenancy a doubtful one in the opinion of the court, the court might have admitted it, instructing the jury that if they believed there was a tenancy, then the testimony was not properly before them.[3]

[1] *Ante*, § 319.

[2] Day *v.* Sharp, 4 Whart. (Pa.) 339.

[3] Funk *v.* Kincaid, 5 Md. 405.

§ **678. Offer must show Materiality.** — In order to put the trial court in the wrong, on appeal or writ of error, for rejecting an offer of evidence on direct examination, the offer, as stated in the bill of exceptions, must show the materiality of the evidence which was tendered.[1] Where the question does not suggest the answer, counsel must, in general, disclose what it will be, or what he expects it will be, or *what he proposes to prove*.[2] Where there is in the bill of exceptions neither a formal offer of evidence, nor any statement of what the witness will testify to, there is no available error.[3] Thus, it is said to be a settled rule, where a *conversation* between persons is offered in evidence, to require the party offering it to disclose *how* it may be material.[4] So, where a tender of evidence is made to prove certain facts, some of which are admissible and others inadmissible, the offer is properly rejected as a whole; the court is not bound to separate it and admit such parts of it as are competent, although it may do so in its discretion.[5] Where a *witness* which a party tenders is *competent as to certain facts*, but not as a general witness, and he is objected to as incompetent, — the party tendering him should state what he proposes to prove by him, so that the court may know that it is proper; otherwise an appellate court cannot say that there is any error in refusing to allow him to testify.[6] In Virginia we find a *qualified statement of the rule*, which is, that where an objection is made to a question, *on the ground of irrelevancy*, and sustained, it is necessary for the party asking the question, in order to put the court in the

[1] United States *v.* Gilbert, 2 Sumn. (U. S.) 20. Bank of Pleasant Hill *v.* Wills, 79 Mo. 275; Aull Savings Bank *v.* Aull, 80 Mo. 199; Jackson *v.* Hardin, 83 Mo. 175, 187.

[2] Jackson *v.* Hardin, *supra;* Bridgers *v.* Bridgers, 69 N. C. 451; Straus *v.* Beardsley, 79 N. C. 59; Oberman *v.* Coble, 13 Ired. L. (N. C.) 1; Roberts *v.* Roberts, 85 N. C. 9; Mergentheim *v.* State (Ind.), 8 N. East. Rep. 568; *s. c.* 107 Ind. 567; Tedrowe *v.* Esher, 56 Ind. 443, 448; Toledo &c. R. Co. *v.* Goddard, 25 Ind. 185, 191; Shellito *v.* Sampson, 61 Ia. 40. Compare Jenks *v.* Knott's Co., 58 Ia. 549; Votaw *v.* Diehl, 62 Ia. 676, 680; Mitchell *v.* Harcourt, *Id.* 349, Martz *v.* Martz, 25 Gratt. (Va.) 361, 367.

[3] Batten *v.* State, 80 Ind. 395, 401.

[4] Trustees *v.* Brooklyn Fire Ins. Co 23 How. Pr. (N. Y.) 448.

[5] Smith *v.* Arsenal Bank, 104 Pa. St. 518.

[6] Stewart *v.* Kirk, 69 Ill. 509.

wrong, to show upon the record what he expects to prove by the witness.[1] But in that State this rule has no application where the objection is to the *competency of a witness;* since here it is a question whether the witness shall be heard at all, though his testimony be ever so relevant or important.[2]

§ 679. [Continued.] **Counsel required to State the Substance of the Offer.**— The court may, in the exercise of a sound discretion, require counsel to state the substance of evidence which is tendered, so as to enable the court to judge of its materiality and relevancy;[3] and a reviewing court will not control the trial court in the exercise of such a discretion.[4] If this is not required, and the evidence is admitted generally, no error is committed, provided the evidence was competent for any purpose.[5] "A party," says Parker, J., "having a witness on the stand, may be called upon by his adversary to state what he proposes to prove, and in that case he must state it. But he need make no such statement, unless called upon to do so. It is enough for him to proceed and put his questions to the witness unless desired to state what he expects to prove."[6]

§ 680. [Continued.] **Aliter on Cross-examination.** — It should be added that the foregoing rule is not applicable on *cross-examination.* Here the party is examining his adversary's witness, and from the nature of the case cannot be expected to know what the answers to his questions will be.[7] It is erroneous to reject questions, propounded on cross-examination, which relate to the subject of the cross-examination, even though it be not apparent that the answers would have benefited the cross-examining party, unless it affirmatively appear that he could not have been injured by the rejection; and it has been held that

[1] Carpenter *v.* Utz, 4 Gratt. (Va.) 270.

[2] Martz *v.* Martz, 25 Gratt. (Va.) 361, 367.

[3] Morgan *v.* Browne, 71 Pa. St. 130, 136; McClelland *v.* Lindsay, 1 Watts & S. (Pa.) 360.

[4] Roy *v.* Targee, 7 Wend. (N. Y.) 359.

[5] McClelland *v.* Lindsay, 1 Watts & S. (Pa.) 360.

[6] Beal *v.* Finch, 11 N. Y. 128, 135.

[7] Harness *v.* State, 57 Ind. 1; Hutts *v.* Hutts, 62 Ind. 214, 225.

this error is not cured by allowing the party to go fully into the same matters with his own witnesses. He has a right to a full cross-examination, and cannot, for that purpose, be compelled to make the witness his own. "Cross-examination," said Christiancy, C. J., "is the great test of the knowledge, as well as of the veracity of witnesses. The right to pursue it may sometimes be abused; and when it is sought to be abused, — as when counsel insists upon going over the same ground again and again, or when it is apparent that the witness has already fully answered without any appearance of evasion, and it is evident the counsel is merely pushing the witness for the sake of annoyance, or for any illegitimate purpose, — it is competent for the court in its discretion, to put an end to it." [1]

§ 681. Tender of Witness Competent as to some Matters only. — Where a party is competent as a witness for a limited purpose, and tenders himself as a witness "generally in his own behalf," it is error to exclude him without being sworn, unless it distinctly appear that he does not wish to be sworn at all, unless allowed to give evidence at large. He should be sworn, and the objection to his competency should be taken to any evidence which he may offer as to which he is incompetent.[2] In other words, where a witness has been called to the stand, who is incompetent to be sworn and to testify on some matters, but who may not speak of other matters, it is not proper to object to his competency generally and to exclude him. In such a case, it will not be presumed that an improper question will be asked of him. It is only by objecting to improper questions when asked, that a party can exclude improper evidence.[3]

§ 682. When Witness presumed Material. — It has been held that, where a bill of exceptions states that a witness was asserted to be competent by the counsel tendering him, and was rejected by the court, — a court of error will infer that the wit-

[1] O'Donnell *v.* Segar, 25 Mich. 367, 374.

[2] Brown *v.* Richardson, 20 N. Y. 474

[3] Beal *v.* Finch, 11 N. Y. 128, 134.

ness was *material* to sustain the issue, without a direct statement to that effect in the bill of exceptions.[1]

§ 683. **Questions must be Specific.**—Where questions are *too general* in their character, they may be properly rejected for that reason alone. Thus, in an action against a sheriff for an escape, it was held that a new trial would not be granted because the judge refused to allow a question to be put in this form: "By what means and in what manner did the prisoner break jail?" To entitle the party to enter upon such an inquiry he should apprise the judge of his intention to show such a state of facts as would excuse the sheriff.[2]

§ 684. **Question must be Relevant at the Time.**—In order to put the court in error for rejecting a question, or a tender of evidence, it must appear that it was relevant *at the time when it was offered*, unless the party offering it proposes to make it relevant by the introduction of some other evidence distinctly specified.[3] It is not sufficient that it became relevant by something that transpired at a subsequent stage of the trial.[4] The mere fact that such evidence may be a part of a *chain of evidence*, the other *links* of which the counsel tendering the evidence intends to supply, is not of itself sufficient to put the court in the wrong in rejecting it; since, as was well observed by Gibson, J., "if this were admitted, no court could, without error, ever reject evidence for irrelevancy,—as there is no fact so entirely irrelevant as to be incapable of being connected with the question, however remotely, by the intervention of a chain of possible circumstances. But the question is, how did the matter stand as it was proposed to the court? If it was altogether irrelevant, the court might reject it, although it might not, perhaps, be error to admit it. If it would be relevant, when

[1] Haussknecht *v.* Claypool, 1 Black (U. S.), 431.

[2] Fairchild *v.* Case, 24 Wend. (N. Y.) 381.

[3] McCurry *v.* Hooper, 12 Ala. 823; Scofield *v.* Walrath, 35 Minn. 356; State *v.* Staley, 14 Minn. 105; Austin *v.* Robertson, 25 Minn. 431.

[4] Carpenter *v.* Bennett, 4 Fla. 284, 334; Winlock *v.* Hardy, 4 Litt. (Ky.) 272; Weidler *v.* Farmers' Bank, 11 Serg. & R. (Pa.) 134.

taken in connection with other facts, it ought to be proposed in connection with those facts, and an offer to follow the evidence proposed, with proof of those facts at the proper times. But the court is not bound to spend its time in an inquiry which, from the showing of the party, can produce no results. Dislocated circumstances may doubtless be given in evidence, particularly if there be no objection to the order of time; but the proposal of the evidence must contain, in itself, by reference to something that has preceded it, or that is to follow, information of the manner in which the evidence is to be legitimately operative." [1] Thus, where a witness for the plaintiff, in an action for slander, is unable to say whether the words were spoken *before* or *after* the commencement of the suit, the testimony is properly excluded, because the judge cannot see whether or not it is relevant.[2]

§ 685. Counsel must have Witnesses ready to Sustain Offer. It is not competent for counsel simply to make an offer of proof which he has no witnesses to sustain, and insist upon the court deciding the question which the offer raises; since that would be invoking from the court a decision upon a mere moot question. Nor is it competent for counsel to make an offer of proof, without stating to the court that he can sustain it by competent witnesses.[3] If no witnesses are tendered, it is not error for the court to reject the offer for that reason; and it follows from this that, in order to reverse a judgment because of the rejection of a tender of competent evidence, it should appear that a witness was offered to prove it.[4] But it does not follow that it will be *presumed*, on error, that the offer was a sham. "If," said Waite, C. J., "the trial court has doubts about the good faith of an offer of testimony, it can insist on the production of the witness, and upon some attempt to make the proof, before it rejects the offer; but if it does reject it, and allows a bill of exceptions which shows that the offer was actually made and refused, and

[1] Weidler *v.* Farmers' Bank, 11 Serg. & R. (Pa.) 134, 139.

[2] Scovell *v.* Kingsley, 7 Conn. 284.

[3] Eschbach *v.* Hurtt, 47 Md. 61.

[4] Robinson *v.* State, 1 Lea (Tenn.), 673.

there is nothing else in the record to indicate bad faith, an appellate court must assume that the proof could have been made, and govern itself accordingly." [1]

§ 686. **Must not repeat Offers after Adverse Ruling.**— While counsel may offer evidence for the purpose of obtaining, in case of doubt, a distinct ruling as to its admissibility, and may vary the form of the offer or include other matters, in order that the particular question desired may be distinctly raised — yet where an adverse ruling has once been obtained, other offers governed by such ruling must not be made.[2]

§ 687. **When offers not made in Hearing of Jury.**— In an important case in Michigan it is said: "If counsel * * * make the offers in the presence and hearing of the jury, and the court permits them to be made in this manner, the character of the offers so made may be such, even although they were rejected below, as to require, on error, a reversal of the judgment where the party making such rejected offers obtains a verdict and judgment in the case. Everything having a tendency to prejudice or influence a jury in their deliberations, which is not legally admissible in evidence on the trial of the cause, should be, so far as possible, kept from coming to their knowledge during the trial. An impression once made upon the mind of a juror, no matter how, will have more or less influence upon him when he retires to deliberate upon the verdict to be given, and no matter how honest and conscientious he may be, or how carefully he may have been instructed by the court not to permit such incompetent matters to influence him, or have any bearing on the case, it will be very difficult, if not impossible, for him to separate the competent from the incompetent, or to say to what extent his impressions or convictions may be attributed to that which properly should not have been permitted to come to his knowledge. But whatever the reason for the rule may be, all courts agree in excluding incompetent testimony, and that an error in this re-

[1] Scotland County *v.* Hill, 112 U. S. 183, 186.

[2] Scripps *v.* Reilly, 38 Mich. 10.

spect will be sufficient cause for reversal. This rule would be but slight protection, if counsel or witnesses could be permitted to make a statement, but not under oath, of the incompetent testimony, or counsel state the same fully to the jury, in their argument, or otherwise. The essence of the wrong consists in the fact that such incompetent testimony is brought to the attention of the jury, more than in the method adopted in communicating the fact. No matter how the information is derived, the result is the same. In this case, after counsel had obtained a clear and distinct ruling of the court as to the inadmissibility of a certain class of articles [newspaper articles], a large number of the same class were offered, and in making each separate offer, counsel stated the purport of the article, or read the headings. This course was objected to, but permitted by the court, and the articles offered were all excluded, the objection as to their admissibility having been sustained. We think the course adopted was not correct, and that, although perhaps not fully covered by the letter of the previous decision in this case, yet that it comes clearly within the reason and the spirit of the rules there laid down. Where the offer is likely to be of such a character that it would have a tendency to prejudice or influence the jury, the correct practice would be to present the article, if in writing, to the court and counsel for examination, without stating either the purport or substance of it. The cases are but few where such objectionable articles are likely to come up on the trial, and, when such a case arises, the good sense of court and counsel will not only see the necessity, but will readily discover and adopt the means requisite to keep them from the reach of the jury." [1]

Article II. — Objections to Evidence and Exceptions.

Section

690. Necessity of Objecting and Excepting.
691. Evidence having no Probative Value.
692. Waiver of Right to Object.
693. Specific Grounds of Objection must be pointed out.
694. Instances under the foregoing Rule.

[1] Scripps *v.* Reilly, 38 Mich. 10, 14.

SECTION
695. [Continued.] Objections to Specific Portions of Testimony must state clearly the Portions Objected to.
696. Exceptions to Testimony *en Masse*.
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712. Arguing the Objection.
713. Effect of Examination of a Party before Trial.

§ **690. Necessity of Objecting and Excepting.** — The general rule is that, *in actions at law*, appellate tribunals review the judgments of trial courts only in respect of errors of law; such cases are not re-examined upon the whole evidence, as is done in cases in equity, admiralty and in actions for divorce. It is therefore necessary, in order to save the rulings of the trial courts for review in actions at law, to preserve a record of such rulings, by *excepting* to them in the trial court when they are made, by bringing to the attention of the court the distinct ground of the exception, and by having the exception embodied in a *bill of exceptions*, which, when signed and sealed by the judge in conformity with law, becomes a part of the record in the cause, which is brought to the appellate court by appeal or writ of error. Unless objections are seasonably made upon specific grounds, and exceptions properly taken in the trial courts, the rulings of such courts, in actions at law, cannot be reviewed in the appellate tribunals. If this were not the rule, the spectacle would be presented of causes tried upon one theory in the court of *nisi prius*, and decided upon a different theory in the

court of appeal.[1] The rule is, therefore, general in actions at law, that no objection to a ruling made on the progress of the trial is available upon error or appeal unless it was first made and ruled upon in the court below.[2] Subject to the qualification stated in the next following section, the rule applies with as much force to the objections to evidence as to objections to any other ruling made in the progress of a trial.[3] The necessity of making seasonable objections to incompetent testimony is just as important in *criminal* as in civil trials, and where the defendant in such a trial fails to object to such testimony when it is offered, he cannot raise the objection for the first time on appeal.[4]

§ **691. Evidence having no Probative Value.** — An exception to the foregoing rule relates to cases where the evidence, which is admitted without objection, is of such a character that the law ascribes to it no probative value whatever. In such a case, — at least according to one view, — if the jury return a verdict in consequence of it in an action at law, the verdict will be set aside as being unsupported by evidence; and, as already suggested, in suits in equity and in other proceedings where the appellate court tries the case anew, it will not be allowed to have any weight in influencing the decree of the court, — especially if the attention of the court is directed to its want of probative value. Notwithstanding this, it is *unsafe*, whether in an action at law or in equity, to allow such matters to be rehearsed as evidence without objection.

§ **692. Waiver of Right to Object.** — A party who agrees that his adversary may go into evidence which may be inadmis-

[1] To this general principle see Letton *v.* Graves, 26 Mo. 251; Peyton *v.* Rose, 41 Mo. 257; Jennings *v.* Prentice, 39 Mich. 421, 423.

[2] Spencer *v.* St. Paul &c. R. Co., 22 Minn. 30; Rush *v.* French, 1 Ariz. T. 99, 102; Martin *v.* Travers, 12 Cal. 243; People *v.* Glenn, 10 Cal. 32; Frier *v.* Jackson, 8 Johns. (N. Y.) 496; Jackson *v.* Cadwell, 1 Cow. (N. Y.) 622; Whiteside *v.* Jackson, 1 Wend. (N. Y.) 418; Waters *v.* Gilbert, 2 Cush. (Mass.) 29; Covillaud *v.* Tanner, 7 Cal. 38.

[3] Hewett *v.* Buck, 17 Me. 147.

[4] State *v.* McLaughlin, 44 Ia. 82; State *v.* Polson, 29 Ia. 133.

sible if objected to, cannot afterwards complain of the reception of such evidence, or of the reception of other evidence of the same character. The reason is, that *modus et conventio vincunt legem:* having established a law of his own, he must be content to abide by it. [1]

§ **693 Specific Grounds of Objection must be pointed out.** — Where evidence is objected to at the trial, if the party would save an exception to the ruling of the court if adverse to him, such as will be available on appeal or error, he must frame his objection so as to bring to the attention of the trial court the specific ground upon which he predicates it, and this must be stated in his bill of exceptions.[2] He *waives*

[1] Rundell *v.* Butler, 10 Wend. (N. Y.) 119. Compare Adams *v.* Farnsworth, 15 Gray (Mass.), 423, 426.

[2] Dozier *v.* Jerman, 30 Mo. 216; Letton *v.* Graves, 26 Mo. 250; Camden *v.* De Doremus, 3 How. (U. S.) 515; Bank of Missouri *v.* Merchants' Bank, 10 Mo. 123, 128; Roussin *v.* St. Louis &c. Ins. Co., 15 Mo. 244; Weston &c. R. Co. *v.* Cox, 32 Mo. 456; Buessemeyer *v.* Stuckenberg, 33 Mo. 546; Hannibal &c. R. Co. *v.* Moore, 37 Mo. 338; Peyton *v.* Rose, 41 Mo. 257, 260. See also Davidson *v.* Peck, 4 Mo. 438; Cozzens *v.* Gillispie, 4 Mo. 82; Peck *v.* Chouteau (Mo.), 3 S. W. Rep. 577; *s. c.* 91 Mo. 138; Shelton *v.* Durham, 76 Mo. 434; Primm *v.* Raboteau, 56 Mo. 407; Margrave *v.* Ausmuss, 51 Mo. 561, 566; Buckley *v.* Knapp, 48 Mo. 152, 164; Woodburn *v.* Cogdal, 39 Mo. 222; St. Louis Public Schools *v.* Risley, 40 Mo. 357; Fields *v.* Hunter, 8 Mo. 128; Dickey *v.* Malechi, 6 Mo. 177, 186; Frost *v.* Pryor, 7 Mo. 314; Watson *v.* McClaren, 19 Wend. (N. Y.) 557; Baier *v.* Berberich, 85 Mo. 50; *s. c.* affirmed, 13 Mo. App. 587; People *v.* Apple, 7 Cal. 289, 290; Kiler *v.* Kimball, 10 Cal. 267; Martin *v.* Travers, 12 Cal. 243; Baker *v.* Joseph, 16 Cal. 173, 180; Mabbett *v.* White, 12 N. Y. 442, 451; Kan. Pac. R. Co. *v.* Painter, 9 Kan. 620, 629; Wilson *v.* Fuller, *Id.* 176, 186; Walker *v.* Armstrong, 2 Kan. 198, 226; Jackson *v.* Cadwell, 1 Cow. (N. Y.) 622, 639; Michel *v.* Ware, 3 Neb. 229, 235; Johnson *v.* Adleman, 35 Ill. 265; Carroll *v.* Benicia, 40 Cal. 390; Rosenheim *v.* American Ins. Co., 33 Mo. 230; Greene *v.* Gallagher, 35 Mo. 226; Clark *v.* Conway, 23 Mo. 438; Grimm *v.* Gamache, 25 Mo. 41; Stone *v.* Great Western Oil Co., 41 Ill. 85; Graham *v.* Anderson, 42 Ill. 514; Howell *v.* Edmonds, 47 Ill. 79; Moser *v.* Kreigh, 49 Ill. 84; Hanford *v.* Obrecht, 49 Ill. 146; Harmon *v.* Thornton, 3 Ill. 351; Gillespie *v.* Smith, 29 Ill. 473; Sargeant *v.* Kellogg, 10 Ill. 273; Swift *v.* Whitney, 20 Ill. 144; Buntain *v.* Baily, 27 Ill. 409; Weide *v.* Davidson, 15 Minn. 330; Schell *v.* Nat. Bank, 14 Minn. 47; Gilbert *v.* Thompson, 14 Minn. 544; Bickham *v.* Smith, 62 Pa. St. 45; Batdorff *v.* Bank, 61 Pa. St. 179; Moore *v.* Bank, 13 Pet. (U. S.) 302; Elliott *v.* Piersol, 1 Pet. (U. S.) 328; Hinde *v.* Longworth, 11 Wheat. 199; People *v.* Durfee (Mich.), 29

all grounds not so specified.[1] The *reason of the rule* is twofold: 1. To enable the trial judge to understand the precise question upon which he has to rule,[2] and to relieve him from the burden of searching for objections which counsel is unable to discover, or which he sees fit to conceal.[3] 2. To afford the opposite party an opportunity to obviate it before the close of the trial, if well taken.[4] It is, therefore, a part of the rule that the party objecting to testimony will not be permitted to *change his ground* on appeal;[5] otherwise the trial court might decide the objection on one ground, and the appellate court on another.[6] This would produce uncertainties and injustice. Thus, it would be a monstrous rule that would permit a defendant in an action of ejectment to object to a deed, on which the plaintiff depended to make out his title,

N. W. Rep. 109; Delphi *v.* Lowery, 74 Ind. 520; Forbing *v.* Weber, 99 Ind. 588; Carter *v.* Bennett, 4 Fla. 284, 337; Camden *v.* Doremus, 3 How. (U. S.) 515; Elwood *v.* Deifendorf, 5 Barb. (N. Y.) 398, 406. See also the following cases as more or less illustrating the rule: Irvinson *v* Van Riper, 34 Ind. 148; Ferriter *v.* State, 33 Ind. 283; Sutherland *v.* Venard, 32 Ind. 483; Hamrick *v.* Danville &c. Co., 32 Ind. 347; Watts *v.* Green, 30 Ind. 98; Sharp *v.* Flinn, 27 Ind. 98; Marcus *v.* State, 26 Ind. 101; Gibson *v.* Green, 22 Ind. 422; Every *v.* Smith, 18 Ind. 461; Smith *v.* Allen, 16 Ind. 316; Rowe *v.* Haines, 15 Ind. 445; Boxley *v.* Carney, 14 Ind. 17; Wolcott *v.* Yeager, 11 Ind. 84; Lackey *v.* Hernby, 9 Ind. 536; Manly *v.* Hubbard, 9 Ind. 230; Ellis *v.* Miller, 9 Ind. 210; Boggs *v.* State, 8 Ind. 463; Coleman *v.* Dobbins, 8 Ind. 156; Priddy *v.* Dodd, 4 Ind. 84; Prather *v.* Rambo, 1 Blackf. (Ind.) 189.

[1] People *v.* Manning, 48 Cal. 335. "All the equities," said Dunne, C. J., "and all the presumptions are, not that the ruling is correct, but that evidence offered ought to come in, unless at the time it was offered good reason is shown why it should be excluded. 'Competency is presumed until the contrary is shown.'" Rush *v.* French, 1 Ariz. T. 99, 128; citing Hall *v.* Gittings, 2 Harr. & J. (Md.) 112, 120 and the cases cited by Chase, C. J., at the last page; Stoddert *v.* Manning, 2 Harr. & J. (Md.) 147; Callis *v.* Tolson, 6 Gill & J. (Md.) 80, 91; Saxon *v.* Boyce, 1 Bailey (S. C.), 66; Smith *v.* White, 5 Dana (Ky.), 376, 382, 383.

[2] Brown *v.* Weightman (Mich.), 29 N. W. Rep. 98; Dickey *v.* Malechi, 6 Mo. 177, 186.

[3] Bundy *v.* Hyde, 50 N. H. 121.

[4] Gill *v.* McNamee, 42 N. Y. 44; Sparrowhawk *v.* Sparrowhawk, 6 N. Y. Week. Dig. 281; *s. c.* 11 Hun (N. Y.), 528; Rush *v.* French, 1 Ariz. T. 99, 125.

[5] Tooley *v.* Bacon, 70 N. Y. 34; Briggs *v.* Wheeler, 16 Hun (N. Y.), 583; McDonald *v.* North, 47 Barb. (N. Y.) 530.

[6] Dickey *v.* Malechi, 6 Mo. 177, 186.

on the ground that it was defectively acknowledged, and then to renew his objection in the appellate court, on that ground that it was a forgery; or that he should object to it in the trial court on the ground of irrelevancy, without stating any other ground, and should then renew his objection in the appellate court on the ground of a defective acknowledgment. Such a rule would level the appellate courts to the position of trial courts, would overturn all just conceptions of appellate procedure in cases at law, and would result in making the hearing of an appeal in such an action a trial *de novo*, without the presence of witnesses or the means of obviating errors or omissions.[1]

§ 694. Instances under the foregoing Rule. — Under the foregoing rule, objections presented by the bill of exceptions in the following form: "Counsel for the plaintiff objected, objection overruled and plaintiff exeepted," are too general in their terms to present any ques-

[1] "The object," said Dunne, C. J., "of requiring the ground of objection to be stated, which may seem to be a technicality, is really to avoid technicalities and prevent delay in the administration of justice. When evidence is offered to which there is some objection, substantial justice requires that the objection be specified, so that the party offering the evidence can remove it, if possible, and let the case be tried on its merits. If it is objected that the question is leading, the form may be changed; if that the evidence is irrelevant, that the relevancy may be shown; if that it is incompetent, the incompetency may be removed; if that it is immaterial, its materiality may be established; if to the order of introduction, it may be withdrawn and offered at another time; — and thus appeals could often be saved, delays avoided and substantial justice administered. Counsel are held to the grounds of objection stated at the time they call for the decision of the court below; because they are supposed to know the law of their case, and if they do not offer objections they are supposed to waive them, and evidence admitted without valid objection should stand. Counsel must not be permitted to wink at the introduction of evidence to which they think there is a valid objection, hoping that it may benefit them, and if it goes the other way, move to exclude it; neither must they be permitted to plead inattention as an excuse. It is their business to be attentive on the trial, and if they miss a point by neglect, they must ose it. Neither can we allow them to strike between wind and water on the trial, and then go home to their books and study out their objections and urge them here. They must stand or fall upon the case they made below; for this court is not a forum to discuss new points of this character, but simply a court of review to determine whether the rulings of the court below on the case, as presented, were correct or not." Rush *v.* French, 1 Ariz. T. 99, 124.

tion for review on error or appeal.[1] So, of objections on the ground that the evidence is "*illegal* and *incompetent*."[2] So, of an objection that the evidence is "*incompetent*," without pointing out the ground on which this claim is made.[3] So, of an objection that the evidence is "*incompetent* and *irrelevant*,"[4] or "*irrelevant*, *incompetent* and *immaterial*,"[5] or, "*inadmissible*."[6] So, an objection that testimony is "*irrelevant*," without specifying wherein, how or why it is irrelevant, will not be considered on appeal or error, if the testimony could, under any possible circumstances, have been relevant.[7] So, where the objection is that the evidence is "*incompetent*" and "*illegal*" it is the duty of the court to overrule it if the evidence is admissible for any purpose.[8] So, an objection that evidence is "*irrelevant, incompetent and immaterial*" is held to be merely a general objection, and properly overruled if the evidence is admissible for any purpose.[9] So, it has been held that an objection that evidence is "*incompetent*," does not raise any issue as to whether the question is *leading;* the only way to raise such an issue is to object specifically that it is leading.[10] So, objections that evidence is "*irrelevant, immaterial* or *improper*" will not be sufficient to raise the question of the competency of the witness, even where he is clearly incompetent by express statute.[11] So, an objection to a deposition for substance will not enable the objecting party to claim its exclusion on the ground of *incompetency*, just as the court commences to charge the jury. The reason is that if the objecting party had placed his objection on the ground of incompetency at the time, the plaintiff might have availed himself of other testimony on

[1] Peck *v.* Chouteau, 3 S. W. Rep. 577; *s. c.* 91 Mo. 138.

[2] Clark *v.* Conway, 23 Mo. 438.

[3] Jones *v.* Angell, 95 Ind. 376; Lake Erie &c. R. Co. *v.* Parker, 94 Ind. 91; McClellan *v.* Bond, 92 Ind. 424; Stanley *v.* Sutherland, 54 Ind. 339, 352; Harvey *v.* Huston, 94 Ind. 527; Fitzpatrick *v.* Papa, 89 Ind. 17; Cox *v.* Stout, 85 Ind. 422; Underwood *v.* Linton, 54 Ind. 468; Murray *v.* Phillips, 59 Ind. 56; Manning *v.* Gasharie, 27 Ind. 399; Bundy *v.* Hyde, 50 N. H. 121.

[4] Louisville &c. R. Co. *v.* Falvey, 104 Ind. 409, 415; Over *v.* Schiffling 102 Ind. 191; Shafer *v.* Ferguson, 103 Ind. 90; Bottenberg *v.* Nixon, 97 Ind. 106; Jones *v.* Angell, 95 Ind. 376; Lake Erie &c. R. Co. *v.* Parker, 94 Ind. 91; Harvey *v.* Huston, 94 Ind. 527; McClellan *v.* Bond, 92 Ind. 424; Stanley *v.* Sutherland, 54 Ind. 339.

[5] Lake Erie &c. R. Co. *v.* Parker, 94 Ind. 91, 94.

[6] Leet *v.* Wilson, 24 Cal. 398, 402.

[7] Dreux *v.* Domec, 18 Cal. 83.

[8] Sneed *v.* Osborn, 25 Cal. 627; Bohanan *v.* Hans, 26 Tex. 450.

[9] Voorman *v.* Voight, 46 Cal. 397.

[10] Kan. Pac. R. Co. *v.* Pointer, 9 Kan. 620, 627.

[11] Cornell *v.* Barnes, 26 Wis. 473, 480.

the particular points.[1] So, the general objection to the witness that he is "*incompetent*" will not be available on appeal, where it appears that he was a competent witness as to certain facts, although he may have been incompetent as to other facts.[2] It is well laid down that, "there is a wide distinction between *immaterial* and *incompetent* evidence. It may be material and tend to prove the issue, but incompetent for that purpose under the rules of law. On the other hand, it may be competent evidence in a proper case, but immaterial to any issue before the court.[3]

§ 695. [CONTINUED.] OBJECTIONS TO SPECIFIC PORTIONS OF TESTIMONY MUST STATE CLEARLY THE PORTIONS OBJECTED TO. —Where certain evidence is objected to, which is clearly admissible, if it is a part of one entire conversation on which the plaintiff relies, but which is left in uncertainty by reason of the indistinct recollection of the witness offered to prove it, the court ought not to let it go to the jury to be considered by them, if they shall find it to have been an entire conversation relied upon. In so holding it was said by Church, J., in giving the opinion of the Connecticut court: "Although it is the privilege and prerogative of the jury to determine all matters of fact which are involved in the issue submitted to them, yet it is equally the exclusive duty of the court to determine all matters of law, even if they involve the necessity of deciding upon the truth of facts."[4] Upon the same principle where, in two instances, after certain testimony had been offered, the defendant objected to certain portions of it as matter which the witness had testified to from hearsay, and not from his own knowledge, and the court merely instructed the jury to reject all statements not made by the witnesses on their own knowledge; and in one of the instances the plaintiff particularly requested the court to instruct the jury specifically as to what particular evidence was to be thus excluded, but the court did not comply with the request, — it was held that this was error." Loomis, J., in giving the opinion of the court said: "As the matter of admitting or rejecting evidence is within the exclusive province of the court, and not of the jury, it should not have been left to them to say what evidence should be excluded; and the party has a right to know where he has taken his objection with particularity, precisely what evidence is received and what rejected.[5]

[1] Motley *v.* Head, 43 Vt. 636.
[2] Forbing *v.* Weber, 99 Ind. 588.
[3] People *v.* Manning, 48 Cal. 335, 338.
[4] Robinson *v.* Ferry, 11 Conn. 460.
[5] Morford *v.* Peck, 46 Conn. 380, 382.

§ 696. EXCEPTIONS TO TESTIMONY EN MASSE. — An exception to testimony *en masse* is unavailing, where any of it is properly admitted. Thus, if a party excepts to the entire testimony of a witness, without specifying particular portions of it, and if any of it was properly admitted, the exception is unavailing.[1]

§ 697. EFFECT OF SUSTAINING AND OVERRULING GENERAL AND SPECIFIC OBJECTIONS. — In a case already much quoted from, in the opinion given by Dunne, C. J., the following judicious observations occur: "There are numerous authorities and adjudications in support of the natural, common-sense proposition that a general objection raises no issue, except it is as to whether the evidence would, under any circumstances or for any purpose, be admitted; and that a specific objection raises no other issue than the particular one tendered. They are also in support of the proposition that if a judge overrule a general objection, he must be sustained unless it clearly appears that, under no possible circumstances in the case would the evidence come in; and that if he sustain a general objection, he must be reversed if it is possible that, under any view of the case, the evidence might be admitted; that if he overrule a special objection, he must be sustained if the particular objection is bad, no matter how many other good objections might have been offered; but if he sustain a special objection, he must be reversed if the special objection urged is not good, notwithstanding that there may be other objections, which, had they been urged, would have sustained his rulings. The policy of the law is evidently to admit evidence unless a good objection to it is clearly shown." [2]

§ 698. IF GROUND STATED, IT MUST BE A GOOD ONE. — Where the objecting party states the ground of his objection, it is incumbent upon him, if he would save an exception to the overruling of it, which will be available on error or appeal, to state a valid ground. If he fails to do this, his objection will not avail him, although he might have stated a

[1] Beebe *v.* Bull, 12 Wend. (N. Y.) 504.

[2] Rush *v.* French, 1 Ariz. T. 99, 127. A loose view is found in one case, that a general objection to evidence will enable the objector to assign any cause for the objection which is valid. If the proponent of the evidence wishes the ground of the objection to be specified, he must call upon the objector to state them at the trial and to have them incorporated in the bill of exceptions. Penn. Mutual Aid Society *v.* Corley (Pa.), 11 Ins. Law Journ. 493.

valid ground.[1] In other words, he cannot change his ground and object to the evidence on one ground, in the trial court, and on another in the appellate court.

§ 699. **Right to rebut Irrelevant Evidence.** — Upon this subject there are *two views*. One is that, where one party introduces irrelevant evidence, the other is entitled to rebut it, and that the party first entering upon such line of inquiry, is estopped to object that the rebutting evidence is irrelevant.[2] Thus, where the plaintiff was interrogated on the witness stand by the defendant, touching certain admissions made in the presence of certain persons and at a certain time, and did not set up that what he said was in reference and with a view to *a compromise of the case*, but gave his version of the conversation, — it was held that the defendant should be allowed to give his version of the same transaction, either by himself or by other witnesses, and that his version should not be ruled out on the ground of having been made in view of a compromise.[3] So, where a defendant is improperly permitted to *assail the character* of the plaintiff by evidence, no error is committed by permitting the plaintiff to countervail it, by evidence of good character.[4] This view is supported by the sensible and just consideration that evidence, though immaterial, may be prejudicial; and if prejudicial the party against whom it is leveled ought to have the right to countervail its prejudicial effect. *The other view* is that the fact that improper evidence has been used on one side, does not justify the same kind of evidence, if objected to, being used on the other side,[5] — which seems to mean that it is *within the power* of

[1] Harris *v.* Panama Railroad Co., 5 Bosw. (N. Y.) 312.

[2] Havis *v.* Taylor, 13 Ala. 324; Hale *v.* Philbrick, 47 Ia. 217; Patton *v.* Philadelphia, 1 La. Ann. 98; Scattergood *v.* Wood, 79 N. Y. 263; Brown *v.* Perkins, 1 Allen (Mass.), 89; Sherwood *v.* Titman, 55 Pa. St. 77; McCartny *v.* Territory, 1 Neb. 121; Thomson *v.* Brothers, 5 La. 277; Ward *v.* Washington Ins. Co., 6 Bosw. (N. Y.) 229. Compare People *v.* Dowling, 84 N. Y. 479; Wallis *v.* Randall, 81 N. Y. 164.

[3] Scales *v.* Shackleford, 64 Ga. 170.

[4] Findlay *v.* Pruitt, 9 Port. (Ala.) 195.

[5] Walkup *v.* Pratt, 5 Harr. & J. (Md.) 51; Mitchell *v.* Sellman, 5 Md. 377; Stringer *v.* Young, 3 Pet. (U. S.) 320, 337. In such a case it was said by Chief Justice Marshall: "Whether a case may exist in which improper

the court to stop the progress of the irrelevant inquiry, and such is the rule; [1] which power the court will exercise, to avoid the consumption of public time and the diversion of the attention of the jury from the real issues in the case.[2] A further reason is, that the plaintiff's *consent* to the admission of incompetent evidence for the defendant, furnishes no reason why he should be allowed to introduce other incompetent evidence, to which the defendant objects.[3] So, it has been ruled that *incompetent testimony* cannot be admitted to *rebut incompetent testimony* which has been offered by the other side.[4] On the other hand, it has been ruled that the verdict will not be set aside because this is done.[5]

§ 700. Time of Objecting and Excepting. — Moreover, it is incumbent on the defendant in a criminal case, as it is on a party in a civil case, if he would avail himself, on error or appeal, of any irregularities committed on the trial of the case, to make his objection and to save his exception *at the time* when the irregularity was committed.[6] Objections to evidence cannot, as a general rule, be made by a *motion to instruct* the jury to disregard the particular evidence. It has been well said: "To allow a party to permit, without objection, the admission of evidence, and for the first time make his objection in instructions, would be intolerable practice. If he had an opportunity to interpose an objection, he cannot take the chances that the testimony will be favorable to him, and, when it turns out otherwise, raise his objection; but must be held to have *waived* it." [7] Such an

testimony may be calculated to make such an impression upon the jury, that no instructions given by the judge can efface it, and whether, in such a case, testimony, not otherwise admissible, may be introduced, which is strictly and directly calculated to disprove it, are questions on which this court does not mean to indicate any opinion." Stringer *v.* Young, *supra*.

[1] Farmers' &c. Bank *v.* Whinfield, 24 Wend. (N. Y.) 420, 422.

[2] Davis *v.* Keyes, 112 Mass. 436.

[3] Wilkinson *v.* Jett, 7 Leigh (Va.), 115; Manning *v.* Burlington &c. R. Co. (Ia.), 20 N. W. Rep. 169; *s. c.* 64 Ia. 240.

[4] McCartny *v.* Territory, 1 Neb. 121.

[5] Furbush *v.* Goodwin, 25 N. H. 426.

[6] Bull *v.* Com., 14 Gratt. (Va.) 613; Read *v.* Com., 22 Gratt. (Va.) 924; Stoneman *v.* Com., 25 Gratt. (Va.) 887, 905; Price *v.* Com., 77 Va. 393; Whart. Cr. Pl. & Pr. (8th ed.) § 77.

[7] Maxwell *v.* Hannibal &c. R. Co., 85 Mo. 95, 106.

objection comes too late, when made for the first time in a *motion for a new trial*.[1] If a party allows *competent evidence* from an *incompetent witness* to go to the jury without objection, he cannot afterwards complain of the finding of the jury thereon, and make his objection for the first time on a motion for a new trial.[2] It is not available, where such evidence has gone in without objection, and the objection is made for the first time to a substantial *repetition* of it.[3]

§ 701. [Continued.] **Objections to Depositions.** — Objections to depositions, which might have been obviated if made when they were taken, come too late when made for the first time at the trial, when it is proposed to read them. "In such cases," said Mr. Justice Swayne, "the objection must be noted when the deposition is taken, or be presented by a motion to suppress before the trial is begun. The party taking the deposition is entitled to have the question of its admissibility settled in advance. Good faith and due diligence are required on both sides. When such objections, under the circumstances of this case, are withheld until the trial is in progress, they must be regarded as waived, and the deposition should be admitted in evidence. This is demanded by the interests of justice. It is necessary to prevent surprise and the sacrifice of subsequent rights. It subjects the other party to no hardship. All that is exacted of him is proper frankness. The settled rule of this court is in accordance with these views." It was therefore held that it was error to exclude the deposition under such circumstances.[4] More broadly, the rule is that no objection to a deposition will be entertained when made at the trial, which could have been remedied, if seasonably made by the taking of a new

[1] State *v.* Peak, 85 Mo. 190; Harvey *v.* State, 40 Ind. 516.

[2] Atchison &c. R. Co. *v.* Stanford, 12 Kan. 354, 380.

[3] McCormick *v.* Laughran, 16 Neb. 87.

[4] Doane *v.* Glenn, 21 Wall. (U. S.) 33, 35. See also York Co. *v.* Central R. Co. 3 Wall (U. S.) 113; Shutte *v.* Thompson, 15 Wall. (U. S.) 151, 160; Buddicum *v.* Kirk, 3 Cranch (U. S.), 293.

deposition.[1] An objection to the *form of a question* in a deposition *de bene esse*, is waived, if not taken before the officer taking

[1] Wright *v.* Cabot, 89 N. Y. 570; Commercial Bank *v.* Union Bank, 11 N. Y 205; Sturm *v.* Atlantic Mut. Ins. Co., 63 N. Y. 87; Zellweger *v.* Caffee, 5 Duer (N. Y.), 100; Union Bank *v.* Torrey, 2 Abb. Pr. (N. Y.) 269; Sheldon *v.* Wood, 2 Bosw. (N. Y.) 267. In conformity with the above text the general rule is that objections which go to the form and manner of taking the deposition must be made and settled prior to the trial. Crowell *v.* Western R. Bank, 3 Oh. 409; Akers *v.* Demond, 103 Mass. 322; Kyle *v.* Bostick, 10 Ala. 591; Towns *v.* O'Brien, 2 Ala. 381; Overton *v.* Tracy, 14 Serg. & R. 324; Lee *v.* Stowe, 57 Tex. 444, 451; Bartlett *v.* Hoyt, 33 N. H. 151. Under § 390 of the Civil Code of Nebraska objections to depositions, except on the grounds of incompetency or irrelevancy, must be reduced to writing and filed before the commencement of the trial or they will be disregarded. Sioux City &c. R. Co. *v.* Finlayson, 16 Neb. 579, 587. See also Weeks on Depositions, § 404. "It may be taken, as the rule, that, where a party is *deprived of the benefit of the cross-examination* of a witness, by the act of the opposite party, or by the refusal to testify, or other misconduct of the witness, or by any means, other than the act of God, the act of the party himself, or some cause to which he assented, that the testimony given on the examination in chief may not be read. People *v.* Cole, 43 N. Y. 508; Smith *v.* Griffith, 3 Hill (N. Y.), 333; Forrest *v.* Kissam, 7 Hill (N. Y.), 465. And the rule may be applied to the examination of a witness on commission, or conditionally out of court, when, in such case, the party desiring the benefit of a cross-examination has not been present or represented at the taking of the testimony, and had no opportunity to push his cross-examination, or to know of the refusal of the witness to testify, or of his neglect to answer any question, or of other like misconduct of the witness. Smith *v.* Griffith, *supra*. But where the party is present at the examination of the witness, in person or by counsel, and is there fully apprised of the facts upon which he afterwards relies at the trial to suppress the testimony, and does not, at the examination or afterwards before the trial, seek to avail himself of them to that end, or to procure for himself, before or at the trial, the benefit of a full cross-examination, he may not, waiting until the trial, then for the first time object to the reading of the deposition, or move to suppress it. He should take an earlier opportunity for action, so that, if successful, his opponent might move for a commission to examine his witness anew out of court, or might obtain a personal attendance at the trial." Sturm *v.* Atlantic Mutual Ins. Co., 63 N. Y. 77, 87, opinion by Folger, J.; citing Kimball *v.* Davis, 19 Wend. (N. Y.) 437; *s. c.*, 25 Wend. (N. Y.) 259; Zellweger *v.* Caffe, 5 Duer (N. Y.), 87, 100; Rust *v.* Eckler, 41 N. Y. 488; Sheldon *v.* Wood, 2 Bosw. (N. Y.) 267. Where no *motion to suppress* depositions has been made, they may be used at the trial, although the personal attendance of the witness can be secured. Phenix *v.* Baldwin, 14 Wend. (N. Y.) 62. In such a case, the most that can be said in favor of the motion to suppress them is, that it addresses itself to the *discretion* of the court

the deposition.[1] Thus, it has been held that the objection that a question is *leading* in its form is an objection, not to the substance or relevancy of the evidence, but to the form and manner of obtaining it, and should be made at the time the question is propounded; but if not made then, or within proper time before the cause is called for trial, it will be taken to have been waived.[2] Where a motion to suppress depositions is grounded upon the objection that *certain portions* of them are *irrelevant*, it will not be sustained; the remedy is a motion to strike out the irrelevant parts.[3] Coming down to a more specific point of time it is held in Indiana that the *swearing of the jury* is, for the purpose of this rule, to be deemed the commencement of the trial. The court say: "The rule provided by the statute is convenient, as well as fair; for why impanel and swear a jury to try a cause, which the parties may afterwards be prevented from trying by the suppression of depositions after the jury are sworn?[4] It has been ruled that it is irregular to arrest the reading of a deposition on the ground that the witness testified that he was the agent of the plaintiff, and that his authority was in writing and ought to have been produced; and that the better practice is for the reading to proceed, and, upon proof that the testimony was illegal, to move to withdraw it from the jury,[5] — a conclusion which is doubtful.[6] There is a difference of opinion upon the question whether a party who offers a deposition in evidence, must *read the whole of it*, *or* whether he is at liberty to read *only such parts* as he may judge favorable to his case; allowing his opponent to read the remainder as his own evidence, if he shall see fit. The former view is taken in Pennsylvania[7] and in

and cannot be claimed as a matter of right. Hedges *v.* Williams, 33 Hun. (N. Y.) 546 (decided under § 910 of the New York Code of Civil Procedure).

[1] Hebbard *v.* Haughian, 70 N. Y. 54.

[2] Crowell *v.* Western R. Bk., 3 Oh. 409; quoted with approval in Lee *v.* Stowe, 57 Tex. 444, 451; Purnell *v.* Gabdy, 46 Tex. 198.

[3] Commercial Bank *v.* Union Bank, 11 N. Y. 203, 210.

[4] Glenn *v.* Clore, 42 Ind. 60, 63.

[5] Crenshaw *v.* Jackson, 6 Ga. 509.

[6] *Post*, §§ 717, 723.

[7] Southwark Ins. Co. *v.* Knight, 6 Whart. (Pa.) 327. Compare Miles *v.* Stevens, 3 Pa. St. 21.

Missouri;[1] while the latter rule has been favored in New York.[2]

§ 702. Error to admit Depositions de bene esse when witness is Present in Court. — Under section 865, Rev. St. U. S., providing that "unless it appears to the satisfaction of the court that the witness is then dead, or gone out of the United States, or to a greater distance than one hundred miles from the place where the court is sitting, or that, by reason of age, sickness, bodily infirmity or imprisonment, he is unable to travel and appear at court, such deposition shall not be used in the cause," the admission of the deposition, taken *de bene esse*, of a witness who was shown to the court to be present in court, ready and able to testify if the case was called, before the reading of the deposition was begun, is error.[3] This is in conformity with previous rulings of the same court. In one case it was said by Marshall, C. J., that the deposition taken under the statute, *de bene esse*, "can only be read when the witness himself is unattainable."[4] In another case it was said, in reference to this provision, that "the act declares expressly that, unless the same (that is, the disability) shall be made to appear on the trial, such deposition shall not be admitted or used in the cause. This inhibition does not extend to the deposition of a witness living a greater distance from the place of trial than one hundred miles, he being considered permanently beyond a compulsory attendance. The deposition in such case may not always be absolute, for the party against whom it is to be used may prove that the witness has removed within the reach of a *subpœna* after the deposition was taken; and, if that fact was known to the party, he would be bound to procure his personal attendance. The *onus*, however, of proving this would rest upon the party oppos-

[1] Hill *v.* Sturgeon, 28 Mo. 329; Cook *v.* Harrington, St. Louis Court of Appeals, No. 4007, not yet reported.

[2] Gellatly *v.* Lowery, 6 Bosw. (N. Y.) 113; Edmonstone *v.* Hartshorn, 19 N. Y. 9; Forrest *v.* Forrest, 6 Duer (N. Y.), 102.

[3] Whitford *v.* County of Clark, 7 Sup. Ct. Rep. 306; reversing *s. c.* 13 Fed. Rep. 837.

[4] The Samuel, 1 Wheat. (U. S.) 15.

ing the admission of the deposition in evidence.[1] "It thus appears," said Waite, C. J., commenting on the foregoing decisions, "to have been established at a very early date that depositions taken *de bene esse* could not be used in any case at the trial, if the presence of the witness himself was actually attainable, and the party offering the deposition knew it, or ought to have known it. If the witness lives more than one hundred miles from the place of trial, no *subpœna* need be issued to secure his compulsory attendance. So, too, if he lived more than one hundred miles away when his deposition was taken, it will be presumed that he continued to live there at the time of the trial, and no further proof on that subject need be furnished by the party offering the deposition, unless this presumption shall be overcome by proof from the other side. But if it be overcome, and the party has knowledge of his power to get the witness in time to enable him to secure attendance at the trial, he must do so, and the depositions will be excluded." [2]

§ **703. What the Record must Show.** — Moreover, in order to save for review the overruling of an objection to evidence, the bill of exceptions must show that the objection was made *at the time* when the evidence was offered; [3] otherwise the objection will be presumed to have been waived. It must disclose what the witness stated, and what the testimony was which was objected to, or a reviewing court will not interfere.[4] This question

[1] Patapsco Insurance Co. *v.* Southgate, 5 Pet. (U. S.) 617. See also Harris *v.* Wall, 7 How. (U. S.) 693; Rutherford *v.* Geddes, 4 Wall. (U. S.) 224.

[2] Whitford *v.* County of Clark, 7 Sup. Ct. Rep. 306, 307. The rulings in the circuit courts of the United States seem to have been uniformly the same way. Lessee of Penns *v.* Ingraham, 2 Wash. C. C. (U. S.) 487 (decided in 1811); Lessee of Brown *v.* Galloway, Pet. C. C. (U. S.) 294 (decided in 1816); Pettibone *v.* Derringer, 4 Wash. C. C. (U. S.) 219 (decided in 1818); Russell *v.* Ashley, Hemp. (U. S.) 549; Weed *v.* Armstrong, 6 McLean (U. S.), 44. Where the question is whether a witness whose deposition *de bene esse* has been taken, is physically able to attend at the trial, the testimony of a non-expert may be heard as to the *declarations* of the witness touching his physical condition. McArthur *v.* Soule, 5 Hun. (N. Y.) 63.

[3] Hannibal &c. R. Co. *v.* Moore, 37 Mo. 338, 341.

[4] Jones *v.* Trustees, 1 Ind. 109.

was discussed with much particularity in what seems to have been a well concided case in the Supreme Court of the territory of Arizona, in an opinion given by Dunne, C. J. The court ruled: Where a party objecting is overruled, and he appeals, he must show by the record: 1. What the question was and what answer was given to it, or what the evidence was which was introduced against his objection. "This," said Dunne, C. J., "is important because the evidence admitted may not injure him. The answer may have been in his favor. It is not necessary that he should show clearly that he was injured, because that would often be impossible: but he must show that evidence was admitted against his valid objection, which, it may be, has injured him; for the object of granting a review by this court is not to determine the abstract questions as to whether the judge below ruled correctly or not, but to give relief in case a party may have been injured by an erroneous ruling. 2. He must set out enough of the evidence to illustrate the point of his objection, and to raise the presumption that he may have been injured; but where error is shown, injury will be presumed, unless the contrary clearly appears. 3. He must show what kind of an objection was made, and, to avail him here, he must show that the objection, as made, was good. Then it is for the other party to see that the statement made contains a showing sufficient to sustain the admission of the evidence as against the objection made. The amount of showing the latter party must make, depends upon the nature of the objection. If the party objecting interposes merely a general objection, all that is necessary is to show enough to obviate the general objection. If the objection is specific, all that is necessary is to show enough to obviate the specific objection as made. Beyond this we cannot in reason require him to go. He should defend himself against the particular attack made; but we cannot ask him to fortify himself against all possible attacks which might have been made." [1]

§ 704. [Continued.] **Where the Objection was sustained.** — "In the second case," said Dunne, C. J., "where the party ob-

[1] Rush *v.* French, 1 Ariz. T. 99, 121.

jecting was sustained, and the other side appeals and asks to have the ruling declared erroneous, the party appealing must see that the record shows: 1. What question he asked, or what evidence he sought to introduce. 2. Sufficient of the other evidence to illustrate the admissibility of that offered. 3. That the evidence so offered was excluded. 4. That there was reasonable ground to presume that he may have been injured by such exclusion. The other party must see that the record shows good grounds for the exclusion." [1] To render an exception available in the Supreme Court of the United States, it must affirmatively appear that the ruling excepted to affected, or might have affected, the decision of the case. If the exception is to the refusal of an interrogatory, not objectionable in form, put to a witness on the taking of his deposition, the record must show that the answer related to a material matter involved; or, if no answer was given, the record must show the offer of the party to prove by the witness particular facts, to which the interrogatory related, and that such facts were material.[2] Where the incompetency of the evidence results in consequence of some *other evidence* in the case, then in order to have the question of its competency reviewed, *all the evidence* must be *preserved* in the record; but in other cases this is unnecessary.[3]

§ **705. Whether necessary to repeat Objections.**— There is authority to the effect that, where a specific objection has been made and overruled, it is not necessary, in order to save the rights of the party, to repeat his objections to subsequent tenders of the same kind of evidence. Thus, it has been ruled that where a certain question is objected to by counsel on the specific ground that it is not proper on cross-examination, and a second question calling for the further elaboration of the subject-matter of the first is objected to, although the specification that it was not proper on cross-examination was not repeated, it may fairly

[1] Rush *v.* French, 1 Ariz. T. 99, 122.

[2] Railroad Co. *v.* Smith, 21 Wall. (U. S.) 256; Packet Co. *v.* Clough, 20 Wall. (U. S.) 528.

[3] McClellan *v.* Bond, 92 Ind. 424; Johnson *v.* Wiley, 74 Ind 233; Shimer *v.* Butler University, 87 Ind. 218; Pavey *v.* Wintrode, 87 Ind. 379.

be regarded as implied that it was intended to object to the second question on the same ground which was taken to the first question.[1]

§ 706. Of Waivers and Estoppels in Respect of Objections to Evidence.—An error in admitting evidence is *cured* by the act of the opposing party in putting witnesses on the stand to prove the facts sought to be proved by the evidence admitted; this upon the plain principle that a party cannot complain of *his own error*.[2] Where evidence offered by one party is rejected by the court, and, after all the evidence is in, a written *admission* is filed by the other party, conceding the facts which the party tendering the evidence offered to prove by it, and a correct instruction is given by the court applicable to such facts, the error in rejecting the evidence is *cured*.[3] The party who has questioned his own witness upon a given subject, cannot object to the *cross-examination* of the witness on the same subject, or claim the exclusion of the answers of the witness contradicting his statements upon the examination-in-chief.[4] The objection that an answer is *not responsive* to the question put to the witness is one which does not concern the other party, if the answer is relevant to the issues. The party examining a witness may sometimes object to volunteered and irresponsive statements made by a witness aside from his questions; but if he is willing to accept the answer, and if it is one which he would have a right to elicit, the opposite party cannot complain.[5] There are cases, however, where the *deposition* of a witness is taken on settled interrogatories, where an answer not called for may be objected to by either party for *surprise;* inasmuch as, if the questions had been so put in writing as to call for it, other interrogatories might have been framed accordingly, which might have led to explana-

[1] Stephens *v.* Brown, 12 Bradw. (Ill.) 619.

[2] Gale *v.* Shillock (Dakota), 29 N. W. Rep. 661.

[3] Liston *v.* Central Iowa R. Co. (Iowa), 29 N. W. Rep. 445; *s. c.* 70 Ia. 714.

[4] Artz *v.* Chicago &c. R. Co., 44 Ia. 284.

[5] Hamilton *v.* People, 29 Mich. 173, 184.

tion.[1] A party is so far *estopped by his own testimony*, that the court will not allow public time to be consumed in disproving a fact which the party himself has admitted when testifying as a witness.[2] It has been held that, where a witness gives testimony upon the plaintiff's direct examination, and in reference to a matter about which no inquiry has been made by the defendant, the plaintiff cannot be allowed to call witnesses to contradict him.[3]

§ **707. Errors without Prejudice.** — An error of the court in *excluding* the evidence of a witness does not injure a party, if the witness is afterwards permitted to testify fully in respect of the matter excluded.[4] The *admission of incompetent testimony* will not, in many cases, avail to work a reversal of a judgment, as, for instance, where such testimony relates to a question which is not in dispute, and consequently could have had no influence on the result, or where the finding must have been the same on the evidence had the incompetent evidence been excluded.[5] A party cannot complain that the opposite party *holds him to the effect of his own evidence*. When, therefore, a party called out the fact that a certain bond was in existence, he could not complain that the other party produced the instrument to confirm the fact.[6] Where a question propounded by the prosecution in a criminal case was subsequently *withdrawn*, the refusal of the court to allow the answer to be recorded, was not such abuse of discretion as to require a new trial.[7] The overruling of an objection to an illegal question becomes harmless to the objecting party, where the witness answers, either that he knows nothing about the matter, or where his answer is favorable to the objector.[8]

[1] *Ibid.*; Greenman *v.* O'Connor, 25 Mich. 30.

[2] Hinkson *v.* Morrison, 47 Ia. 167.

[3] Trustees *v.* Brooklyn Fire Ins. Co., 23 How. Pr. (N. Y.) 448.

[4] Branson *v.* Caruthers, 49 Cal. 374.

[5] Forbing *v.* Weber, 99 Ind. 588; Aufdencamp *v.* Smith, 96 Ind. 328; Terre Haute &c. R. Co. *v.* Pierce, 95 Ind. 496; Rhoads *v.* Jones, 92 Ind. 328; Citizens' Bank *v.* Adams, 91 Ind. 280, 288; Bush *v.* Seaton, 4 Ind. 522; Manchester *v.* Doddridge, 3 Ind 360; Parker *v.* State, 8 Blackf. (Ind.) 292.

[6] Filmore *v.* Union Pacific R. Co., 2 Wyo. 94.

[7] Carter *v.* State, 56 Ga. 463.

[8] Nailor *v.* Williams, 8 Wall. (U. S.) 107; Lovell *v.* Davis, 101 U. S. 541.

§ 708. When error not Cured by Subsequent Evidence to the same Effect. — The error of admitting incompetent evidence is in most cases available error, although the evidence is merely *cumulative*. Thus, where the unsworn declarations of a person are admitted, this will be error, although the person is subsequently called as a witness and testifies to the same facts; but whether the error will be sufficiently prejudicial in its character to work a reversal, will depend upon the nature and surroundings of the case.[1] As a general rule the admission of improper evidence, over a specific objection, will work a reversal, although the evidence was merely *cumulative*.[2]

§ 709. Objections must be renewed in Motion for New Trial. — In some jurisdictions the rule is that objections to evidence, and other objections made at the trial must, in order to be available on appeal or error, be renewed by the objector in his motion for a new trial.[3] In Indiana, in order to present the question of the rulings of the court in admitting or rejecting evidence for re-examination on a motion for new trial, the motion must *point out* the evidence so admitted or excluded. A *general complaint* that the court erred in admitting illegal, incompetent and irrelevant evidence, or in refusing to admit legal, proper and relevant evidence, does not direct the mind of the court to the errors complained of, and such a motion is properly overruled for that reason alone.[4]

§ 710. Court excluding Illegal Evidence of its own Motion. — It is said in *Georgia* that, where evidence is admitted

[1] In Anderson *v.* Rome &c. R. Co., 54 N. Y. 334, the declarations of a person were put in evidence, and he was afterwards called as a witness and gave evidence to the same facts. It was held that the error of allowing his unsworn declarations to be rehearsed before the jury, was of a character so prejudicial that it was not cured. Compare Warrell *v.* Parmlee, 1 N. Y. 519.

[2] Osgood *v.* Manhattan Co., 3 Cow. (N. Y.) 612.

[3] Lake Erie &c. R. Co. *v.* Parker, 94 Ind. 91; McGee *v.* Robbins, 58 Ind. 463; Cobb *v.* Krutz, 40 Ind. 323; McKinney *v.* Shaw &c. Co., 51 Ind. 219.

[4] Harvey *v.* Osborn, 55 Ind. 535, 549; Ohio &c. R. Co. *v.* Hemberger, 43 Ind. 462; Sherlock *v.* Alling, 44 Ind. 184; Meek *v.* Keene, 47 Ind. 77.

without objection, if the court rule it out, it is *error*.[1] Contrary to this, it is held in *Missouri* that the rule that the court does not err in admitting evidence where the objection to it is not specific, does not apply *in criminal cases*, since it is the duty of the court to see that innocent men are not convicted. It is accordingly laid down in that state that, in criminal cases, the court should exclude from the jury all improper evidence offered by the prosecution, whether the objection be general or special.[2] The rule is believed to be a dangerous one, and calculated to increase miscarriages of criminal justice, already too numerous. It is believed that such a burden ought not to be put upon the trial court, except where the evidence is of such a nature that its inadmissibility and prejudicial character are entirely obvious.

§ 711. Prosecuting Attorneys not to object in Doubtful Cases. — The Supreme Court of California has offered these sound observations for the guidance of judges and prosecuting attorneys in criminal trials: "In consideration of the number of appeals brought to the court in criminal cases, upon technical points, having for the most part no necessary connection with the merits, we feel warranted in making some suggestions, an attention to which we are persuaded will lead to a more speedy and satisfactory enforcement of criminal justice. In capital cases almost every case is appealed. We do not complain of this, even when the grounds of appeal do not present a plausible reason for the reversal of the judgment; since a natural sense of responsibility in the counsel to whose hands the life of a fellow being is confided, may well influence him to exhaust every resource to save his client from the last penalty of the law. But still it is important that the laws should be enforced, so as to render as certain as possible the conviction of those guilty of their infraction. With every disposition on the part of the judges to do this, the effort frequently fails, because something is done or omitted which contravenes some arbitrary or technical

[1] Barker *v.* Blount, 63 Ga. 423, 427.

[2] State *v.* O'Connor, 65 Mo. 374.

right of the prisoner. Courts have no power in criminal cases to affirm a judgment merely because the judges are persuaded that, upon the merits of the case, the judgment is right. If any error intervenes in the proceeding, it is presumed to be injurious to the prisoner, and generally he is entitled to a reversal of the judgment; for it is his constitutional privilege to stand upon his legal rights and to be tried according to law. And yet it very often happens that the matter of exception taken by him serves no other purpose than to defeat justice. For example, a question proper in itself is asked a witness, and the court refuses to allow the answer; if answered, the reply would probably be worth little or nothing to the defendant; yet for this error we would be bound to reverse a judgment which would have been the same whether the questions were answered or not; for, though we might *surmise*, we would not *know* the effect of the denial of this legal right upon the jury, who are the sole judges of the facts. And many other illustrations might be given. As no man ought to be convicted unless on a full exposure of the merits of the case if he is really guilty, it would seem that little or nothing is gained by interposing technical objections to keep a knowledge of the whole case on its legal merits from the jury. Questions as to the admissibility of evidence frequently arise, and in the hurry of a *nisi prius* trial, the best judge may err, especially when suddenly called to pass upon them without the aid of books or argument. These constitute the usual grounds of reversal. Whenever there is any doubt of the question, or rather whenever the evidence proposed by the defense is not plainly inadmissible, it is better to let it go in; since, in nine cases out of ten, a single equivocal fact, of doubtful bearing upon the case, would have no effect upon the judgment of the jurors, who are usually disposed to pass and do pass upon the general merits. Not unfrequently the offer to make the proof and the exclusion of it have about the same effect on the minds of the jury — though it should not — as if the proof were introduced. If the course here suggested were pursued by the prosecuting attorneys, we are convinced that the number of convictions would not be less than at present, while

the number of appeals, or at least the number of those successfully prosecuted would be greatly diminished."[1]

§ 712. **Arguing the Objection.** — The *refusal* of the trial court *to hear argument* of counsel, as to the admissibility of evidence, is not of itself error;[2] though cases might arise where it would be such an abuse of discretion as would work a reversal of the judgment. It is ruled that, when a tender of testimony is made, the court may, in its discretion, hear the arguments for and against its admission, openly *in the presence of the jury*, or privately in the absence of the jury; and that, after the testimony has been admitted, no exception lies, upon the ground that such discussions took place in the hearing of the jury.[3]

§ 713. Effect of Examination of a Party Before Trial. — The New York Code of Civil Procedure, in force in 1876, provided that a party to an action might be examined at the instance of the adverse party under the same rules of examination as any other witness.[4] It further provided that the examination might be had before the trial. Under these sections of the Code, it has been held that a party may be examined by his opponent before issue joined,[5] and before complaint served.[6] These examinations are had for the purpose of preparing the examining party's case for trial, and it is held that such an examination precludes the further examination of the party at the trial on the same subject matter, unless some reason or excuse is shown, such as the omission by inadvertence to ask some questions or to prove some facts.[7]

Article III. — Striking out and Withdrawing.

Section

715. Power to Strike Out.
716. Motion to Strike Out.
717. Striking Out where Offer to Connect not Fulfilled.
718. Motion to Strike out Answer.

[1] People *v.* Williams, 18 Cal. 187, 193; repeated in People *v.* Devine, 44 Cal. 452, 460.

[2] Olive *v.* State, 11 Neb. 3.

[3] State *v.* Wood, 53 N. H. 484.

[4] New York Code Civ. Proc., § 390.

[5] McVickar *v.* Greenleaf, 4 Rob. N. Y. 657.

[6] Havemeyer *v.* Ingersoll, 12 Abb. Prac. N. S., 301.

[7] Wilmont *v.* Miserole, 40 N. Y. Sup. (8 Jones & Sp.) 327. Compare Clark *v.* Vorce, 15 Wend. 193.

SECTION
719. Motion to Strike Out all the Testimony of a Witness.
720. Striking out Plaintiff's Evidence at the Close of his Case.
721. [Continued.] Right to Open and Close on such a Motion.
722. Right to Withdraw Evidence.
723. Error of Admitting Incompetent Testimony Cured by Subsequently Withdrawing it.

§ **715. Power to Strike out.**—The court has, at any stage of the trial, the *discretionary* power to exclude evidence improperly admitted, or admitted subject to exceptions. If its admissibility depends upon outside or collateral facts, there can be no reason why the court should not hear them without delay.[1] It is proper to exercise this power where incompetent evidence is admitted under a *mistake of fact*, which mistake is shown by subsequent evidence.[2] This power may be exercised *at any time* before the cause is finally submitted to the jury.[3]

§ **716. Motion to Strike out.**— When testimony is admitted without objection, and afterwards appears to be inadmissible, the proper course is to ask the court to instruct the jury to disregard it. It is too late to except to the admission of it, and if the exception is overruled, to assign the ruling for error.[4] But in such a case the motion to strike out is not a matter of right, but addresses itself to the discretion of the court.[5] It is scarcely necessary to say that it will be error for the court to take the inconsistent position of refusing to allow the objecting party to offer contradictory evidence, and at the same time of refusing to strike out the testimony, on the ground that it is irrelevant.[6] If it is prejudicial, the objecting party has the right either to have it stricken out, or to rebut it,[7] so as to remove its prejudicial effect from the minds of the jurors. Testimony will not be stricken out on the ground that the question to which

[1] Maurice *v.* Worden, 54 Md. 233, 251; Montfort *v.* Rowland, 38 N. J. Eq. 181; Parker *v.* Smith, 4 Cal. 105.

[2] People *v.* McMahon, 2 Park. Cr. (N. Y.) 663.

[3] Judge *v.* Stone, 44 N. H. 593; Selkirk *v.* Cobb, 13 Gray (Mass.), 313.

[4] Gilmore *v.* Pittsburg &c. R. Co., 104 Pa. St. 275.

[5] Gawtry *v.* Doane, 51 N. Y. 84, 90.

[6] Gilbert *v.* Cherry, 57 Ga. 128.

[7] *Ante*, § 483.

it is a response was *leading*, if no objection on such ground was made to the question, and if such a motion is sustained, the ruling will be error, provided the testimony stricken out was relevant and material to the issue.[1] Where a motion is made to strike out testimony and the adverse party consents that the motion may be sustained, after which the moving party changes his mind and *withdraws the motion*, but the court nevertheless, upon the request of the adverse party, strikes out the testimony,—the party making the motion cannot complain of the action of the court, and the original admission of the testimony ceases to be available error.[2]

§ 717. **Striking out where Offer to Connect not Fulfilled.** — Where evidence is introduced, accompanied by the assurance of counsel, that it will be followed up by proof of other facts, material and competent, which will render its admission proper, the judge properly admits it. But if this assurance is not fulfilled, it will be the duty of the court, upon application of the opposing counsel, to direct the jury not to regard it.[3] But where the judge admits evidence which is in the character of a link in a chain of facts necessary to make out the case of the proponent, the mere fact that the other links are not supplied will not support an *exception to its admission;* since if it were otherwise, it would result in the principle that evidence is erroneously admitted because ultimately insufficient.[4]

§ 718. **Motion to Strike out Answer.** — It will often happen that, although the question may be proper, the answer will be improper, not being responsive to the question. In such a case, objection to the answer must be taken by moving to strike it out.[5] So, where a witness is asked a question, and, instead of

[1] Williams *v.* Grand Rapids, 53 Mich. 271.

[2] Louisville &c. R. Co. *v.* Falvey, 104 Ind. 409.

[3] Blackburn *v.* Beall, 28 Md. 208; Forsythe *v.* Ganson, 5 Wend. (N. Y.) 558; Dillin *v.* People, 8 Mich. 357.

[4] Labron *v.* Woran, 1 Hill (N. Y.), 91.

[5] Farmers' Bank *v.* Cowan, 3 Abb. App. Dec. (N. Y.) 88, 90; Roquest *v.* Boutin, 14 La. An. 44. Compare Reddington *v.* Gilman, 1 Bosw. (N. Y.) 235; Roberts *v.* Johnson, 37 N. Y.

answering in a responsive manner, gives an expression of his *opinion*, this may be properly stricken out on motion.[1] But where the question foreshadows the answer, and the question is not objected to, any further objection is *waived*.[2] Thereafter the refusal of the court to strike out the evidence on motion, cannot be assigned for error.[3] The reason is, that a party ought not to be allowed to sit by, during the reception of incompetent evidence, without objecting thereto, taking his chances of any advantage to be derived therefrom, and afterwards, when he finds such evidence prejudicial to him, to require the same to be stricken out.[4] Whether, under such circumstances the court will sustain a motion to strike out, becomes a matter of *discretion*.[5] Thus, it has been held that if a party, with full knowledge of the *incompetency of a witness*, fails to object to him when he is called, but allows him to be sworn and examined without objection, he thereby loses his right to object to his evidence; yet the court may, of its own motion, if it appears that the evidence is opposed to the policy of the law and dangerous to the administration of justice, suppress it.[6] The party moving to strike out the answer of a witness to a question must *specify his objections* to the answer, with as much particularity as is required in an objection to a question.[7]

§ 719. Motion to Strike out all the Testimony of a Witness. — Less harm is generally done by admitting incompetent evidence, than by excluding evidence which is competent. Where the judge remains *in doubt*, he should, therefore, incline rather to *admit* than to *reject* the evidence which is challenged.

Super. 157; Gould *v.* Day, 94 U. S. 405, 414; Gibson *v.* Hatchett, 24 Ala. 201; McCabe *v.* Brayton, 38 N. Y. 196; Spaulding *v.* Hallubeck, 35 N. Y. 204.

[1] Ryan *v.* People, 19 Hun (N. Y.), 188.

[2] Levin *v.* Russell, 42 N. Y. 251, 256; Boone *v.* Ridgway, 29 N. J. Eq. 543; Donelson *v.* Taylor, 8 Pick. (Mass.) 391; Mohawk Bank *v.* Atwater, 2 Paige (N. Y.), 60; Greenl. Ev., § 421.

[3] Brockett *v.* New Jersey Steamboat Co., 18 Fed. Rep. 156.

[4] Levin *v.* Russell, *supra*.

[5] Pontius *v.* People, 82 N. Y. 340, 347; Marks *v.* King, 64 N. Y. 628; Platner *v.* Platner, 78 N. Y. 90; Monfort *v.* Rowland, 38 N. J. Eq. 181.

[6] Monfort *v.* Rowland, *supra*.

[7] Sill *v.* Reese, 47 Cal. 294.

It is, therefore, a sound rule that a motion to strike out evidence because it is irrelevant and immaterial, ought not to be granted, unless the evidence is clearly of that character.[1] Where competent testimony has been given by a witness, a motion to strike out all his testimony should be overruled, although some of it may be incompetent. It is the duty of the party to select the incompetent from the competent testimony, and to point out in his motion the specific testimony objected to, as well as to indicate the character of his objections.[2] "This," said Elliott, J., "is not a mere arbitrary technical rule, but is founded on solid principle and essential to the fair administration of justice. It is in harmony with the well settled rule of practice, everywhere obtaining, that the motion of the party must point out the specific testimony objected to, and indicate the character of the objections; and it is also in harmony with the familiar rule that, if a demurrer is addressed to an entire pleading, it must be overruled, although the pleading may be bad in form."[3] A motion to strike out all the testimony of a witness is properly overruled where it appears that some of the testimony was elicted by the questions of the party making the motion.[4]

§ 720. Striking out Plaintiff's Evidence at the Close of his Case. — In Missouri the court cannot, at the close of the plaintiff's case, strike out his testimony on the ground that it is insufficient to make out his case. If it is not sufficient to make out his case, the court may instruct the jury to find for the defendant; but if it tends in any degree to substantiate the allegations of his petition, it must go to the jury, who are the exclusive judges of its weight.[5]

§ 721. [Continued.] Right to Open and Close on such a Motion. — A rule of court providing that "on trials of fact the plaintiff

[1] Chester *v.* Bakersfield Town Hall Assn., 64 Cal. 42. Refusing to strike out *impeaching evidence:* Hovey *v.* Lane, 52 Ind. 49.

[2] Louisville &c. R. Co. *v.* Falvey, 104 Ind. 410, 416; Wolfe *v.* Pugh, 101 Ind. 293; Elliott *v.* Russell, 92 Ind. 526; Cuthrell *v.* Cuthrell, 101 Ind. 375; State *v.* Hymer, 15 Nev. 49.

[3] Louisville &c. R. Co. *v.* Falvey, 104 Ind. 410, 416.

[4] McCarty *v.* Waterman, 96 Ind. 594.

[5] McFarland *v.* Bellows, 49 Mo. 311.

shall have the opening and conclusion," does not apply to a case where, on a motion by the defendant for the exclusion of evidence, he offers to introduce evidence exclusively for the court, for the purpose of enabling it to determine whether the evidence sought to be excluded is such a privileged paper as should exclude it altogether from the consideration of the jury.[1]

§ **722. Right to Withdraw Evidence.** — A party having once introduced evidence, cannot of right withdraw it, on finding that it does not answer his purpose. "Before the evidence is given, it is within the control of the party. Once given, it belongs to the cause, and is the common property of all the parties." [2] But where a party has tendered evidence, and it has been admitted against the objection of the opponent, the court may, in its *discretion*, allow him to withdraw it before the case goes to the jury. It is proper in most cases for the court to allow the party thus to correct the supposed error into which he has fallen, and not to run the risk of its working a reversal of the judgment which he may obtain.[3] In most cases the opposite party could not ground an exception upon the ruling of the court in permitting the withdrawal of evidence under such circumstances ; [4] since it would not be prejudicial to him, — though cases might occur where it would work injury and prejudice, as shown in the next section.

§ **723. Whether Error of Admitting Incompetent Testimony Cured by Withdrawing it.** — There are numerous holdings to the effect that error in admitting incompetent testimony is cured by subsequently withdrawing it from the consideration of the jury, by directing them not to regard it ; [5] and there is

[1] Maurice *v.* Worden, 54 Md. 233, 251.

[2] Decker *v.* Bryant, 7 Barb. (N. Y.) 183, 189; Clinton *v.* Rowland, 24 Barb. (N. Y.) 634.

[3] Providence &c. Co. *v.* Martin, 32 Md. 310, 316; Boone *v.* Purnell, 28 Md. 607, 630; Boyd *v.* State, 17 Ga. 194; Davenport *v.* Harris, 27 Ga. 68; Gray *v.* Gray, 3 Litt. (Ky.) 465.

[4] As was suggested in Boone *v.* Purnell, *supra*.

[5] Tullidge *v.* Wade, 3 Wils. 18; Com. *v.* Shepherd, 6 Binn. (Pa.) 282; Umangst *v.* Kraemer, 8 Watts & S. 391; Minns *v.* State, 16 Oh. St. 221; Hamblett *v.* Hamblett, 6 N. H. 333; Pavey *v.* Burch, 3 Mo. 447; Beck *v.* Cole, 16 Wis. 95; Hawes *v.* Gustin, 2 Allen (Mass.), 402; Smith *v.* Whitman, 6 Allen (Mass.), 562.

equally good authority to the contrary.[1] But there is another class of cases which hold that, where the evidence is of a character clearly prejudicial to the opposing party, the prejudice may not be cured by withdrawing it, but the improper admission of it is ground of reversing the judgment. The same principle must apply, where evidence which is illegally admitted is subsequently withdrawn by the act of the party. Whether the withdrawing of it will cure the error of admitting it, will depend upon its character and prejudicial tendency. *Prima facie*, it will. "The question," said Durfee, C. J., in discussing this point, "is, did the withdrawal take the testimony out of the case? If it did, it is to be considered as if it had never been admitted. We think the withdrawal, being by consent of court, is to be regarded as the act of the court, and that, in contemplation of law, it purged the case absolutely of the testimony." The conclusion was that, while it would rest within the *discretion* of the trial court to grant a new trial for the admission of illegal testimony subsequently withdrawn by counsel, — yet a judgment could not be reversed on exceptions for this reason.[2] The Court of Appeals of New York took a different view of the question. After repeated objections to illegal questions had been made and overruled, and the answers of the witness had been given, the party tendering the evidence proposed to have it stricken out. The opposing party declined to accept this proposition, and elected to retain his exception. The court made no ruling, and gave no instruction to the jury on the subject. The former rulings, the exceptions thereto, and the objectionable testimony, all remained in the case. It was said by the reviewing court: "The defendant's counsel had the legal right, after the evidence had been admitted in spite of his repeated objections, to insist upon his exception; and it was not his duty to waive it, as he would have done by accepting the proposal of the plaintiff's counsel. So far as the jury might be influenced by the incompetent evidence, the mischief was already done, and would not

[1] *Ante*, § 351; Erben *v.* Lorrillard, 19 N. Y. 302; O'Sullivan *v.* Roberts, 39 N. Y. 360.

[2] State *v.* Towle, 13 R. I. 661.

have been repaired by the agreement of counsel to strike it out. The answer of the witness was strictly responsive to the question objected to, and the plaintiff's counsel had no right to have it stricken out. * * * The offer of the plaintiff's counsel, if explicit, would not have caused the jury to overlook this evidence when they came to consider the case, and it is impossible to say that it did not have some influence upon them." The court therefore held that the error of admitting incompetent evidence is not cured *by the offer* of the counsel tendering it to have it stricken out.[1]

[1] Furst *v.* Second Avenue R. Co., 72 N. Y. 542.

CHAPTER XXVI.

ON THE PRODUCTION AND USE OF BOOKS AND PAPERS.

ARTICLE I. — DISCOVERY AND INSPECTION.
ARTICLE II. — NOTICE TO PRODUCE AND SECONDARY EVIDENCE.
ARTICLE III. — USE OF BOOKS AND PAPERS AT THE TRIAL.

ARTICLE I.— DISCOVERY AND INSPECTION.

Subdivision 1. — Under the Federal Statute.

SECTION
730. Subpœna *Duces Tecum* a Substitute for Other Methods.
731. Statutes Extending to Courts of Law the Power to Compel Discovery.
732. Federal Statute does not Abolish Bills of Discovery.
733. Supersedes State Statutes.
734. Enables Parties to Prepare for Trial.
735. Enables the Defendant to draw his Answer.
736. Does not Subject Party to a Penalty.
737. Inflicts Non-suit or Default.
738. Production of Books and Papers by the United States.
739. What the Application must Show.
740. May be Made before Trial.

§ 730. Subpœna Duces Tecum a Substitute for other Methods.— As already sufficiently explained, a trial had according to the ancient common law, proceeded on the conception that it was a species of combat between two subjects, rather than an inquisition by the sovereign, upon the complaint of one of them against the other, for the purposes of justice. A party was, therefore, entitled to all the advantage, in respect of disclosing the truth, which possession and secrecy could give him. He could not testify for himself; he was not obliged to testify for his adversary, nor to furnish evidence against himself. The court of chancery broke into this barbarous rule by the intro-

tion of the bill of discovery; upon the exhibition of which its subpœna was issued, followed, if necessary, by other compulsory process, bringing the defendant into court, and searching his conscience by means of interrogatories, which he was compelled to answer on oath. No such power existed in the courts of law; or, if it existed, it was but feebly exercised, and only in a few special cases;[1] so that, for a great period, the bill of discovery in equity, in aid of an action at law, was the only means afforded by the remedial procedure in England, by which a party could compel his adversary to make disclosures of material facts which were locked up in his breast alone. These facts might be matters within his exclusive knowledge, or evidence of them might be furnished by means of books or papers which were in his exclusive possession. To compel him to disclose the contents of such books or papers, where he was privileged against making such disclosure, the common-law courts early resorted to the writ of subpœna *duces tecum*, which has been defined to be "a process by which a court, at the instance of a suitor, commands a person, who has in his possession or control some document or paper that is pertinent to the issues of the pending controversy, to produce it for use at the

[1] The English courts of law have *sometimes* exercised a power analogous to that of chancery, of compelling an absent party to produce documents for inspection (Morrow *v.* Saunders, 1 Brod. & Bing. 318; Blakey *v.* Porter, 1 Taunt. 384; Bateman *v.* Philip, 4 Taunt. 157), even before the passage of the statute conferring such power upon the courts of law. And the same power was sparingly exercised in New York, in cases at law, prior to the Revised Statutes. Jackson *v.* Jones, 3 Cow. (N. Y.) 17; Lawrence *v.* Ocean Ins. Co., 11 Johns. (N. Y.) 245, note *a;* People *v.* Vail, 2 Cow. (N. Y.) 623. Cases where such relief was refused: Denslow *v.* Fowler, 2 Cow. (N. Y.) 592; Willis *v.* Bailey, 19 Johns. (N. Y.) 268; May *v.* Gwynne, 4 Barn. & Ald. 301. Discovery in equity: Lane *v.* Stebbins, 9 Paige (N. Y.) 622. It was held that the Supreme Court would order a defendant to allow the plaintiff to take a copy of a paper in his possession, on which the suit was founded, though the plaintiff once had a *counterpart* which was lost; and that it was not necessary to show that the paper was delivered to the defendant to hold as trustee of the plaintiff. It was said that the Supreme Court would grant this rule, as to such a paper in all cases where chancery would entertain a bill of discovery. Wallis *v.* Murray, 4 Cow. (N. Y.) 399.

trial."[1] This writ extended no further than to compel the production of books and papers, the existence and character of which were *already known* to the party seeking to use them as evidence; so that, as already seen,[2] it was necessary that it should describe the books or papers required to be produced, with a considerable degree of accuracy.[3] Beginning with the Judiciary Act of 1789, as we shall presently see,[4] statutes have been passed in many American jurisdictions, extending to courts of law the power which had been hitherto possessed by courts of chancery, of compelling discovery by parties. These statutes seem to have left the subpœna *duces tecum* untouched in its former efficacy.[5] This efficacy has been greatly enlarged by other statutes enabling parties to testify as witnesses; so that now a party can generally, by means of this writ, compel his adversary to bring into court, for the purpose of being used as evidence on a trial, any books or documents which contain matter material to the issues, subject to his *privilege*, which has been already discussed.[6]

§ 731. Statutes Extending to Courts of Law the Power to compel Discovery.— In section 15 of the Judiciary Act of 1789, the Congress of the United States seems to have enacted the first statute extending to courts of law the power which courts of chancery hitherto exclusively possessed, of compelling the opposite party to produce books and papers for inspection before or at the trial. Sixty-two years after its adoption in this country, it was adopted and enacted in England.[7] This statute is preserved in the Revised Statutes of the United States at section 724. It is as follows: "In the trial of actions at law, the courts

[1] Rollins, Surrogate, in Hoyt *v.* Jackson, 3 Dem. (N. Y.) at p. 390.

[2] *Ante*, § 175.

[3] It has been lately held that the agent of a *telegraph company* is not in *contempt* for refusing to obey such a writ, which commands him to search for and produce all messages from and to a large number of persons therein named, between specified dates. It must identify the particular message required. Ex parte Jaynes, 70 Cal. 638.

[4] Next section.

[5] Mitchell's Case, 12 Abb. Pr. (N. Y.) 249.

[6] *Ante*, chap. XII.

[7] Stat. 14 & 15 Vict., 99, § 6.

of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by ordinary rules of proceeding in chancery. If a plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant as in cases of non-suit; and if a defendant fails to comply with such order, the court may, on motion, give judgment against him by default." Statutes more or less similar have been enacted in many of the States. Thus, section 9 of the Illinois Practice Act,[1] provides that the several courts shall have power, in any action, pending before them, upon good and sufficient cause, and upon reasonable notice thereof given, to require the parties, or either of them, to produce books or writings, in their possession or power, which contain evidence pertaining to the issue.[2] A similar provision is found in the Revised Statutes of New York[3] and also in the Code of Civil Procedure of that State.[4] The federal statute above quoted does not apply to proceedings in equity, those courts having ample power to compel such discovery without statutory aid.[5] The later Federal statute[6] making parties to suits in equity, as well as in suits at law, competent witnesses, seems to have largely dispensed with the aid of this statute. A party may now examine his adversary, as he might examine any other witness. Such an adversary may be compelled, as a witness, by a subpœna *duces tecum*, to produce books and papers in his possession, the same as any other witness.[7] "He is," said Wallace, J., "bound to obey the writ and be ready to produce papers in obedience to the summons. Like any other witness, it is his duty to make reasonable search for the papers and documents required, if they are in his possession;

[1] Rev. Stat. Ill. 1880, chap. 31.

[2] See also as to the *North Carolina Statute*, Commissioners *v.* Lemly, 85 N. C. 341; Strudwick *v.* Brodnax, 83 N. C. 401.

[3] 4 R. S. N. Y. 1878, P, 168, § 854.

[4] New York Code of Civil Procedure, § 854; present edition by Throop, § 858.

[5] Bischoffsheim *v.* Brown, 29 Fed. Rep. 341, per Wallace, J.; *infra*, § 732.

[6] Supp. Rev. St. U. S. 312.

[7] Merchants' Nat. Bk. *v.* State Nat. Bk., 3 Cliff. (U. S.) 201.

but, before he can be required to exhibit their contents, he is entitled to appeal to the discretion of the court, if any sufficient reason exists to protect him from disclosure." [1]

§ **732. Federal Statute does not Abolish Bills of Discovery.** — It has been thought that this statute is not to be construed as taking away any right to have relief by bill of discovery, except in cases where the remedy therein provided for is given. The bill of discovery covered many matters not therein provided for, and is not abolished by its terms. The object of the statute was to give a more summary remedy in certain cases, not to take away any existing remedies.[2]

§ **733. Supersedes State Statutes.** — As the matter of the production of books and papers in the courts of the United States is expressly regulated by the above statute, it is not a matter as to which, under section 914 of the Revised Statutes of the United States, the practice of State courts is adopted.[3]

§ **734. Enables Parties to Prepare for Trial.** — Under this statute, it has been held that the production of books and papers can be compelled, for the purpose of enabling a party to prepare for trial. It is not confined to the production of books and papers on the trial.[4] In this view it is only requisite that the cause

[1] Bischoffsheim *v.* Brown, 29 Fed. Rep. 341, 343.

[2] United States *v.* Hutton, 10 Ben. (U. S.) 268, 278; Bischoffsheim *v.* Brown, 29 Fed. Rep. 341.

[3] United States *v.* Hutton, 10 Ben. (U. S.) 268. See also Beardsley *v.* Littell, 14 Blatchf. (U. S.) 102. It was held in this latter case that a party has not the *right to examine his adversary out of court* before trial, although there is a statute of the particular State in which the *Federal court* is held, which gives such a right. The reason is that the whole subject of oral testimony, in actions at common law, in the courts of the United States is regulated by the statutes of the United States; and that these statutes make no provision for such an examination. There is nothing in § 914 of the Revised Statutes of the United States, providing for conformity of the practice of the Federal courts, in suits at law, to that of the State courts, which authorizes the adoption of the statute of a State court, providing for such an examination. Beardsley *v.* Littell, 14 Blatchf. (U. S.) 102. As to the effect of § 914, Rev. Stat. U. S., see Indianapolis &c. R. Co. *v.* Horst, 93 U. S. 291.

[4] Central Bank *v.* Taylor, 2 Cranch C. C. (U. S.) 427; Jacques *v.* Collins,

should be *at issue*, that the court should be satisfied that the evidence sought for will be pertinent to the issue, and that the circumstances are those in which a discovery would be decreed in chancery;[1] for the authority conferred by the statute can only be exercised in cases where relief might have been had in chancery, by a bill of discovery.[2]

§ 735. Enables the Defendant to Draw his Answer.— A bill of discovery would lie to obtain the production of books and papers to enable the party to draw his pleading, and, by analogy, it has been held that he may, under the above statute, move for the production of books and papers in the hands of the plaintiff, for a like purpose.[3] It was ruled by Mr. Justice McLean that a motion to produce a paper in the possession of the plaintiff, which was necessary to enable the defendants to plead, may be granted, in the discretion of the court, although no notice has been given; but he conceded the rule to be, that, where the possession of a paper is desired to be used *in evidence*, a notice is necessary.[4]

§ 736. Does not Subject Party to a Penalty. — A bill of discovery would not be allowed in chancery, in any case where it would subject the defendant to a penalty, unless the bill relinquished all claim to the penalty. As the Federal statute, above quoted, merely transfers to the courts of law the power to compel a discovery, possessed by the courts of chancery, it has been held that the power would not be exercised in an action to recover damages for the *infringement of letters-patent*, where the production of the books sought for would furnish evidence which would subject the defendant to a penalty under the act of Con-

2 Blatchf. (U. S.) 23; United States *v.* Youngs, 10 Ben. (U. S.) 264; United States *v.* Hutton, *Id.* 269; Finch *v.* Rikeman, *Id.* 301. It was, however, held by Mr. Justice Curtis that the production of papers could only be compelled *at the trial*. Iasigi *v.* Brown, 1 Curt. C. C. (U. S.) 401.

[1] Jacques *v.* Collins, *supra*.

[2] Finch *v.* Rikeman, *supra*.

[3] United States *v.* Hutton, 10 Ben. (U. S.) 268, 279.

[4] Bronson *v.* Kensey, 3 McLean (U. S.), 180. The soundness of this ruling may be doubted.

gress,[1] and the plaintiff had not relinquished his claim to the penalty.[2]

§ **737. Inflicts Non-suit or Default.** — The above statute has so far altered the rule of the common law, as to inflict upon the party the penalty of a non-suit or default, upon the non-production of a paper in obedience to the court's order, instead of merely letting in the opposite party to parol proof.[3]

§ **738. Production of Books and papers by the United States.** — Although a bill of discovery will not lie against the United States, yet it has been held that, under the above statute, the United States will be compelled to produce the official weigher's returns of the weight of merchandise, on the motion of a defendant sued for the balance of duties alleged to be due thereon, the defense being that the dues were fully paid, and the motion being supported by affidavit that an inspection of copies of the returns is necessary to enable the defendant to prepare for trial.[4] In such an action, where it appeared that the defendants were clearly entitled to the production of the papers called for, the court ought to stay the proceedings until their production, and, in case of the refusal of the collector to exhibit them within a reasonable time, to issue a *mandamus* for their production.[5] Where a bill was filed in the English court of chancery, by the United States, for an account of certain property of the so-called Confederate States, it was held by Lord Cairns, L. C., that, although a bill for a discovery cannot be maintained against a sovereign State, yet if a discovery becomes necessary to aid the defendants, the court may *stay the proceedings* until means of discovery should be furnished.[6]

[1] 5 U. S. Stat. at Large, 123.

[2] Finch *v.* Rickman, 2 Blatchf. (U. S.) 301.

[3] Iasigi *v.* Brown, 1 Curt. C. C. (U. S.) 401.

[4] United States *v.* Youngs, 10 Ben. (U. S.) 264; United States *v.* Hutton, 10 Ben. (U. S.) 269.

[5] United States *v.* Hutton, 10 Ben. (U. S.) 268. In this case there was a considerable discussion of the validity and effect of a regulation made by the collector of customs under § 251 of the Revised Statutes of the United States, touching the inspection of books and papers in the custom house.

[6] United States *v.* Wagner, L. R. 2 Ch. 582, 595.

§ 739. What the Application must Show. — "The applicant must show that the paper exists, and is in the control of the other party; that it is pertinent to the issue, and that the case is such that a court of equity would compel its discovery." [1]

§ 740. May be made before Trial. — Even under a holding that the papers could only be produced for the purpose of being used *at the trial*, it was ruled, on grounds of manifest convenience, that the application for an order to produce them on notice might be made before the trial.[2] In such a case, Mr. Justice Curtis, at circuit, said: "If the notice is made before the trial, the correct practice seems to be, after the moving party has made a *prima facie* case, to enter an order *nisi*, leaving it for the other party to show cause at the trial. He must then come prepared to produce the paper, if he fails to show cause." [3]

Subdivision 2.— Under the Statutes of New York.

SECTION

743. Construction of the New York Statute.
744. Does not Extend to Cases of Tort.
745. Nor to Matters which are Privileged.
746. Does not Require a Party to Disclose his own Evidence.
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749. But not to Anticipate a Defense.
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755. Proceeding by Petition and Order to show Cause.
756. Affidavit by whom made.
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761. Explicit Denial ends the Application.
762. Vacating *Duces Tecum* on Application of Attorney.
763. Appeal from an Order Granting an Inspection.
764. Question for Decision on Appeal.

[1] Iasigi *v.* Brown, 1 Curt. C. C. (U. S.) 401, 402.

[2] Iasigi *v.* Brown, 1 Curt. C. C. 401.

[3] *Ibid.*

§ 743. **Construction of New York Statute.** — The proceeding for a discovery, according to the chancery practice, was superseded in New York by provisions of the Revised Statutes, and these in turn were supplemented by a provision (§ 388) of the Code of Civil Procedure.[1] It has been held that the provision of the code does not repeal those of the Revised Statutes. Not being inconsistent with each other, they might well stand together, either as directing the mode of making the discovery, or as defining the powers of the courts in case an order for a discovery should be disobeyed.[2] The discovery therein provided for may be had as well *after issue joined*, as *before;* but under either statute, the court must be satisfied that the books or papers contain *evidence relating to the merits of the action*.[3] The court must be satisfied before granting the order, that the discovery is *pertinent or material* to the claim or defense of the party seeking the remedy.[4] And where the plaintiff's claim was proved *prima facie*, it was held (reversing the trial court), that an order for the inspection of the defendant's books, in order to get further proof, should not have been made.[5]

§ 744. **Does not extend to Cases of Tort.** — The provisions of the Revised Statutes have been held co-extensive only with the principles of the former court of chancery, — from which the conclusion has been reached that such an inspection cannot be demanded in an action for *libel*.[6] In an action for a personal tort, brought by a physician, the plaintiff cannot be compelled to make a discovery of his books and papers, for the purpose of enabling the defendant to intercept and rebut his testimony as to the damage sustained by him, by showing his gains from his practice.[7]

[1] 2 R. S. N. Y. (1846) 199.

[2] Hoyt *v.* American Exch. Bank, 1 Duer (N. Y.), 652; Morrison *v.* Sturges, 26 How. Pr. (N. Y.) 177.

[3] Morrison *v.* Sturges, *supra*.

[4] 2 Wait Pr. 531, and cases cited.

[5] Sanger *v.* Seymour, 42 Hun (N. Y.) 641.

[6] Opdyke *v.* Marble, 18 Abb. Pr. (N. Y.) 266.

[7] Mott *v.* Consumers' Ice Co., 2 Abb. N. Cas. (N. Y.) 143.

§ 745. Nor to Matters which are Privileged. — A physician's account books, containing information which would be privileged as concerns his patients, are not subject to discovery and exploration, in an action between the physician and a third person.[1]

§ 746. Does not Require Party to Disclose his own Evidence. — The provision of section 388 of the New York Code of Procedure does not sanction an order requiring either party to disclose the evidence which he intends to introduce against his adversary.[2] So, in another jurisdiction, it is held that it is an abuse of the power of compelling the party to produce documents, to use it so as to compel the opposite party to discover evidence which is material to his case, but not material to the case of his opponent; "for the rule is that the defendant has the right to enforce the production of such documents by the plaintiff, as relate to his defense, and does not extend to the enforcement of the production of documents by means of which the plaintiff's case is to be established." [3]

§ 747. NOR EXTEND TO DISCOVERY OF BOOKS OF A CORPORATION. — It has been held, but, it is believed, on grounds that are quite untenable, that agents of a corporation will not be compelled to discover the books of the corporation.[4] It was also ruled that the fact that the petition for the discovery alleged that the corporation was fictitious, made no difference.[5] This would seem to be a political decision, not entitled to much respect. It is plain that the discovery of the books of a corporation cannot properly be had at all, except by process directed against the agents of the corporation who have them in their custody. The corporation, being itself an intangible body, could not be imprisoned for contempt; and although the process might be in name directed against the corporation, it would be necessary to serve it upon its agents, having control over the matter of the production of the books.

[1] Mott *v.* Consumers' Ice Co., 2 Abb. N. Cas. (N. Y.) 143.

[2] Strong *v.* Strong, 1 Abb. Pr. (N. S.) (N. Y.) 233.

[3] Abrahams *v.* Swann, 18 W. Va. 274, 278.

[4] Opdyke *v.* Marble, 18 How. Pr. (N. Y.) 266.

[5] *Ibid.*

§ **748. Enables Plaintiff to draw his Petition.** — Where an application for the exhibition of a writing is made before issue joined, to enable the plaintiff to frame his complaint, it can only be granted where the petition shows that the inspection is necessary to enable the plaintiff to frame his complaint. Where the petition contains enough matter to enable the plaintiff properly to frame his complaint, the application will not be granted, though it may appear that certain of the allegations cannot be made upon knowledge, but can only be made upon information and belief.[1] The granting of such an order has been said to be a matter resting very largely within the discretion of the court. In dealing with such an application, it was said: "The power to search through defendant's account books, in order to find isolated entries not particularized, to enable the plaintiff to frame a complaint, is open to great abuse, and should only be granted where the purpose and necessity of such examination are apparent. At a later stage of the proceedings, when the issues between plaintiff and defendants shall have been developed, other appropriate measures can be taken by the plaintiff to obtain the information now sought, if it be found to be then necessary."[2]

§ **749. But not to Anticipate a Defense.** — In New York it is not usual to direct a discovery and inspection of books and papers, *in anticipation of a defense*, and with a view of enabling a party to prepare to meet it. The rule, as generally stated, is that the papers to be inspected must relate to the maintenance of the position taken by the applicant, and to that of the opposite party.[3] Accordingly, where the plaintiff moved for an inspection of the defendant's books, in order to show the non-payment of a debt, it was held that, as the defense of payment was an affirmative defense, in respect of which the burden was on the defendant, the plaintiff was not entitled to an inspection of his books, in anticipation of his defense, and to meet it.[4]

[1] Rafferty *v.* Williams, 50 N. Y. Super. 66.

[2] Mehesy *v.* Kahn, 50 N. Y. Super. 209.

[3] Sanger *v.* Seymour, 42 Hun (N. Y.), 641; citing Andrews *v.* Townsend, 14 Week. Dig. (N. Y.) 243.

[4] Cutter *v.* Pool, 54 How. Pr. (N. Y.) 311.

§ 750. Nor Discover the Names of Proper Parties Defendant. — In a motion, under the provision of the Revised Statutes of New York, for the discovery of the books, etc., of a printing and publishing company called "The World Company," for the purpose of enabling the plaintiff to prepare his complaint, with the names of real defendants, to be inserted in the place of certain fictitious names contained in the summons, it was ruled that the courts could not grant a discovery and inspection for such a purpose, but only for the purpose of aiding the plaintiff in stating his cause of action.[1]

§ 751. Enables Defendant to Prepare his Answer. — An order requiring the plaintiff to produce, or give copies of papers, to enable the defendant to answer the complaint, will not be made when it is manifest that the defendant has no defense which he cannot set up in due legal form, without the aid of such papers.[2] It is said: "Discovery may be ordered to assist a defendant to *facts* without which he cannot frame an answer with safety to his rights. But it is not intended to protect him from answering untruthfully, or to inform him how fully he may have furnished the plaintiff with the means of disproving the answer which he may propose to interpose."[3] The defendant must show *how* or *why* it is necessary to have the discovery, in order to prepare his answer. In other words, he must set forth the necessary *facts* in his petition to show that such a discovery is necessary.[4] It does not satisfy this rule that the defendant states, in his petition, that he *expects to be able to prove* that a note and acceptances, which are the foundation of the action, were paid by the transfer of the property mentioned and described in the papers whereof a discovery is sought.[5]

§ 752. An Illustration. — Where an action was brought to recover a balance of moneys, alleged to have been received by the defendant as

[1] Opdyke *v.* Marble, 18 Abb. Pr. (N. Y.) 266.

[2] Mora *v.* McCredy, 2 Bosw. (N. Y.) 669.

[3] Mora *v.* McCredy, 2 Bosw. (N. Y.) 669.

[4] Gelston *v.* Marshall, 6 How. Pr. (N. Y.) 398.

[5] Gelston *v.* Marshall, 6 How. Pr. *supra*. See also Stanton *v.* Delaware Mut. Ins. Co., 2 Sandf. (N. Y.) 662.

the plaintiff's agent, and the complaint was drawn upon the face of certain accounts rendered by the defendant, it was held that he was entitled to an order for the inspection of the same, and of the vouchers filed by him in support thereof, to enable him to frame his answer. In such a case the defendant should be allowed an inspection of his book of accounts, as the plaintiff's agent, if necessary, to enable him to meet the proofs of the account stated thereafter in the complaint, and make a substantial allegation as to what the accounts all together showed. The allegation in the complaint, that such books of account were falsely and fraudulently made up by the defendant, was regarded as rendering it more proper to grant an inspection.[1] - - - - In another case, upon an application by the defendant for the discovery of the contents of a letter written to him by the plaintiff, and his answer thereto, written on the same paper, which were in the plaintiff's possession, where such petition showed that they contained evidence that the plaintiff had no legal demand against the defendant, the discovery was granted, the allegation not being controverted by the plaintiff.[2]

§ 753. **Fishing Explorations not Countenanced.** — The statutes of New York, providing for this mode of discovery, do not countenance *fishing explorations*, for the mere purpose of obtaining evidence or witnesses. If, therefore, the order for a discovery of books and papers does not show that the entries sought for are *evidence*, but only that they contain *information* by which evidence may be obtained, the order will not be granted.[3] An inspection is denied of the documents of the adversary before trial, where it is clear that they may be produced on an examination of the adverse party under a subpœna *duces tecum*, when the only purpose is to prove *circumstances* as the foundation of relevant inferences, rather than *facts* proximately probative of an issue.[4]

§ 754. Inspection of Books of an Insolvent. — It has been reasoned in New York, construing a statute,[5] that it is altogether foreign to the

[1] Inyo Mining Co. *v.* Pheby, 49 N. Y. Super. 392.

[2] Livermore *v.* St. John, 4 Rob. (N. Y.) 12.

[3] Woods *v.* Figaniere, 25 How. Pr. (N. Y.) 522.

[4] New England Iron Co. *v.* New York Loan Co., 55 How. Pr. (N. Y.) 351.

[5] § 21 of the General Assignment Act of that State.

purposes of the legislature to compel the assignee to produce the assignor's books, in order to enable a creditor to extract evidence therefrom that will aid him in a litigation, existing or contemplated, *not relating to the assigned estate.* "An insolvent," said Van Hoesen, J., "is under no greater obligation than a solvent person, to disclose to his adversary the evidence on which he relies. It cannot add to the quantum or value of the assigned estate to show from the assignor's books that he intentionally misrepresented the weight of the hides on which he procured a loan from the petitioner; nor ought the assignee to be compelled to exhibit the evidence which he has to show that the petitioner took usury from the assignor."[1] In another case where, shortly before making an assignment for the benefit of his creditors, the assignor had allowed a judgment by default to be entered against him, under which his stock in trade had been levied upon and sold, and the circumstances of the transaction tended to show that the claim sued on was fictitious, and that it was concocted for the purpose of defrauding the actual creditors of the assignor, — the court allowed the assignee to bring suit for the recovery of the property, but refused to allow him to examine, under the provisions of the above statute, the persons who were alleged to have taken part in, or to have knowledge of, the fraudulent transaction. Charles P. Daly, C. J., said: "The order allowing the assignee to sue will be granted, and whatever examination of parties, or witnesses may be necessary to sustain the action, must be had *in that action.* The examination allowed by the Assignment Act is to aid *in the administration of the assignment.* If it is necessary to perpetuate testimony, then it should be made under the Revised Statutes, and subject to the restrictions and limitations which, by adjudged cases, is to be applied to such proceedings. What is sought to be done in this application is to go into the whole alleged cause of action, by the examination of witnesses and the filing of their testimony, before any action is commenced. It is only necessary to suggest the gross abuses that would arise should such a proceeding as this be allowed. The examination as to the whole subject of inquiry has nothing to guide it, and may be as extensive and irrelevant as the person who obtains such an order wishes. It is impossible for the referee to determine in advance what may or what may not be irrelevant, and the most unrestrained license of inquiry would be the consequence. When an action is commenced, and an issue or issues have been found, there is then a definite limit to the

[1] Matter of Everit, 10 Daly (N. Y.), 99.

inquiry, and a means of determining what is, or is not relevant. If an examination is necessary to enable the plaintiff to frame his complaint, he must specifically show why a discovery is necessary for that purpose; or if a discovery is necessary to enable the plaintiff to give or procure evidence, the necessity for it must be shown. All that was evidently intended by the twenty-first section of the Assignment Act was, that parties should have, in their assignment proceedings, the same power as to compelling the production and examination of books and papers, the discovery of evidence requisite to the complete administration of the assigned estate by the court, or the perpetuation of testimony where there is reason to apprehend that the party may lose it,— which, by various statutory provisions parties have in actions, with the additional right of compelling answers that might criminate the witness, but for the provision in the act and the right of the party to avail himself of the testimony so taken in any action then pending or thereafter brought." [1]

§ 755. **Proceeding by Petition and Order to Show Cause.** — Under the New York Code of Civil Procedure, the proceeding to compel the inspection of the books of the adversary party, takes place upon a *verified petition*, praying for the discovery or inspection sought, upon which the only order which can be made in the first instance is an order directing the relief prayed for, or to show cause why it should not be had. A peremptory order compelling the production of books and papers for examination, cannot be granted *ex parte*.[2]

§ 756. **Affidavit by Whom Made.** — The affidavit should be made by the *party* himself; if made by his *attorney*, some reason should be shown for his making it.[3] Where the State (or the people of the State) are moving parties in the application, the necessary facts must not only be stated, but the person from whom the information is derived should *himself* make the affidavit or petition, and state the facts positively, or else state the nature of the information which he has of the facts.[4]

[1] Matter of Burtnett, 8 Daly (N. Y.) 363.

[2] Dick *v.* Phillips, 41 Hun (N. Y.), 603.

[3] Phelps *v.* Platt, 54 Barb. (N. Y.) 557.

[4] People *v.* Rector, 6 Abb. Pr. (N. Y.) 177.

§ **757. What the Petition must Show.**— The petition must *point to the places* where the information sought for exists, or *describe the entries*, other than by merely stating their supposed effect as evidence. It must also show the *expediency* or *necessity* of resorting to this mode of proof. If it is deficient in these particulars, the inspection will be denied.[1] It must *state definitely* what it is that the petitioner seeks to discover, so that the court may see that it is material to the case.[2] It must show that entries, affecting or throwing some light on the matters in controversy, exist, or, at least, enough to call upon the adverse party to show whether they do or do not exist. It must show that such entries are *material*, and it must *state facts* from which the court can see that they are material, in addition to stating other matters prescribed by court rules regulating such applications.[3] The entries, of which a discovery is sought, must be described with sufficient certainty, to enable the adverse party to ascertain whether they exist and are in his possession.[4] Such a petition will not be granted where it prays for a discovery, generally, of all the books, papers, and correspondence of the adverse party, containing entries made during a period of several years, relating to purchases of a specified commodity.[5]

§ **758 Information and Belief not Enough.** — It is not enough that the party *believes* or is *advised* that a paper contains material evidence. *Facts* must be shown to support such belief. Nor is it enough that the paper may, or probably will, furnish *information to obtain evidence* which may be material. The paper *itself*, must contain the evidence, either by itself or in connection with other evidence.[6] An affidavit seeking such a discovery and inspection, sworn to on *information and belief*, that the books of a corporation will show the names of proper par-

[1] New England Iron Co. *v.* New York Loan Co., 55 How. Pr. (N. Y.) 351.

[2] People *v.* Rector, 6 Abb. Pr. (N. Y.) 177; Walker *v.* Granite Bank, 19 Abb. Pr. (N. Y.) 111.

[3] Cassard *v.* Hinman, 6 Duer (N. Y.), 695.

[4] People *v.* Rector, *supra*.

[5] Cassard *v.* Hinman, *supra*.

[6] Morrison *v.* Sturges, 26 How. Pr. (N. Y.) 177; Strong *v.* Strong, 1 Abb. Pr. N. S. (N. Y.) 233; Husson *v.* Fox, 15 Abb. Pr. (N. Y.) 464.

ties defendant against whom it is desirable to bring an action for libel, has been denied.[1] It must state this *positively*, not on *information or belief;* and the absence of a party will not excuse the want of such positive information, unless the affidavit sets forth the sources and grounds of such information and belief.[2] In such a case it was said: "The uniform course of decision has been against any attempt to use this power of the court for the mere purpose of *hunting for evidence*, without some knowledge on the part of the applicant as to what the entries are, and in what paper or book it is contained. It is very evident, no such knowledge exists in the present case, and the whole petition rests upon the supposition that there must be some entries in the defendant's books, and if the plaintiff can obtain an inspection, he can obtain some information beneficial to him in conducting this prosecution. Such a rule, if carried out to this extent, would give to a party the privilege of always examining his adversary's books, if he can swear that the litigation relates to matters which ought to be entered in the books, and that he can swear that he believes that he keeps correct ones."[3]

§ **759. Certainty required in Description.** — Practical certainty is required in the description of the books and papers which are to be produced, as in the case of a *subpœna duces tecum*.[4]

§ 760. [Continued.] Illustration. — An order requiring the production of "books and papers, if any such there are, touching the business relations of the defendants as between themselves and third parties, which would refer to, or would cover or include, the purchase of the said ice," — has been held too vague and indefinite to be enforced.[5]

§ **761. Explicit Denial ends the Application.** — An explicit denial by the party that there are any such entries, books or

[1] Opdyke *v.* Marble, 18 Abb. Pr. (N. Y.) 266; Walker *v.* Granite Bank, 19 Abb. Pr. (N. Y.) 111.

[2] Walker *v.* Granite Bank, *supra*.

[3] *Ibid.*, opinion by Ingraham, P. J.

[4] *Ante*, § 750; Olney *v.* Hatcliff, 37 Hun (N. Y.), 286.

[5] Olney *v.* Hatcliff, 37 Hun (N. Y.), 286.

papers, under his control, ends the application. He cannot, it has been ruled, be subjected to a fishing examination.[1]

§ 762. Vacating Duces Tecum on Application of Attorney. — In a case in New York, brought to recover moneys alleged to have been taken from the plaintiffs' firm by the defendant, while employed by the plaintiffs as a book-keeper or clerk, the defendant alleged that the moneys were taken in pursuance of an arrangement with one Clyde, who was then the senior partner of the plaintiffs' firm, by which the defendant was to have one-fourth of the profits. The defendant subpœnaed one of the plaintiffs to produce the books of the firm. The subpœna was thereafter set aside, on an application of the plaintiffs, based upon an affidavit of one of their attorneys, stating that he believed that the subpœna was served with a view of annoying the plaintiffs, and that the books called for were from forty to fifty in number. It was held that the court erred in granting the application to vacate the subpœna; that if the subpœna was too broad, the court should have required the plaintiff to allow the defendant to inspect the books, or should have compelled them to produce copies of such portions of the books as were material to the issues. The court said: "The case to be tried, in such a case, is stifled without a trial. The materiality of evidence should be determined at the trial, where an exception is possible to a ruling of the judge before whom the trial is had. In this case, if the books are material, there is no remedy."[2]

§ 763. Appeal from an Order Granting an Inspection. — In New York an appeal lies to the Supreme Court, at general term, from an order made at special term, granting or denying to a party leave to inspect and examine the books of the party appealing. Such an order is regarded as disposing of a substantial right.[3] But the Court of Appeals of New York does not revise such orders. That court has said: "Whether the subpœna *duces tecum* should be set aside, was *matter of discretion* in the court below; and whether permission to inspect and copy plaint-

[1] Hoyt *v.* American Exch. Bk., 1 Duer (N. Y.), 652. In this case, the *mode of making application* for the discovery under the Revised Statutes and Code of Civil Procedure of New York, is stated.

[2] Clyde *v.* Rogers, 24 Hun (N. Y.), 145.

[3] Thompson *v.* Erie Ry. Co., 9 Abb. Pr. (N. S.) (N. Y.) 212; Woods *v.* Figaniere, 25 How. Pr. (N. Y.) 522.

iff's books should be granted, was also *matter of discretion*. These are matters of practice, with which we have no jurisdiction to interfere. The appeal should therefore be dismissed with costs." [1]

§ **764. Question for Decision on Appeal.** — On an appeal from such an order, the question for decision is, whether sufficient evidence appears to satisfy the court that the books called for are material and necessary for the applicant, as claimed; and it has been ruled that, where there is no denial of the facts alleged, the applicant is entitled to the benefit of all intendments and inferences which may be drawn from the allegations made by him.[2]

Article II. — Notice to Produce and Secondary Evidence.

Subdivision 1. — Notice to Produce.

Section

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787. Evidence to Excuse their Production.
788. Where the Document is held by a Third Party.

[1] Clyde *v.* Rogers, 87 N. Y. 625; *s. c.* in court below, 24 Hun (N. Y.), 145.

[2] Thompson *v.* Erie Ry. Co., 9 Abb. Pr. (N. S.) (N. Y.) 212.

SECTION
789. Party failing to Produce cannot meet Secondary Proof with like Proof.
790. [Continued.] A Contrary View.
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792. What Secondary Evidence may be given.
793. Answer to Notice not Evidence.
794. Presumption of Contents in Case of Failure to Produce.
795. Evidence of Attempts to Destroy or Fabricate Evidence.
796. Secondary Evidence as to Incidental and Collateral Papers.

§ **770. Necessity of the Notice.** — Where a written instrument is in the possession of the opposite party and is material to the issues, secondary evidence of its contents is not in general admissible, unless a seasonable notice to produce it upon the trial, has been served upon such party or his counsel, and not complied with.[1] And it is error to allow a *copy* to be given in evidence, without proof of a previous notice to produce the original.[2] Except as hereafter stated, preliminary notice to produce the instrument, before resorting to inferior evidence of its contents, is indispensable. "Inconvenience or absence from the State is not an excuse for omitting this notice; the exception would be where the party himself could not be found after diligent inquiry. Then the law would treat the instrument as lost. Other exceptions are, where the action is brought for the instrument itself, when proof of notice is not necessary. The action for the instrument is a demand for the production of it."[3] Roundly stated, the rule is that, in order to lay a foundation for secondary evidence, it must be shown that the original writing is *lost or destroyed by time, mistake or accident*, or is *in the hands of the adverse party*, who has had due notice to produce it on the trial.[4] The rule is the same in *criminal* as well as in *civil* cases.[5] A

[1] Grimes *v.* Fall, 15 Cal. 63; Farmers' &c. Bank *v.* Lonergan, 21 Mo. 46; Williams *v.* Benton, 12 La. Ann. 91; Anderson Bridge Co. *v.* Applegate, 13 Ind. 399; Potier *v.* Barclay, 15 Ala. 439; United States *v.* Winchester, 2 McLean (U. S.), 135; Fuller *v.* Hoyt, 14 Tex. 49; Murchison *v.* McLeod, 2 Jones L. (N. C.) 239.

[2] Richards *v.* Richards, 37 Pa. St. 228.

[3] Carland *v.* Cunningham, 37 Pa. St. 228, 232, opinion by Thompson, J.

[4] Anderson Bridge Co. *v.* Applegate, 13 Ind. 339.

[5] United States *v.* Winchester, 2 McLean (U. S.), 135.

demand before suit brought for the delivery of the instrument, does not take the place of a notice to produce it for evidential purposes upon the trial.[1]

§ 771. **Notice not Complied with lets in Secondary Evidence.** — Conversely, if a seasonable notice to produce has been given and disregarded, *parol evidence* of the contents of the paper will be heard, or a *copy* of it will be admitted in evidence, on proof that it is a copy.[2] Where one party gives to the other notice to produce certain instruments of writing known to be in his possession, and the party so notified fails to produce them, it is competent to inquire, upon cross-examination of a witness for such party, what are the contents of such instruments.[3]

§ 772. **Object of requiring Notice to Produce.** — The object of requiring notice to produce to be given, is to prevent the party to whom the notice is directed from being taken by *surprise*.[4]

§ 773. **Exception where the Pleadings give Notice.** — According to numerous holdings, notice to produce an original paper is not required, where the form of the action, or the pleadings are such as to give notice that its production will be necessary at the trial, to contradict the evidence of the other party.[5] Thus, where the action is brought *for the possession of the paper itself*, *e.g.*,

[1] Fuller *v.* Hoyt, 14 Tex. 49. It has been held that a party may testify orally as to the amount due him, from a written account of a sale shown him, made by the defendant as his factor, without giving the plaintiff notice to produce it, — the theory of the court being that, as the account of the sale was made by a third party person, to wit, an auctioneer, it was not such an instrument as must be produced in evidence. First National Bank *v.* Decatur, 50 Ill. 321. Compare Weaver *v.* Crocker, 49 Ill. 461, where a somewhat similar ruling was made. But the soundness of these holdings seems doubtful.

[2] McKellip *v.* McIlhenny, 4 Watts (Pa.), 317; Augur Steel &c. Co. *v.* Whittier, 117 Mass. 451; Commonwealth *v.* Goldstein, 114 Mass. 272.

[3] Pangborn *v.* Continental Ins. Co. (Michigan), 29 N. W. Rep. 475.

[4] Field *v.* Zamansky, 9 Bradw. (Ill.) 47; Milliken *v.* Barr, 7 Pa. St. 23.

[5] Nealley *v.* Greenough, 25 N. H. 325; Hammon *v.* Hopping, 13 Wend. (N. Y.) 503; How *v.* Hall, 14 East, 274; Scott *v.* Jones, 4 Taunt. 865; Whitehead *v.* Scott, 1 Mood. & R. 2; Bucher *v.* Jarratt, 3 Bos. & Pul. 143; Jolley *v.* Taylor, 1 Camp. 143; People *v.* Holbrook, 13 Johns. (N. Y.) 90;

an action of *trover*, a notice to produce it is not necessary.[1] So, in *assumpsit* against a carrier for the non-delivery of written instruments, it is not necessary to prove a notice to the defendant to produce them, before giving parol evidence of their contents.[2] So, the defendants to an action are entitled, on the trial, without notice, to the production of all papers which formed any part of the *contract sued on*.[3] So, in an action for damages for *forging a note*, evidence that the note was in the hands of the defendant, and that it was forged, is admissible, without producing the note, or giving the defendant notice in the declaration to produce it.[4] So, on the trial of an *indictment* for the *larceny of bank-notes* or other written instruments, where the stolen property is alleged to be in the possession of the accused, parol evidence may be given of their contents, without notice to the accused to produce them;[5] though there is opinion to the contrary.[6] But in the last view, where notice has been given and refused, *copies* may be given in evidence. It is no argument to say that, because the defendant was under bond to produce the originals, and thus give evidence against himself, their contents cannot be proved by copies.[7]

Hardin *v.* Kritsinger, 17 Johns. (N. Y.) 293; Bissell *v.* Drake, 19 Johns. (N. Y.) 66; McClean *v.* Hertzog 6 Serg. & R. (Pa.) 154; Com. *v.* Messinger, 1 Binn. (Pa.) 273; Lawson *v.* Bachman, 81 N. Y. 616; Howell *v.* Huyck, 2 Abb. App. Dec. (N. Y.) 423; Hooker *v.* Eagle Bank, 30 N. Y. 83, 86. This rule has been denied in Alabama, where it has been held that secondary evidence of the written demand and notice, given by a landlord to his tenant, which is made necessary by a statute to enable the landlord to maintain against the tenant an action of unlawful detainer, cannot be shown by secondary evidence in such an action, without a notice to produce the original. Dumas *v.* Hunter, 30 Ala. 75.

[1] McClean *v.* Hertzog, 6 Serg. & R. (Pa.) 154; People *v.* Holbrook, 13 Johns. (N. Y.) 90. See also Ross *v.* Bruce, 1 Day (Conn.), 100; Scott *v.* Stark, 4 Taunt. 865; Rose *v.* Lewis, 10 Mich. 483.

[2] Jolley *v.* Taylor, 1 Camp. 143, per Lord Mansfield, C. J.

[3] Dewitt *v.* Prescott, 51 Mich. 298, 301.

[4] Bruce *v.* Ross, 1 Day (Conn.), 100.

[5] McGinnis *v.* State, 24 Ind. 500 (overruling Williams *v.* State, 16 Ind. 461); Com. *v.* Messinger, 1 Binn. (Pa.) 273; State *v.* Gurnee, 14 Kan. 111, 120.

[6] Rex *v.* Haworth, 4 Car. & P. 254.

[7] Le Merchand's Case, cited in Leach's Cr. Cas. 336, *n.* See other cases cited in the same note.

§ 774. **Dispensed with when Papers in Court.** — According to one view, where the papers asked for are in court, in the hands of the attorney of the opposite party, there is no necessity for a previous notice. In such a case, it was said: "No surprise or hardship could result from his being required to produce them on demand." [1] But, according to another view, notice to produce is necessary, even though the paper is in court at the trial. This is not required in order that, upon proof of such notice, the party having the custody of the paper may be compelled to furnish evidence against himself; but it is required to lay the foundation for the introduction of secondary evidence of the contents of the paper. "This rule," it has been observed, "is of immense importance *to prevent surprise* indeed, it has been held that proof that the adverse party or his attorney, has the instrument in court, does not make notice to produce it unnecessary, for the object of the notice is not only to produce the paper, but to give the party an opportunity to provide proper testimony to support or impeach it." [2] But upon a motion or rule, reciting matters appearing in the *files of the court*, they may be produced without further formality.[3]

§ 775. **Notice to produce a Notice not Necessary.** — "Every written notice," said Gibson, C, J., "is, for the best of all reasons, to be proved by a *duplicate original;* for if it were otherwise, the notice to produce the original could be proved only in the same way as the original notice itself, and thus a fresh necessity would be constantly arising, *ad infinitum*, to prove notice of the preceding notice." [4]

§ 776. **Not to produce a Notice to an Indorser.** — Perhaps not for this reason, a written notice to an indorser of a promissory note may be proved by parol, without giving notice to parties to produce the writing; [5] but more probably for the reason

[1] Field *v.* Zamansky, 9 Bradw. (Ill.) 479.

[2] Milliken *v.* Barr, 7 Pa. St. 23, opinion by Burnside, J.

[3] Souder *v.* Lippincott, 48 N. J. L. 437.

[4] Eisenhart *v.* Slaymaker, 14 Serg. & R. (Pa.) 153; reaffirmed in Morrow *v.* Com., 48 Pa. St. 305.

[5] Eagle Bank *v.* Chapin, 3 Pick. (Mass.) 180; Central Bank *v.* Allen,

that such a notice consists of a few simple facts, the nature of which is well known.

§ 777. Exceptions in the Case of Recorded Deeds. — An exception to the foregoing rule is admitted in the case of recorded deeds. Here a certified copy from the record may be used, on the proper preliminary proof being made, without notice to the opposite party to produce it.[1] There are holdings to the effect that, if the deed has been recorded, a transcript from the record may be introduced, provided the party make oath that the original is not in his custody, and is beyond his control.[2]

§ 778. Exception where the Opposite Party has Obtained the Paper Surreptitiously. — The affidavit of a party to a cause, that an original paper, of which he has had the custody, has disappeared without his consent, and has been seen in possession of the counsel of the opposite party, has been held sufficient proof to let in secondary evidence of its contents.[3]

§ 779. Whether Notice in Writing or by Parol. — It has been said that the general rule of practice, regarding a *written notice* to produce papers, has reference only to the preliminary preparations for the trial, and that the reason of the rule does not apply to a notice given in the presence and hearing of the court, while the trial is in progress. It was therefore held that a verbal notice, given at a previous meeting before a referee, was good.[4]

§ 780. Description of the Papers in the Notice. — As in the case of a *subpœna duces tecum*,[5] reasonable or practical certainty in the description of the papers, the production of which is required, is generally insisted upon; since it would be unjust to let

16 Me. 41; Roberts *v.* Bradshaw, 1 Stark. 28; Kine *v.* Beaumont, 7 J. B. Moore, 112.

[1] Bowman *v.* Wettig, 39 Ill. 416. The proof which was held sufficient in this case was, that the party had searched for the deed unsuccessfully, and could not produce it.

[2] Ferguson *v.* Miles, 3 Gilm. (Ill.) 358; Mariner *v.* Saunders, 5 Gilm. (Ill.) 113; Bowman *v.* Wettig, 39 Ill. 416, 422. In Missouri without the oath: Barton *v.* Murrain, 27 Mo. 235; Avery *v.* Adams, 69 Mo. 603.

[3] Morgan *v.* Jones, 24 Ga. 155.

[4] Kerr *v.* McGuire, 28 N. Y. 446.

[5] *Ante*, § 175.

in secondary evidence of a paper, upon a notice to produce which failed to specify the character of the paper intended. It has been held that a notice to produce "all letters, papers and documents, touching or concerning the bill of exchange mentioned in the declaration in this cause, and the debt sought to be recovered," — is too general.[1] In general, where the notice is such that the party to whom it is delivered could not mistake the paper intended, it will be held sufficient.[2] It will be good, although *informal* and *inaccurate* in certain particulars, — as, for instance, as to the date of the paper, — if it fairly apprize the party what paper is to be produced.[3] Accordingly, a notice describing a letter as inclosed in an envelope, has been held sufficient to call for both the envelope and the inclosure.[4] In an action against a person seeking to charge him as a partner, a notice to produce "all papers pertaining to the partnership" calls for any *deed* which the defendant may have making him a partner.[5]

§ 781. **Notice to Agent or Attorney.** — Notice need not, in general, be given to the party himself; notice to his agent or attorney is sufficient,[6] even in penal actions.[7]

§ 782. **Length of Time of Notice.** — "The length of time," says Clopton, J., "for which notice should be given, depends on the attendant circumstances, and the time required to obtain the paper. The notice should be for a reasonable time — sufficiently long to enable the party to procure and produce it without undue inconvenience. If the paper is not in court, and cannot be produced without delaying the trial, notice should be given prior to the trial; but when the paper is in court, and in the power of the party to produce immediately, notice at the trial is sufficient." [8]

[1] France *v.* Lucy, Ry. & M. 341.

[2] Graham *v.* Oldis, 1 Fost. & Fin. 262.

[3] Frank *v.* Manny, 2 Daly (N. Y.), 92.

[4] United States *v.* Duff, 6 Fed. Rep. 45.

[5] Jones *v.* Parker, 20 N. H., 31.

[6] Attorney-Gen. *v.* Le Merchant, 2 T. R. 203 *n.*; *ante*, § 190.

[7] Gates *v.* Winter, 3 T. R 306.

[8] Littleton *v.* Clayton, 77 Ala. 571, 574, 575. "Due notice," under the *North Carolina statute*, means sufficient time to enable the party to have the document present when called for. McDonald *v.* Carson, 95 N. C. 378.

§ 783. INSTANCES WHERE LENGTH OF TIME WAS HELD SUFFICIENT. — It is said by Russell: "In *town cases*, service of notice on the attorney, on the evening before the trial, is in general sufficient."[1] When, therefore, notice to produce a letter was served upon the defendant's attorney on the afternoon of the day before the trial, at twenty minutes before five o'clock, and he had his office in the same town and near the place of trial, it was held that the length of time was sufficient.[2] - - - - A notice given on the *preceding evening* was held sufficient, where the counting house of the party was very near the court house.[3] - - - - Where both parties lived in London, a notice served on defendant's attorney *at seven o'clock* on the evening of the day before the trial, was held not too late.[4] - - - - Where one of the parties lived in the assize town, and the plaintiff's attorney served the defendant's attorney in the assize town, on the commission day, with notice to produce a paper, and paid the expense of going to fetch it, and the defendant's attorney said that that was of no use, as the paper was not in existence, — it was held that the plaintiff might give secondary evidence of its contents, as the statements of the defendant's attorney that it was not in existence obviated any objection to the lateness of the service of the notice to produce.

§ 784. INSTANCES WHERE LENGTH OF TIME WAS HELD INSUFFICIENT. — Unless under special circumstances, a notice to parties is insufficient which barely allows time to procure them by *telegraphic communication* with clients.[6] - - - - Notice given to a party *during the trial* is not sufficient, unless it appear to the satisfaction of the court, that the paper is *in court at the time* and in possession of the party, or, if elsewhere, that it would be of easy access.[7] - - - - Where the trial was at the Middlesex sittings (in London), and the plaintiff resided in London, notice served upon him at *half past eight o'clock on the evening before the trial*, was too late.[8] - - - - So, where the notice was served on the plaintiff's attorney at a *quarter before nine* on the night before the trial, it was held that it was too late.[9] - - - - A notice to produce deeds was served on the defendant's attorney in *Essex* on *Saturday*, the commission day of the assizes being *Monday*. The attorney went to *London* and fetched them. A notice was served on the commission day evening, to pro-

[1] 2 Russ. on Crimes, 743.

[2] United States *v.* Duff, 6 Fed. Rep. 45.

[3] Shreve *v.* Dulaney, 1 Cranch C. C. (U. S.) 499.

[4] Leaf *v.* Butt, 1 Car. & M. 451.

[5] Foster *v.* Pointer, 9 Car. & P. 718.

[6] Dewitt *v.* Prescott, 51 Mich. 298.

[7] Atwell *v.* Miller, 6 Md. 11.

[8] Lawrence *v.* Clark, 14 Mees. & W. 249.

[9] Holt *v.* Meirs, 9 Car. & P. 191.

duce another deed. The attorney stated that he had been to town and fetched the deeds, and that, if the plaintiff would pay the expense of sending for this from town, where it was, it should be had. The plaintiff did not offer to pay such expense, and the trial was had on *Thursday*. It was held by Lord Tenterden, C. J., that, under these circumstances, the plaintiff was not entitled to give secondary evidence of the last mentioned deed.[1] - - - - Where the notice was given *the day previous* to the trial, to produce a paper which was eighty miles distant, in the trial of another person, the reviewing court refused to take judicial notice of facts which would imply that the paper could not be obtained, so as to exclude secondary evidence,[2] — in other words would not, upon these facts, say that the trial court erred in admitting such evidence. A notice given *several days* before the term at which the cause was tried, was deemed *prima facie* sufficient, although the party refusing the notice resided without the State, — the court reasoning that, if he was willing to produce it, but unable to do so, because of the shortness of the notice, he should have applied for a continuance.[3]

§ 785. Notice applies to any Subsequent Trial. — Where a paper is produced at one trial, it should remain on file, unless leave is granted to withdraw it for special reasons, so that it may be used at another trial in case a new trial is awarded. "If a party is notified that a paper is wanted at one trial, it is, or should be known by such party that, if there be a new trial, the paper will be wanted again."[4] On this principle, as already seen,[5] an admission made at the first trial of a cause, if reduced to writing, or incorporated into the record, will be binding upon the party making it, at another trial, unless the trial judge, in the exercise of his discretion, thinks proper to relieve him from it;[6] and the power of the trial judge to grant this relief may be doubted. Upon the same analogy, where notice is given to produce a paper at a trial, that is a sufficient notice to produce the same paper at any subsequent trial of the same cause.[7] If given before a justice of the peace, it is available on a trial in a higher court, to which the cause has been appealed.[8]

[1] Curtis *v.* Spitty, 3 Barn. & Ald. 182.
[2] Cody *v.* Hough, 20 Ill. 43.
[3] Jefford *v.* Ringgold, 6 Ala. 544.
[4] Rawson *v.* Knight, 73 Me. 343.
[5] *Ante*, § 193.
[6] Holley *v.* Young, 68 Me. 215.
[7] Rawson *v.* Knight, 73 Me. 340.
[8] Read *v.* Moore, 19 Johns. (N.Y.) 337.

§ 786. **Evidence of the Possession of the Documents.** — The party giving the notice is bound to prove the books or documents to be in the hands of the opposite party, or under his power or control, before secondary evidence of their contents will be received. He must prove this by *competent evidence*. He cannot prove it by the *admissions of other persons*, whose admissions are not binding upon the party.[1] But cogent evidence is not required. Where, after notice to produce, *bare evidence* is given that the document is in the possession of the party receiving the notice, if it is not produced, secondary evidence of its contents will be heard.[2] It is sufficient evidence to let in secondary proof of the contents of a written instrument, that it was *last seen* in the possession of the party invited to produce it.[3] Evidence that the document is *in the hands of the agent of the party* notified to produce it, — *e.g.*, where the defendant is a ship-owner, and the document is in the hands of the captain, — is sufficient to let in secondary evidence of its content, if it is not produced.[4]

§ 787. **Evidence to Excuse their Production.** — The party notified to produce the document, may produce evidence showing that it is *lawfully out of his possession*, whereupon the judge will decide whether secondary evidence of its contents can be admitted, — the question being exclusively within his cognizance.[5]

§ 788. [**Continued.**] **Where the Document is held by a third party.** — "In order to let in secondary evidence, the instrument need not be in the actual possession of the party; it is enough if it be in his power, which it would be if in the hands of a party in whom it would be wrongful not to give up possession to him. But he must have such a right to it as would entitle him, not merely to inspect, but to retain."[6] It was accordingly held that, where a document was in the hands of one

[1] Birkbeck *v.* Tucker, 2 Hall (N. Y.), 121.

[2] Robb *v.* Starkey, 2 Car. & K. 443.

[3] Norton *v.* Heyward, 20 Me. 359.

[4] Baldney *v.* Ritchie, 1 Stark. 333.

[5] Harvey *v.* Michell, 2 Mood. & R. 366; *ante*, § 318 *et seq.*

[6] Parry *v.* May, 1 Mood. & R. 279, 280, opinion by Littledale, J.

who occupied the position of a *stake-holder* between the party invited to produce it and a third person, secondary evidence of its contents would not be admitted.[1] But where the writing is in the possession of a third person, who resides *out of the jurisdiction* of the court, and does not appear to be in the possession of the opposite party, secondary evidence of it will be let in without a notice to produce it.[2]

§ 789. **Party Failing to Produce, cannot meet Secondary Proof with Like Proof.**— The party who refuses to produce documentary evidence, when required by an order of the court, cannot, because of his contumacy, be allowed to meet secondary proof of their contents with like proof; he can only rebut such secondary proof by producing the instruments themselves.[3]

§ 790. [CONTINUED.] A CONTRARY VIEW. — The contrary has been held in Michigan, and in a case where there was merely a notice to produce but no order of court. Notice to produce a paper having been given and not complied with, an alleged copy was offered in evidence, and received against objection. Thereafter, the objecting party offered to prove that this copy was not a copy of any paper which he had ever assisted in making, or which had been in his possession. This evidence was ruled out, and it was held error. The court did not perceive any sound reason why the document itself should be excluded, if he had it, and said: "There is no authority for such exclusion, where it relates to his own case, even where not produced when called for by his adversary." The court also denied this doctrine of estoppel, as one not calculated to promote justice, and observed further: "If such rule could ever have been proper, there can be no reason for it now, when parties are competent witnesses, and can be compelled, by *subpœna duces tecum*, to bring into court any paper in their hands, which their adversaries have a right to inspect and prove."[4] But it would nevertheless seem that where a party refuses, after proper notice, to produce a paper, it would be a mere trifling with justice to allow him to introduce it, after thus driving his adversary to experiment with secondary proof.

[1] Parry *v.* May, 1 Mood. & R. 279, opinion by Littledale, J.

[2] Shepard *v.* Giddings, 22 Conn. 282.

[3] Bogart *v.* Brown, 5 Pick. (Mass.) 18; Platt *v.* Platt, 58 N. Y. 646, 649, Doon *v.* Donaher, 113 Mass. 151.

[4] Molton *v.* Mason, 21 Mich. 364, 370, opinion by Campbell, J.

§ 791. AFTER PAPER PRODUCED, SECONDARY EVIDENCE NOT ADMISSIBLE. — After a paper is produced in compliance with the notice, if the producing party offers to verify it by his oath, the other party cannot refuse to use it, and cannot be allowed to introduce a *copy* in the first instance, on the allegation that the paper produced is not genuine; although he may show wherein it is erroneous or defective after he once introduces it. "It seems to us," said Mr. Justice Miller, "that the court was right in refusing to *admit in the first instance* what was conceded to be a copy, when that which was at least *prima facie* the original was in court, to answer the notice of the party desiring to use the copy. How far the plaintiff could have been permitted to show a variance of the defendant's paper from the genuine, after it was once introduced, we need not inquire. But a copy could not be introduced until what seemed to be the original had been before the court and become the subject of inspection by the jury." [1] The propriety of this holding is very doubtful. Upon what principle does the mere production of a paper, in response to a notice, *authenticate it* as the paper called for in the notice? Why should the fact that his adversary is willing to verify the paper with his oath, make it incumbent on him to accept that oath and make the paper his evidence, or be estopped from proving the fact? Why should a party be required to put in evidence a paper the authenticity of which he denies, merely because the other party has seen fit to produce it in response to a notice, it may be to produce something else? If he should put it in, as above suggested, upon what principle could he thereafter deny its authenticity? The true rule is that evidence of the contents of a writing which is merely *substitutionary*, cannot be given where the writing is in court or capable of being produced; but the rule can have no just application where the *identity* of the writing which is in court, with the writing whose contents it is sought to prove, is unsettled or in dispute.

§ 792. What Secondary Evidence may be Given. — The refusal of the party to produce the paper upon notice, does not dispense with the *best evidence* of the contents of the paper, which is attainable in the absence of the paper itself, nor does it allow its substance to be made out by anything less than *satisfactory evidence* of all that is essential.[2]

[1] Stitt *v.* Huidekopers, 17 Wall. (U. S.) 385, 397.

[2] Molton *v.* Mason, 21 Mich. 364.

§ **793. Answer to Notice not Evidence.** — Before the passage of modern statutes a court of law did not have *power to compel* the party to produce the paper. It was, therefore, not incumbent on him to produce it, or to give any reason why he would not. It was held to follow from this, that any answer which he might make to such a notice was irrelevant, and consequently inadmissible as evidence.[1]

§ **794. Presumption of Contents in Case of Failure to Produce.** —Where the party contumaciously fails to produce a document after notice, — or, having the power to decline producing it, elects to exercise this power, — everything touching the contents of the document and its execution will be presumed against him, which the case fairly admits of, under the operation of the maxim *contra spoliatorem omnia præsumuntur*.[2] This is a branch of the doctrine of presumptions which it is not intended to go into here .

§ **795. Evidence of Attempts to Destroy or Fabricate Evidence.** — Evidence of attempts, by the opposite party or by one authorized by him, to destroy, fabricate, or suppress evidence, may be shown, — such acts being in the nature of an admission that the party has no sufficient case unless aided by suppressing or fabricating evidence.[3]

§ **796. Secondary Evidence as to Incidental and Collateral Papers.** — Where a paper relates to an incidental and collateral matter, drawn out to test the temper and credibility of the witness, and in no wise affects the merits of the controversy between the parties, the witness may, without error, be asked to *state its substance*.[4] Thus, it was held allowable to ask a witness of the opponent, who had said that he had seen and copied a paper in reference to the expenses of the suit, subscribed by various per-

[1] Reid *v.* Colcork, 1 Nott & Mc. C. (S. C.) 604.

[2] See Benjamin *v.* Ellinger, 80 Ky. 472.

[3] Lyons *v.* Lawrence, 12 Bradw. (Ill.) 531; Chicago City R. Co. *v.* McMahon, 103 Ill. 485; *ante*, § 453.

[4] Klein *v.* Russell, 19 Wall. (U. S.) 433, 463.

sons, what were the contents of the paper, — the purpose of the question being to show that the witnesses of the opponent were in a combination to defeat the plaintiff and to share the expenses of the opponent. In such a case, it is not necessary to lay a foundation, by calling on the opponent to produce the paper.[1] On the other hand, it has been ruled that a party may object, though his witness does not, to a question propounded to the witness on cross-examination, as to whether the latter had made certain statements in an affidavit not produced, — the reasoning being that the affidavit was the best evidence.[2]

Subdivision 2. — Secondary Evidence of lost Instruments.

SECTION

799. Preliminary.
800. Secondary Evidence of Lost Instruments.
801. Voluntary Destruction.
802. Foundation to let in Secondary Evidence.
803. Special Count not Necessary.
804. Question Decided by the Judge.
805. Under what Rules of Evidence.
806. His Decision not Reveviewable.
807. Person last known to have been in Possession must be Examined.
808. Certainty of Evidence to Prove Contents.
809. Stringency of the Rule, when Relaxed.
810. Lost Depositions.

§ **799 Preliminary.** — It is not within the plan of this work to enter into a full investigation of the subject of lost documents, of the methods of supplying them, and of secondary evidence of their contents; but a slight digression will be made for the purpose of suggesting some outline views on the subject, referring the reader for fuller treatment to the standard works on evidence.

§ **800. Secondary Evidence of Lost Instruments.** — A party who intends to use a written instrument in evidence must produce the original, if in his possession; but if it is in the possession

[1] Klein *v.* Russell, *supra*.

[2] Newcomb *v.* Griswold, 24 N. Y. 298, 301 (Smith, J., dissenting).

of the other party, who refuses to produce it after notice, or if the original is lost or destroyed, — secondary evidence, the same being the best which the nature of the case allows, will be admitted. The party in such a case may read a *counterpart;* or if there is no counterpart, an *examined copy;* or if there is no such copy, he may give *parol evidence* of its contents. Where a writing has been voluntarily destroyed, for fraudulent purposes, or to create an excuse for its non-production, secondary evidence of its contents, by the party so destroying it, is not admissible. But where the destruction or loss, although voluntary, happens through mistake or accident, such evidence will be admitted.[1]

§ **801. Voluntary Destruction.** — From the preceding, it follows that, where the proof is that the party deliberately and voluntarily burned the instrument sued on, and there is nothing to account or afford any explanation of the act, consistent with an honest or justifiable purpose, he will not be allowed to introduce secondary evidence of its contents.[2]

§ **802. Foundation to let in Secondary Evidence.** — A party alleging the loss of a material paper must, in order to lay a foundation for introducing secondary evidence of its contents, show that he has, in good faith and to a reasonable degree, exhausted all the sources of information and means of discovery which the nature of the case would suggest, which are accessible to him. The person last known to have been in possession of the paper must be examined to prove the loss; if out of the State, his deposition must be procured, or some good excuse must be given for not procuring it.[3]

[1] Riggs *v.* Tayloe, 9 Wheat. (U. S.) 483; Jackson *v.* Frier, 16 Johns. (N. Y.) 192. That secondary evidence of the contents of written instruments is admissible, wherever it appears that the original is destroyed or lost by accident, without fault of the party, was also ruled in Renner *v.* Bank of Columbia, 9 Wheat. (U. S.) 581.

[2] Blade *v.* Noland, 12 Wend. (N. Y.) 173.

[3] Kearney *v.* New York, 92 N. Y. 617; Simpson *v.* Dall, 3 Wall. (U. S.) 460, 475. Wrongful detention in another State not sufficient to let in evidence of contents of a negotiable paper, under the New York Statute relating to lost instruments: Van Alstyne *v.* Commercial Bank, 4 Abb. App. Dec. (N. Y.) 449. *Contra*, evidence that the possessor of the note is out of the State lets in secondary evidence

§ **803. Special Count not Necessary.** — Contrary to the English practice, it seems to be the practice in this country, that a special count in the declaration or complaint is not necessary, in order to let in proof that the instrument sued on has been lost; since this would shut the door against secondary evidence in all cases where the instrument happens to become lost after the declaration is filed.[1]

§ **804. Question decided by the Judge.** — The evidence of the loss of a written instrument, adduced to lay the foundation for introduction of secondary evidence of its execution and contents, is addressed solely to the judge, who is to determine it exclusively, without the intervention of the jury.[2]

§ **805. Under what Rules of Evidence.** — Evidence adduced upon this question is not governed by the ordinary rules of evidence. Thus where, under the old law, a witness was incompetent by reason of *interest*, he was not incompetent to speak upon this preliminary question. For a like reason, a party was not incompetent.[3]

§ **806. His Decision not Reviewable.** — Whether a foundation has been laid, sufficient to let in secondary evidence of the contents of an instrument alleged to be lost, is a preliminary question of fact for the decision of the trial judge, the determination of which is not reviewable on error or appeal, unless the evidence of loss was so clear and conclusive that it was error of law to find against it.[4]

§ **807. Person last known to have been in Possession must be Examined.** — The person last known to have been in possession of the paper must be examined as a witness to prove its loss, even where he is out of the jurisdiction, — in which latter

of its contents: Bronson *v.* Tuthill, 1 Abb. App. Dec. (N. Y.) 206.

[1] Renner *v.* Bank of Columbia, 9 Wheat. (U. S.) 581, 597.

[2] Jackson *v.* Frier, 16 Johns. (N. Y.) 192.

[3] Jackson *v.* Frier, 16 Johns. (N. Y.) 192.

[4] Kearney *v.* New York, 92 N. Y. 617, 620; *ante*, §§ 318, 324.

case, his deposition must be procured if practicable, or some good excuse given for not procuring it.[1]

§ 808. **Certainty of Evidence to prove Contents.**—Parol evidence to prove the contents of a lost instrument should show that it was duly executed as required by law, and should substantially disclose its contents. The testimony of a witness who has simply heard it read, and who can give but a small portion of its contents, is insufficient.[2] In the case of a *lost note*, it is not necessary that its contents should be proved by a *notarial copy*. All that is required is that it should be proved by the *best evidence*, which the party has it in his power to produce, which must, at all events, be such as to leave no reasonable doubt as to the substantial parts of the paper.[3]

§ 809. **Stringency of the Rule, when Relaxed.** — The stringency of the rule requiring search for documents and proof of their loss, before letting in secondary evidence of their contents, is *proportioned to their character and value*. Slight proof of such loss is sufficient, where the documents, from their nature, would have only a transitory value, and where no reasons exist for preserving them. Accordingly, it has been held that a deposition will not be rejected because the witness speaks of papers not produced, if it appear that they were received a long time before the deposition was taken, and are such as would probably not be preserved for so long, or are not in the power of the witness or the party.[4] It has been so held concerning *family letters* received by the witness in a foreign country.[5]

[1] Kearney *v.* New York, 92 N. Y. 617, 621; Deaver *v.* Rice, 2 Ired. L. (N. C.) 280; Dickinson *v.* Breeden, 25 Ill. 186; Bunch *v.* Hurst, 3 Des. Eq. (S. C.) 273; Turner *v.* Yates, 16 How. (U. S.) 14; Parkins *v.* Cobbet, 1 Car. & P. 282.

[2] Edwards *v.* Noyes, 65 N. Y. 125.

[3] Renner *v.* Bank of Columbia, 9 Wheat. (U. S.) 581, 597.

[4] Tilghman *v.* Fisher, 9 Watts (Pa.), 441.

[5] Am. Life Ins. Co. *v.* Rosenagle, 77 Pa. St. 507, 513. The doctrine of this case qualifies the following doubtful text of Greenleaf: "If a witness, being examined in a foreign country upon interrogatories sent out with a commission for that purpose, should, in one of his answers, state the contents of a letter which is not produced, that part of the deposition will be suppressed, notwithstanding, he being out of the jurisdiction, there may be

§ 810. **Lost Depositions.** — Applying the rule stated in the last chapter, that objections must specifically state the ground of objection relied on, we find that it was held that, where an original deposition regularly taken, sealed up, transmitted, opened, and filed in the case, was lost, and a copy, taken under the direction of the clerk of the court and sworn to as a true copy, was offered in evidence in its place, an objection to the copy "on the ground that it was not the original," — was too indefinite to let in argument that the witness was alive, that the lost deposition could only be supplied by the same witness, and that secondary evidence was inadmissible to prove the contents of the first deposition.[1]

Article III. — Use of Books and Papers at the Trial.

Section

815. Party not bound to put in Evidence all Papers produced on his Notice.
816. But they may be put in Evidence by the Party Producing them.
817. [Continued.] Illustration.
818. Tender of Documentary Evidence, how made.
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823. [Continued.] Admission of Document Carries with it Proof of Signature and Indorsement.
824. [Continued.] Objection for want of Proof by Subscribing Witness.
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829. [Continued.] Where Document is Produced on Notice.

no means of compelling him to produce the letter." 1 Greenl. Ev., § 88. This statement of Greenleaf is based on the authority of an English *nisi prius* decision in which Tindal, C. J., said: "I think it would be a most inconvenient and a most dangerous rule to hold, that it should rest in the option of the party examined, whether he will produce the document or not. We have no power to compel the witness to give any evidence at all, but if he does give an answer, that answer must be taken in relation to the rules of our law on the subject of evidence." Steinkeller *v.* Newton, 9 Carr. & P. 313.

[1] Burton *v.* Driggs, 20 Wall. (U. S.) 125, 133.

SECTION
830. Right to Seal up Pages which are not Pertinent.
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840. Book Entries on Proof that they were Truly made.
841. Use of the Instrument which is the Foundation of the Action.
842. Duplicate Evidence of Indebtedness.
843. Objections to Documentary Evidence must be Specific.

§ 815. Party not Bound to put in Evidence all Papers Produced on his Notice. — A party is not bound to put in evidence all the papers produced in response to his notice, — especially where papers are produced not named therein. This is illustrated by a ruling in an action on a policy of insurance. The plaintiffs, in order to prove the death of the insured, and a compliance with the conditions of the policy as to proof of loss, called upon the defendant company to produce "all proofs of the death" of the insured. The defendant produced a package containing those proofs, which the plaintiff had furnished it, and also several other papers. It was held that the plaintiff was not bound to offer any evidence beyond the papers thus produced, but might select only those which he had furnished to the defendant, and that it was error to reject those which he offered because he did not offer all.[1]

§ 816. But they May be put in Evidence by the Party producing them. — It was ruled by Lord Kenyon that, where a notice has been given to produce books, if the party giving the

[1] Heaffer *v.* New Era Life Ins. Co., 101 Pa. St. 178.

notice calls for them and exhibits them, this fact does not make them evidence for the party whose books they are; but it is only a matter of observation to the jury, in behalf of such party, that the entries are in his favor;[1] but if the party calling for them thereafter declines to use them in evidence, they may be put in evidence by the party producing them, provided they are material and relevant to the issues,[2] and this, although they were called for under a misapprehension of their contents, provided there is no doubt as to their identity. "A party cannot," said Bigelow, J., "require his adversary to produce a document, and, after inspecting it, insist on excluding it from the case altogether. Such a course of proceeding would give one party an unfair advantage over the other. He would gain the privilege of looking into the private documents of the other party, without any corresponding obligation or risk on his own part. It is, therefore, generally deemed a just and wise rule that, in such cases, the paper called for and produced, after it has been seen and examined by the party calling for it, becomes competent evidence in the case for both parties.[3] It is manifest that this rule would be of little use, if the paper can be excluded on the allegation that the party calling for it mistook the nature of its contents. Generally, the party seeking for it acts on the supposition that it contains matter favorable to his side of the case. He, therefore, assumes the risk of making it evidence; and cannot be heard to say, after he has ascertained its contents by inspection, that he intended to call for a different paper, or, in other words, that its contents were not such as he expected. If there is no doubt as to the identity of the document, the party who produces it has the right to insist on its being read to the jury; and the court cannot, in the exercise of their discretion, deny him this privilege."[4]

§ 817. [CONTINUED.] ILLUSTRATION. — During the progress of a cause before a surrogate in New York, contesting a will, a subpœna

[1] Sayer *v.* Kitchen, 1 Esp. 210.

[2] Hoyt *v.* Jackson, 3 Dem. (N. Y.) 388.

[3] Citing 1 Greenl. Ev., § 563.

[4] Clark *v.* Fletcher, 1 Allen (Mass.), 53, 57.

duces tecum was issued at the request of the contestant, and was served on Mr. Conkling, former counsel of the contestant, requiring him to produce certain papers therein described. In obedience to the subpœna, Mr. Conkling attended in court, and requested to be sworn as a witness, and, on being sworn, produced to the surrogate the papers described in the subpœna, and, taking the court's direction, delivered them to the surrogate. Before resting his case, the contestant's counsel moved that the papers deposited with the court by Mr. Conkling, "be placed in the custody of counsel for contestant." The court said: "For the present, I deny your motion." Thereupon Mr. Evarts, of counsel for proponents, asked the court to put at their disposition, for use as evidence in the cause, the papers produced under the subpœna issued by the other side. This was resisted on the ground of privilege. The court ruled, substantially, that the privilege was the privilege of the party, and not the privilege of his attorney; that the privilege had not been waived by the act of Mr. Conkling in delivering the papers to the surrogate; that such of the papers, as had not been offered in evidence by the contestant, remained subject to his control; and directed the official stenographer to return to Mr. Conkling such of the papers, produced by him, as had not been offered in evidence.[1]

§ 818. **Tender of Documentary Evidence, how made.** — It has been ruled that, where documentary evidence is offered, each piece should be presented by itself to the presiding judge; exhibited, if desired, to the opposing counsel; identified by the court stenographer with suitable marks; and, if objected to, its genuineness established by the testimony. Where a *bundle of papers* was offered in evidence, described as "invoices of goods, notes and drafts paid," and an objection was raised to the reception of any *bundles*, it was held, on the most obvious grounds, that it was rightly sustained.[2] It is said to be ordinarily proper for a trial court to permit documents to be *offered* in evidence *provisionally*, and afterwards to *instruct* the jury as to their effect.[3]

§ 819. **Reading the Paper.** — Where a written instrument is offered in evidence, it is discretionary with the judge to read the

[1] Hoyt *v.* Jackson, 3 Dem. (N. Y.) 388.

[2] Virgie *v.* Stetson, 73 Me. 452, 461.

[3] Smith *v.* Shattuck, 12 Ore. 362.

paper himself, so as to keep its contents from the jury until it is admitted, or to direct counsel to read it.[1]

§ **820. Proof of Execution.** — Where the party offering a written instrument, makes out a *prima facie case of its execution*, the other party, it has been held, should not be allowed to introduce counter evidence, before the instrument is read to the jury.[2] But this ruling does not seem to be sound. The established rule seems to be that, when objection is made to the admissibility of a paper offered in evidence, upon a ground which calls for the testimony of witnesses, it is proper for the court, before permitting the paper to be read to the jury, to allow the objecting party to cross-examine the witness producing it, and to receive other evidence upon the question, in order to decide whether or not it is admissible.[3] Documents cannot be authenticated by the testi-

[1] Brill *v.* Flagler, 23 Wend. (N. Y.) 354.

[2] Verzan *v.* McGregor, 23 Cal. 339.

[3] Trussell *v.* Scarlet, 18 Fed. Rep. 214. In a note to this case, by Dr. Wharton, it is said that this view is in harmony with many rulings on the subject of admissibility. He said: "When the admissibility of either a witness or a document is in question, the party opposing the admissibility is entitled, as a preliminary test, to cross-examine on this specific issue the witnesses on whose testimony the admissibility depends. No document or witness, — such is the fundamental principle, — is self-proving. We must fall back, as a basis logically necessary in all cases, on parol proof; and this proof only is effective when exposed to the criticism of cross-examination. This is illustrated by the old practice of examination on *voir dire*. When a witness, in old times, as to whose competency there was any question, was called, he was sworn, not 'to tell the truth, the whole truth, and nothing but the truth.' but 'true answers to make to such questions as should be put to him.' These questions related solely to his competency: and the burden of this preliminary examination fell upon the party objecting to competency. In fact, the old practice was, that when there was an objection to competency, for the objecting counsel to ask for the administering of the *voir dire* oath, which was granted as a matter of course. The objecting counsel then proceeded to inquire as to the witness' interest in the case, or other ground of incompetency; the party sustaining the admissibility being then entitled to examine in reply. The same distinction is taken with regard to the proof of lost documents. A witness called to prove the contents of a lost document, after his examination, by the party calling him on the subject of the loss, and of his knowledge of the document, is open to cross-examination by the opposing counsel; and it is not until the witness has been thus fully probed, and his knowledge on

mony of witnesses as to their identity, unless the opposite party has had an opportunity to inspect them and to cross-examine the witnesses.[1]

§ 821. [Continued.] Illustrations. — While one of the plaintiff's witnesses was on the stand, the defendants, during cross-examination, undertook to prove by him the identity of certain documents, which counsel for plaintiff was not allowed to see, but which were afterwards read as having been proved. This was held erroneous. Campbell, J., said: "There is no case where a witness proving an instrument should not be subject to immediate cross-examination, which could never be effective without the view of the document itself, not only to guard against forgery or substitution, but also to inform parties what issues were likely to arise concerning genuineness, or any other fact which is material. Our rules in equity cases have done away with proof of instruments at the hearing, for the reason that there was always danger of surprise and imposition. But there was never any practice which deprived parties of the right to inspect and cross-examine in season." [2]

§ **822. [Continued.] When Proof of Execution Dispensed with.** — Where a *verbal contract refers to a written instrument*, not as a contract, but as containing some of the terms of the verbal contract, it is not necessary, in order to admit the writing in evidence, for the purpose of establishing the contract, to prove its execution; it is enough that it is identified.[3] So, one writing may be so acknowledged by another, that proof of the latter will carry with it the authentication of the former, rendering it unnecessary to do more than identify the former, in order to its admission in evidence.[4] The production of a paper under notice, by the opposite party, dispenses with the necessity of proof of the fact which makes it operative, where it appears that the party producing it claims any benefit under it.[5]

this specific issue drawn out, that the document is received in evidence." (Citing Fisher *v.* Samuda, 1 Camp. 190, 193; Clark *v.* Houghton, 12 Gray (Mass.), 38; Richardson *v.* Robbins, 124 Mass. 105; Coxe *v.* England, 65 Pa. St. 212; Rankin *v.* Crow, 19 Ill. 626).

[1] De Witt *v.* Prescott, 51 Mich. 298, 300.

[2] Dewitt *v.* Prescott, 51 Mich. 298, 300.

[3] Smith *v.* New York Central R. Co., 4 Abb. App. Dec. (N. Y.) 262.

[4] Clarke *v.* Mix, 15 Conn. 153.

[5] Pearce *v.* Hooper, 3 Taunt. 60, opinion by Lord Mansfield, C. J.

Thus, where a *deed* is produced by the opposite party on notice, it has been held unnecessary to prove its *delivery*.[1] Where the instrument is the *foundation of the action*, and its genuineness is *not denied on oath*, statutes exist in many jurisdictions, dispensing with proof of its execution.[2] The statutes relating to registration do not contemplate the recording of the duplicate *impression of seal*. It is, therefore, no objection to the admission in evidence of the *certified copy of a recorded deed*, that a *copy of the impression of the official seal* of the officer, who took the acknowledgment of the grantor, does not appear on it, if it be stated in the body of the certified act of acknowledgment, that it was certified under such official seal.[3]

§ 823. [Continued.] **Admission of Document carries with it Proof of Signature and Indorsement.** — So, where written instruments are received in evidence without objection, the signatures of all persons who are properly parties thereto, are considered as admitted.[4] This is nothing but a branch of the broader rule that, where an instrument of writing is received in evidence without objection, proof of its execution is waived.[5] Where an instrument is offered in evidence and not objected to, any indorsement upon it is considered as proved.[6]

§ 824 [Continued.] **Objection for Want of Proof by Subscribing Witnesses.** — This objection must be made when the paper is offered, or it will be deemed waived.[7] Where a party calls his adversary, or permits him to be called, to prove the instrument, this dispenses with proof by the subscribing witness.[8]

§ 825. [Continued.] **Authentication of Documents in a Deposition.** — Upon the taking of a deposition, documents which are merely produced and identified before the commissioner and

[1] Campbell *v.* Roberts, 66 Ga. 733.

[2] Leary *v.* Meyer, 78 Ind. 393; Strange *v.* Barrow, 65 Ga. 23; Templin *v.* Rothweiler, 56 Ia. 259.

[3] Griffin *v.* Sheffield, 38 Miss. 359.

[4] Maxwell *v.* Kennedy, 10 La. Ann. 798.

[5] Tyler *v.* Marcelin, 8 La. Ann. 312.

[6] Bell *v.* Keefe, 12 La. Ann. 340; Maxwell *v.* Kennedy, 10 La. Ann. 798.

[7] Rayburn *v.* Mason Lumber Co., 57 Mich. 273.

[8] *Ibid.*

returned by him as exhibits to his deposition, are not considered as having been proved. Such identification is not enough to admit them as evidence at the trial, but their genuineness must be established by witnesses who are subject to cross-examination.[1] The distinction between proving the authenticity of a document and merely identifying it, is one which should be constantly borne in mind. "If the *proof of authenticity* is to be by the deposing witness, there must be *opportunity of cross-examination* on the point, and the document be submitted to the cross-examining counsel, and annexed to the deposition, unless a case excusing this is shown, and a copy is supplied. If the paper is merely to be *identified*, submission to adverse counsel is not matter of right, and annexation to the deposition not essential."[2] If the witness is to be examined as to the genuineness of an instrument, the *original* of it must, of course, be exhibited to the witness and returned, attached to the interrogatories by the commissioner.[3] This is a very important rule, in order to prevent deception. Unless the paper be particularly described, *identified* by the commissioner *with marks*, and annexed to the deposition as returned by him, the deposition, so far as it relates to the paper, cannot be read in evidence.[4] A paper which is *pinned to a deposition*, not referred to in it, and which contains no evidence that it has been attached thereto by the officer taking the deposition, is not sufficiently identified as an exhibit to be admitted in evidence.[5] But a deposition ought not to be suppressed, on the ground that the witness referred to certain deeds which were not set out as exhibits, when it appears that the deeds are not under the control of the witness, are not the foundation of the action, and that there is no dispute as to their contents.[6] It has been held no objection to a deposition that the bill of items of the plaintiff's account annexed thereto, and sworn to by the depo-

[1] Kelley *v.* Weber, 9 Abb. N. C. (N. Y.) 62.

[2] Note by Mr. Austin Abbott in 9 Abb. N. C. (N. Y.) at page 65; citing Weeks on Dep. 358–361.

[3] Weidner *v.* Conner, 9 Pa. St. 78.

[4] Petrikin *v.* Collier, 7 Watts & S. (Pa.) 392; Dodge *v.* Israel, 4 Wash. C. C. (U. S.) 323. See Swisher *v.* Swisher, Wright (Oh.), 755.

[5] Susquehanna &c. R. Co. *v.* Quick, 61 Pa. St. 328, 339.

[6] Lyon *v.* Barrows, 13 Iowa, 428.

nent, is in the handwriting of the plaintiff's attorney; nor that such bill is described in the deposition as "marked A," when it is not so marked, — there being no other account annexed.[1] It seems that, where the instrument has been identified by the commissioner, by sufficient marks, it is not a fatal objection that it was not *physically attached* to the deposition, provided it was enclosed under seal, in the same package with the deposition, and thus returned by the commissioner.[2] Moreover, it has been said that, where papers alleged to have been exhibited to the witness at the giving of his deposition, are not sufficiently identified by the officer, they may be identified by parol evidence.[3]

§ 826. [Continued.] **Exhibits, where there are Different sets of Interrogatories.** — Where there are different sets of interrogatories, drawn for the purpose of taking the depositions of different witnesses, it is not, in the nature of things, possible that the same exhibit should accompany each. In such a case, it has been held sufficient that it be attached to one set of the interrogatories, and referred to by proper descriptions in the others; and it has been held that, if so referred to, and properly indentified by the witness, and certified by the commissioner, this will be sufficient.[4]

§ 827. **Right of Inspection.** — There is a confusion in the judicial holdings as to whether the opposite party has the right to inspect a document which is produced and proved, before it is formally offered in evidence. According to one view, a party has no right to the inspection of papers which are proved by a witness on the stand, unless they are offered in evidence, — although the act of producing the papers and proving them may be a species of forensic thimble-rigging, devised to prejudice the jury.[5] Under this view, the mere fact that the signature to a paper is verified by a witness in court, does not entitle the

[1] Marvin *v.* Raygan, 12 Cush. (Mass.) 132.

[2] Humphries *v.* Dawson, 38 Ala. 199.

[3] Dailey *v.* Green, 15 Pa. St. 118, 127.

[4] Moberly *v.* Leophart, 51 Ala. 587; *s. c.* on former appeal, where the same point was considered, 47 Ala. 257.

[5] Houser *v.* State, 93 Ind. 228.

opposite party to inspect the paper, or to cross-examine the witness upon it, until the paper has been put in evidence; although it is irregular for the counsel to ask a witness any question concerning the document which he does not intend to offer in evidence.[1] Nor are the English holdings quite uniform on this question. It was ruled by Mr. Chief Justice Erle at *nisi prius*, that the mere fact that counsel, in cross-examining a witness, puts a document into the witness' hand, and asks him whether it is in his handwriting, does not entitle the opposite counsel to see the document.[2] On the contrary, it was ruled by the Court of Common Pleas that when, on cross-examination of a witness for the plaintiff, the defendant's counsel puts a document into his hands, and proves out of his mouth that it is *in the plaintiff's handwriting*, the plaintiff's counsel has a right to see it at once, for the purpose of identifying it and re-examining the witness upon it;[3] and it was conceded by Mr. Chief Justice Erle, in the case first cited, that the opposite counsel has the right to inspect it before the cross-examining counsel proceeds to found any question upon it.[4] But, where a witness, on cross-examination, proves the handwriting of the opposite party to a paper, the counsel for the party has no right to see such paper, to enable him to found an examination upon it, as to whether it was really the writing of his client or not.[5] The rule, as laid down by Lord Denman, C. J., is that if the cross-examining counsel puts a paper into the witness' hand and questions him upon it, *and anything comes of those questions*, the counsel for the opposite party has the right to see the paper, and to re-examine the witness in respect of it; but if the cross-examination, founded on the paper, entirely fails, and nothing comes of it, the opposite counsel has no right to see the paper.[6] Where a witness uses a document for the purpose of *refreshing his memory*, it is the

[1] Styles *v.* Allen, 5 Allen (Mass.), 320.

[2] Cope *v.* Thames Dock Co., 2 Car. & K. 757.

[3] Peck *v.* Peck, 21 Law Times (N. s.) 670; *s. c.* 18 Week. Rep. 295.

[4] Cope *v.* Thames Dock Co., *supra*.

[5] Russell *v.* Rider, 6 Car. & P. 416.

[6] Reg. *v.* Duncombe, 8 Car. & P. 369.

right of the opposing counsel to inspect the document; but this right may be *limited to that portion* of the document which has been thus used by the witness. Thus, it was ruled by Vice-Chancellor Malins, that on the cross-examination of a witness, the cross-examining counsel is not entitled to inspect the whole of a diary used by the witness to assist his memory, but only such portions of it as refer to the subject-matter of the suit.[1]

§ 828. [CONTINUED.] ILLUSTRATION. — In a bastardy proceeding the prosecuting attorney handed to the relatrix, who was testifying as a witness, two letters, and asked her if she knew the handwriting. The defendant's counsel objected to the question, and demanded an inspection of the letters. The court overruled the objection, and refused the defendant an inspection of the letters at that time. The relatrix then testified that the letters were written by the defendant. The prosecuting attorney then, in answer to a question by the court, stated that he intended to offer the letters in evidence. They were then, by order of the court, delivered to the defendant for inspection. Nevertheless, the prosecuting attorney did not offer them in evidence. It was held that in this there was no error sufficient to reverse a judgment. The court, speaking through Hammond, J., said: "In the conduct of a trial, there are many trifling occurrences, bearing favorably or unfavorably upon the one or the other of the parties, which are difficult for the trial court, and beyond the power of this court to correct. Fortunately, however, for litigants, the ingenuity of counsel upon the one side, is usually counterbalanced by the tact of counsel on the other, so that the substantial rights of parties are generally preserved. It is only where there has been manifest injustice occasioned by a proceeding, in which the power of the trial court for correction has not been properly used, that this court may intervene by reversal."[2]

§ 829. [Continued.] Where Document is Produced on Notice. — A party who gives notice to produce a paper in evidence, must be supposed to know its contents. If he does not, he ought not to be permitted to speculate through the forms of law, and obtain from his adversary the inspection of any paper or document he may choose to demand. It has been reasoned that

[1] Burgess *v.* Bennett, 20 Week. Rep. 720; *ante*, § 402, subsec. 2.

[2] Houser *v.* State, 93 Ind. 228, 230.

notice to produce a paper requires it to be produced in evidence, and, when once called for and produced, it is in evidence, as it could not be called for on any other terms.[1] This is illustrated by a case where the defendants gave notice to the plaintiffs to produce a letter, on the trial, which, when it came on, they refused to do, unless the defendants would engage to read it in evidence. This they declined acceding to, without being first permitted to inspect it, and, on this being denied, the trial court ruled that the inspection could not be demanded, except on the terms which the plaintiff wished to impose. It was held that this ruling was correct.[2] Where a witness, in obedience to a subpœna *duces tecum*, attends in court, and, after being sworn, produces papers which he thereupon places in the custody of the court, — either party thereafter has the same right, which he had when the witness was present, to insist that the papers shall be placed at his disposal for use as evidence in the cause.[3]

§ **830. Right to Seal up Pages which are not Pertinent.** — It is said by Dr. Greenleaf: "Where books are to be produced, the defendant will have leave to seal up and conceal all such parts of them as, according to his affidavit, previously made and filed, do not relate to the matters in question." [4] It is the uniform practice of courts to permit a party producing his books to seal up those pages which do not relate to the subject of the litigation.[5] Upon a like principle, it has been held proper for the court to make an order placing the books which contain the accounts which are pertinent to the issue, in the possession of the clerk of the court, limiting the inspection to certain pages containing the pertinent accounts, and giving the defendant liberty to seal up the remaining parts; which order further recited that, it appearing that the journal entries were so intermingled with other matters as that inspection of them would expose such out-

[1] Lawrence *v.* Van Horne, 1 Caines (N. Y.), 276, 285.

[2] *Ibid.*

[3] Hoyt *v.* Jackson, 3 Dem. (N. Y.) 388.

[4] 3 Greenl. Ev., § 301.

[5] Dias *v.* Merle, 1 Paige (N. Y.), 494; Gerard *v.* Penswick, 1 Swanst. 533; Pynchon *v.* Day, 118 Ill. 9, 15.

side matters, the defendant might present in court a *verbatim* copy of all the journal entries relating to matters between the parties, giving the page where entered, such copy to be verified by affidavit and the certificate of the clerk of the court, upon an actual examination and comparison, provided the plaintiff should so require. It was held that this was proper.[1]

§ 831. Cross-examining as to Contents of Written Documents. — (1.) *Document must be produced.* — As a general rule, a witness cannot, upon cross-examination, even for the purpose of discrediting him, be asked as to the contents of a written paper which is neither produced, nor its absence accounted for.[2] Thus, a witness cannot be cross-examined as to what he swore to in an affidavit, unless the affidavit is produced.[3] It has been held that a witness cannot be asked on cross-examination, he not having been interrogated as to the point on direct examination, whether his name was not written in the book of a certain association.[4] But it has been held that a witness, on cross-examination, may admit not having mentioned a fact on a former examination, although that examination is in writing and not produced.[5] So it has been ruled that, in order to explain or contradict a statement made by a party as to an alteration in a will under which he claims, the probate of the will is not sufficient evidence, but the original document itself should be put in the hands of the witness.[6]

(2.) *Aliter where the Witness is a Party.* — But the foregoing rule does not apply where the witness on cross-examination is the opposite party to the action. Thus, a party may be cross-

[1] Pynchon *v.* Day, 118 Ill. 9.

[2] Macdonnell *v.* Evans, 11 C. B. 930; *s. c.* 21 L. J. C. P. 141; *s. c.* 16 Jur. 103. It has been ruled at *nisi prius*, that the defendant cannot, in the course of the plaintiff's evidence, cross-examine the plaintiff's witnesses as to the contents of written documents, although notice has been given to the plaintiff to produce them, and he refuses to produce them at that stage of the cause. Sideways *v.* Dyson, 2 Stark. 49; Graham *v.* Dyster, 2 Stark. 21.

[3] Sainthill *v.* Bound, 4 Esp. 74.

[4] Darby *v.* Ouseley, 1 Hurl. & N. 1; *s. c.* 2 Jur. (N. S.) 497; *s. c.* 25 L. J. Exch. 227.

[5] Ridley *v.* Gyde, 1 Mood. & Rob. 197.

[6] Brown *v.* Hughes, 1 Fost. & Fin. 299, per Channell, B.

examined as to the contents of an affidavit which is not put in,[1] or as to whether he has read a letter of a certain date, and in certain terms.[2] It was also ruled by the same learned judge[3] that the rules of a society to which the defendant belonged, proved by the cross-examination of one of the witnesses, are evidence against him.[4] So, it has been ruled that a party to an action, called as a witness in his own behalf, may be asked, on cross-examination, as to the contents of a letter which he has written, without producing the letter.

(3.) *When the Document itself Evidence.* — When a book is put into the hands of a witness to *refresh his recollection*, and questions are asked upon it on cross-examination, the book is not thereby made *evidence*, for the party producing it, though it may be such for the cross-examining party.[5] Where a document is put into the hands of a witness for the purpose of founding the cross-examination upon it, it does not thereby become evidence for the party whose witness it thus cross-examined.[6] A good illustration of this is found in a case where the defendant's counsel, on cross-examination of the plaintiff, read a letter from him, which, in effect, overthrew his case, and then submitted that there was no evidence for the jury; but the court held that, as this letter was the defendant's and not the plaintiff's evidence, it could not be looked to as a part of the plaintiff's case in determining this question.[7]

(4.) *Witness asked whether Representation in Writing or Parol.* — In view of the foregoing rules, and in view of the further rule that the contents of a writing which can be produced are not provable by parol, when a witness is asked on cross-examination whether he has made representations of a particular

[1] Sladden *v.* Sergeant, 1 Fost. & Fin. 322.

[2] Ireland *v.* Stiff, 1 Fost. & Fin. 340.

[3] Willes, J.

[4] Minns *v.* Smith, 1 Fost. & Fin. 318.

[5] Payne *v.* Ibbotson, 27 L. J. Exch. 341. See *ante*, § 402, subsec. 4.

[6] Collier *v.* Nokes, 2 Car. & Kir. 1012.

[7] Rawlings *v.* Chandler, 9 Exch. 687.

nature, if he answers in the affirmative, he should next be asked whether he made the representation by parol or in writing.[1]

§ 832. Cross-examining Witness as to the Contents of Letter claimed to have been written by him. — It is said by Prof. Greenleaf: "The counsel will not be permitted to represent, in the statement of a question, the contents of a letter, and to ask the witness whether he wrote a letter to any person with such contents, or contents to the like effect, without having first shown to the witness the letter, and having asked him whether he wrote that letter, and his admitting that he wrote it; for the contents of every written paper, according to the ordinary and well established rules of evidence, are to be proved by the paper itself, and that alone, if in existence. But it is not required that the whole paper be shown to the witness. Two or three lines only of a letter may be exhibited to him, and he may be asked whether he wrote the part exhibited. If he denies, or does not admit, that he wrote that part, he cannot be examined as to the contents of such letter, for the reason already given; nor is the opposite counsel entitled in that case to look at the paper. And if he admits the letter to be his writing, he cannot be asked whether statements, such as counsel may suggest, are contained in it; but the whole letter must be read as the only competent evidence of that fact."[2]

§ 833. [CONTINUED.] ILLUSTRATION OF A VIOLATION OF THIS RULE.— In a case in Iowa, in the course of the cross-examination of the plaintiff, her attention was called to certain letters said to have been written and signed by her. As to one of those letters she was asked: "Examine that writing and signature, and see if it is your writing or not." Thereupon her counsel requested "that the witness have the privilege of examining the contents of the letter, before being required to answer if it was her signature." This request was refused, and the plaintiff excepted. The witness answered that she would not be positive that the signatures to the letters were her signatures. She stated that she

[1] The Queen's Case, 2 Brod. & Bing. 284, 292.

[2] 1 Greenl. Ev. § 463; quoted with approval in Glenn *v.* Gleason, 61 Ia. 28, 34.

thought at one time that the signature to one of the letters was her signature. Thereupon counsel for defendant proceeded to read certain clauses of the letters, and asked the witness if she had written them. Questions like the following were put to her: "Did you, in the same letter, say to him: 'Do not let them draw anything out of you that will conflict with the statement I give you;' 'No one to love them, no one to caress them,' — Did you write that?" The counsel for the plaintiff protested against this mode of examining the witness, for the reason that the letters were the best evidence of their contents, and that the witness should not be compelled to give her recollection of what she had written when the letters which she had written were in court. The court overruled the objection and permitted the counsel to proceed, and the witness answered all the interrogatories to the effect that she did not remember. It was held that in so ruling the court erred. The course of examination was a plain violation of the rules above drawn from the text of Prof. Greenleaf. The course pursued tended to embarrass and confuse the witness and prejudice her in the minds of the jury, and the error was not cured by the fact that the letters were subsequently read in evidence.[1]

§ **834. Use of Document for one Purpose does not make it Evidence for all Purposes.** — The fact that a party uses a document, *e.g.*, an account book, for the purpose of fixing the date, does not make it competent evidence against him for all purposes.[2]

§ **835. Whole of a Correspondence.** — By analogy to a rule already stated in respect of conversations,[3] if a portion of a correspondence is given in evidence, the other party is entitled to call for the remaining portion of it.[4] The rule appears to be firmly settled, both as to a conversation or writing, that the introduction of a part renders admissible so much of the remainder, as tends to explain or qualify what has been received, and that is to be deemed a qualification which rebuts and destroys the inference to be derived from, or the use to be made of the por-

[1] Glenn *v.* Gleason, 61 Ia. 28, 33.

[2] Abbott *v.* Pearson, 130 Mass. 191; Compare Shaw *v.* Stone, 1 Cush. (Mass.) 228.

[3] *Ante*, § 412.

[4] Livermore *v.* St. John, 4 Rob (N. Y.) 12.

tion put in evidence.[1] A party may give in evidence against his adversary any letter of his, containing admissions material to the issue, without putting in the whole of the correspondence between them. If the letter, which he puts in evidence, shows that it is *in reply to another letter*, he may doubtless put that letter in evidence also, as tending to explain the former.[2] But he is not bound to do so; he may leave it to his adversary, on cross-examination or otherwise, to offer any competent evidence of the rest of the correspondence which he desires.[3] In considering this question it was said by Mr. Chief Justice Gray: "When a particular communication, which refers to a previous one, is not introduced as containing the terms of a contract, we see no more reason for obliging the party offering it to put in the previous communication also, when the communications are written, than when they are oral. In either case, whether the communications are by successive letters or by distinct conversations, the party introducing the second in evidence may, if he pleases, introduce the first also; and if he does not, the other party may. The actual custody of the papers does not affect the question which party shall introduce them, but only the steps to be taken to compel

[1] Grattan *v.* Metroplitan Life Ins. Co., 92 N. Y. 274, 284; Gildersleeve *v.* London, 73 N. Y. 609 (applying the rule in the construction of a pleading). Compare Rouse *v.* Whited, 25 N. Y. 170; The Queen's Case, 2 Brod. & Bing. 297, 298; Prince *v.* Samo, 7 Ad. & El. 627. In Rouse *v.* Whited, *supra*, the question, as it relates to conversations, is examined at length, and the conclusion is reached that, where one party puts a *part* of a conversation in evidence, this does not entitle the other party to demand the *whole conversation*, but only so much of it as is *relevant to the issues:* approving Prince *v.* Samo, *supra*, and denying on this point the Queen's Case, *supra*. See also Forrest *v.* Forrest, 6 Duer (N. Y.), 126, 127.

[2] Trichet *v.* Hamilton Ins. Co., 14 Gray (Mass.), 456.

[3] Stone *v.* Sanborn, 104 Mass. 319, 324; Barrymore *v.* Taylor, 1 Esp. 326; De Medina *v.* Owen, 3 Car. & K. 626. Contrary to the above, Pollock, C. B., ruled in Walson *v.* Moore, 1 Car. & K. 626, that the party offering the reply in evidence should put in both letters or neither; but this was supposed by Mr. Chief Justice Gray to be nothing more than an exercise of *discretion* as to the *order of proof*. Stone *v.* Sanborn, *supra*. In Crery *v.* Pollard, 14 Allen (Mass.), 284, the reply was held admissible, as evidence of notice to the party to whom it was addressed, without producing the letter to which it was a reply.

their production." [1] In another American jurisdiction an opposing view has been expressed, that the party seeking to avail himself of the letter of his adversary as evidence, is bound to call for and put in evidence the letter to which it is a reply, as a part of his own evidence, — the court saying: "However ingenious and plausible the reason assigned in the English authorities, it seems to us, the general principle adopted by the American authors on evidence, that the whole admission must be taken together, generally requires the prior letter to be produced or accounted for, before the answer can be properly admitted in evidence; though we do not decide it to be always the rule, and without exception; for the character of the letter and the case may make the production of the first unnecessary. The rule in chancery that a party against whom an answer is produced may claim to have the whole bill, as well as the answer, read as part of his adversary's case, upon the same ground that where one proves *answers* in conversation against a party, he may insist on having the *question* to which he made the replies, put in evidence, is, we think, a forcible illustration and correct application of the principle." [2]

§ 836. Assailing the Integrity of one's own Documentary Evidence. — After introducing a document in evidence, without any qualification, the party introducing it cannot be permitted to impeach its integrity, or assail the correctness of its statements.[3]

§ 837. Effect of putting in Evidence Affidavit of Opposing Party. — A party is not bound by all the statements contained in the affidavit of his opponent, although he himself puts it in evidence for a particular purpose; but he may contradict that portion of it which works against him. Such would be the rule if he were to put his opponent upon the stand; he would not be estopped by his testimony, but would be at liberty to show the facts to be contrary thereto.[4] But a party cannot get in his

[1] Stone *v.* Sanborn, 104 Mass. 319, 325.

[2] Simmons *v.* Haas, 56 Md. 153, 162; citing 1 Greenl. Ev., § 201, note 1.

[3] Maclin *v.* Insurance Co., 33 La. Ann. 801.

[4] Mather *v.* Parsons, 32 Hun (N. Y.), 339, 344. Compare Hunt *v.* Fish, 4 Barb. (N. Y.) 324; *ante*, § 515.

own affidavit, by putting in evidence the affidavit of his opponent, in which his own affidavit is referred to and contradicted.[1]

§ 838. **Telegraphic Dispatches.** — The telegraphic message which is *sent* and not the one which is *received* and transcribed at the other end of the line, is the original. The latter is a copy, and carries with it none of the qualities of primary evidence.[2] Where it is material to prove the sending and delivery of a telegraphic message, the usual course is to show the delivery of the original message at the office from which it was to be telegraphed, and then to show that it was transmitted and delivered at the place of its destination. But even where the original is produced, its authenticity must be established, either by proof of the handwriting, or by other evidence of its genuineness. It has been held that proof of the destruction of all the messages sent from the sending office, on the day on which the particular message was sent, is sufficient foundation to let in secondary evidence of its contents. But this secondary evidence can only be admitted, on proof that the copy offered is a correct transcript of the message actually authorized by the party sought to be affected by its contents.[3]

§ 839. **Dispatch received not Evidence of Dispatch sent.** — The fact that a telegraphic dispatch was *delivered* to a man on a certain day at a distant place, is not proved by producing what purports to be a telegraphic *reply* signed by him, received at the sending office, very soon after on the same day, and addressed to the sender of the former dispatch;[4] for, although men, in the ordinary affairs of life, constantly act upon such evidence, yet it was said that the only way to prove such a message in a court of law, is to summon both the intermediate agents or bearers of the message, — that is, the agent of the telegraph company receiving

[1] Degraft *v.* Hovey, 16 Abb Pr. (N. Y.) 120 In this case it is erroneously said that, after putting in his opponent's affidavit he *could not contradict it*, having made it his own testimony. See *ante*, § 515. As to the *conclusiveness* of an affidavit used in judicial proceedings, see Maybee *v.* Sniffen, 2 E. D. Smith (N. Y.), 1.

[2] Matteson *v.* Noyes, 25 Ill. 591.

[3] Smith *v.* Easton, 54 Md. 138, 145.

[4] Howley *v.* Whipple, 48 N. H. 487.

and transmitting the message, and the agent at the end of the transit, receiving and delivering it, — and by them proving its transmission and delivery. Anything short of this would be to rely upon hearsay evidence of the loosest character.[1]

§ 840. Book Entries on Proof that they were truly made. — Upon a principle very closely allied to that which permits the use by witnesses of memoranda to refresh their memories,[2] is a principle which admits the contents of books of accounts, upon proof that the books were truly kept and the entries truly made, although the witness so deposing cannot testify, by reason of the lapse of time, to the truth of the particular entries. Originally, it seems, such entries were only admissible after the *death* of the person whose books they were.[3] Other circumstances, such as *insanity* or *absence* beyond the jurisdiction, have been regarded as tantamount to death.[4] In such cases the books are admitted on proof of the handwriting of the party. But where the party is *alive*, produced as a witness, and is not able to recollect the fact recorded in the books, independently of the entry, after referring to it, the principle has been extended so as to admit the writing in evidence, upon preliminary proof of the single additional fact that it was truly made.[5]

§ 841. Use of the Instrument which is the Foundation of the Action. — While the defendant, in an action brought upon a written instrument, is entitled to crave oyer of it under the common-law practice, or to an inspection of it under statutes, he

[1] Howley *v.* Whipple, *supra.*

[2] *Ante*, § 398, *et seq.*

[3] Price *v.* Earl of Torrington, 1 Sm. L. Cas. (6 Am. ed.) 390; Doe *v.* Turford, 3 Barn. & Ad. 898; Pool *v.* Dicas, 1 Bing. N. C. 649; Welsh *v.* Barrett, 15 Mass. 380; Brewster *v.* Doane, 2 Hill (N. Y.), 537; Nicholas *v.* Webb, 8 Wheat. (U. S.) 326.

[4] Chicago &c. R. Co. *v.* Ingersoll, 65 Ill. 399.

[5] 1 Greenl. Ev., § 115, note 4, § 120, note 2; Merrill *v.* Ithaca &c. R. Co., 16 Wend. 587; Bank of Monroe *v.* Culver, 2 Hill (N. Y.), 532; Cole *v.* Jessup, 10 N. Y. 96; Bunker *v.* Shed, 8 Metc. (Mass.) 150; Farmers' &c. Bank *v.* Boraef, 1 Rawle (Pa.) 152; Smith *v.* Lane, 12 Serg. & R. 84; Redden *v.* Spruance, 4 Har. (Del.) 265, 269; Bullard *v.* Wilson, 5 Mart. (N. S.) (La.) 196; *s. c.* 3 Cond. 505; Spann *v.* Baltzell, 1 Fla. 302, 321; Underwood *v.* Parrott, 2 Tex. 168, 176; Humphreys *v.* Spear, 15 Ill. 275; Lawrence *v.* Stiles, 16 Bradw. (Ill.) 489.

cannot claim the right to have it delivered to him for the purpose of being annexed to a commission to take depositions, in order that it may be inspected by his witnesses, who reside out of the State. There is no precedent for thus placing the instrument which is the foundation of the action, and which belongs to the plaintiff, within the power of the defendant.[1] Witnesses may be examined on a commission as to an original paper, by annexing a copy to the interrogatories, for the purpose of reference, description and identification, and by producing the original on the examination of the witness for inspection and identification. It is not necessary that the original be annexed to the interrogatories. "A party is never called upon to risk the loss of valuable original papers, by annexing them to a commission to be transmitted to a distant State or country for execution."[2]

§ 842. **Duplicate Evidence of Indebtedness.** — It seems that, where the evidence of an indebtedness is in duplicate, so that an action can be supported upon either instrument, it is not necessary to sue upon both, but an action upon one will be a bar to an action upon the other; and hence that, in an action upon one, it will not be necessary to introduce the other in evidence.[3]

§ 843. **Objections to Documentary Evidence must be Specific.** — It is but a specification under the rule[4] already stated, to say that, when a document is offered in evidence and objected to, the objection must distinctly state the grounds on which the objector chooses to stand. The reason is that the opposite party may have opportunity of curing the defect, if there be one.[5]

[1] Butler *v.* Lee, 19 How. Pr. (N. Y.) 383; *s. c.* 32 Barb. (N. Y.) 75.

[2] Commercial Bank *v.* Union Bank, 11 N. Y. 203, 209.

[3] See Skinner *v.* Skinner, 77 Mo. 148, 155.

[4] *Ante*, § 693.

[5] Garner *v.* State, 5 Lea (Tenn.), 213, 218.

CHAPTER XXVII.

OF NATURAL EVIDENCE.

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ARTICLE II. — VIEW OF PLACES AND THINGS OUT OF COURT.

ARTICLE I. — INSPECTION OF PERSONS AND THINGS IN COURT: TRIAL BY INSPECTION.

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§ 850. In What Cases formerly Permitted. — *Trial by inspection* or examination was an ancient and well recognized mode of determining *collateral questions* which arose in legal proceed-

ings, and was frequently resorted to for the purpose of determining the *chief issue* in an action at law, in which last case the inspection was by the judge or judges, who thereupon proceeded to give their judgment without the intervention of a jury. This mode of trial seems to have been thus used where the question of *non-age* was in dispute, as in the case of a suit to reverse a fine for the non-age of the cognizor.[1] It was also resorted to to determine questions of *personal identity*, — as where it was pleaded in abatement that the plaintiff was dead and that the pretended plaintiff was simulating a deceased person;[2] in cases of *idiocy*, where the lord chancellor determined the question by an inspection of the person of the alleged idiot;[3] on an *appeal* of *mayhem*, where the issue joined was mayhem or no mayhem, in which case the decision was by the court on inspection;[4] in actions of *trespass for mayhem*,[5] or for an *atrocious battery*,[6] — in which cases the judges would, upon an inspection, *increase the damages* at their discretion, — a practice which has gone wholly out of use in modern times, though it is common for courts to require a *remittitur* of damages as a ground for refusing a *new trial*.

§ **851. In what Cases still Commonly Granted.** — In modern procedure, this mode of trial is regularly resorted to in the following cases: —

1. In criminal trials, where the defendant, a female, having been tried and found guilty, pleads her *pregnancy* in stay of execution.[7]

[1] 3 Bla. Com. 332; 9 Co. Rep. 31.

[2] 3 Bla. Com. 332; 9 Co. Rep. 30.

[3] 3 Bla. Com. 332; 9 Co. Rep. 31.

[4] 3 Bla. Com. 332; 2 Roll. Abr. 578. It should be added that appeals of mayhem were abolished by statute. 59 Geo. III., ch. 46.

[5] 3 Bla. Com. 332; 1 Sid. 108.

[6] 3 Bla. Com. 332; Hardr. 408.

[7] Reg. *v.* Bayntun, 17 How. St. Tr. 589, 631. Compare Reg. *v.* Hunt, 2 Cox C. C. 261. See 2 Hawk. P. C., ch. 51, § 10; Bish. Crim. Proc., § 1323; 1 Chit. Crim. L. 759, 761; 3 Inst. 17; 1 Hale P. C. 368; 2 Hale P. C. 407, 413. In recent times this has been regarded, it would seem, ground for an application to the home secretary, in England, for a respite of the sentence: Reg. *v.* Hunt, *supra*. The plea of pregnancy merely operates to *delay* sentence; it is not a ground for a new trial, since it does not touch the question of guilt or innocence: Holman

2. In cases in *chancery*, where an inspection became necessary in order to determine whether an heir presumptive or a devisee for life, in tail or in fee, should be admitted to the enjoyment of an estate.[1]

3. In proceedings for *divorce* or nullity of marriage, on the ground of impotency or sexual incapacity.[2]

4. In proceedings to lay out *roads* and to assess damages, where land is taken for public uses; in the former of which cases a jury of view is ordered under statutory regulations, and in the latter it is the common practice for the jurors or commissioners to view the *locus in quo*.[3]

5. In criminal or civil trials where, under statutory authority, and sometimes without it, the court may order a *view* by the jury, of the place where the alleged crime was committed, or the features of which are involved in the controversy.[4]

6. In actions for *personal injuries*, where it becomes necessary

v. State, 13 Ark. 105, 111. As to the meaning of the term "quick with child," which commonly arises in such cases, see Bish. Stat. Crim. § 45; Rex *v.* Phillips, 3 Camp. 73, 76; Com. *v.* Reid, 1 Pa. Leg. Gaz. Rep. 182; Reg. *v.* Wycherley, 8 Carr. & P. 262; State *v.*Cooper, 22 N. J. L. 52, 57; Rex *v.* Russell, 1 Mood. C. C. 356, 360; State *v.* Smith, 32 Me. 369; State *v.* Emerich, 13 Mo. App. 492.

[1] 1 Bla. Com. 456; Lord Belmore *v.* Anderson, 4 Bro. C. C. 90; Ex parte Aiscough, 2 P. Wms. 591.

[2] 2 Bish. Mar. & Div., § 590, *et seq.*; Devenbagh *v.* Devenbagh, 5 Paige, (N. Y.) 554, 557; Briggs *v.* Morgan, 3 Phillimore, 325; *s. c.* 1 Eng. Ecc. 408; 2 Hagg. Con. 324; Norton *v.* Seton, 3 Phillimore, 147; Shafto *v.* Shafto, 28 N. J. Eq. 34; Brown *v.* Brown, 1 Hagg. Ecc. 523; *s. c.* 3 Eng. Ecc. 229; Anon., Dean & S. 333; Aleson *v.* Aleson, 2 Lee, 576; Newell *v.* Newell, 9 Paige (N. Y.), 25; Anon., 35 Ala. 226; LeBarron *v.* LeBarron, 35 Vt. 365; Pollard *v.* Wybourne, 1 Hagg. Ecc. 725; Owen *v.* Owen, 4 Hagg. Ecc., 261; B. *v.* L., L. R. 1 Prob. & Div. 639; T. *v.* M., L. R. 1 Prob. & Div. 31; H. *v.* H., 3 Swab. & Tr. 517, 592; *s. c.* 33 L. J. (P. M. & A.) 159, and 34 L. J. (P. M. & A.) 12; Harrison *v.* Sparrow, 3 Curt. Ecc. 1.; *s. c.*, 7 Eng. Ecc. 357; *s. c.*, *sub nom.* Harrison *v.* Harrison, 4 Moore P. C. 96; S. *v.* E., 3 Swab. & Tr. 240; M. *v.* B., 3 Swab. & Tr. 550; H. *v.* C., 1 Swab. & Tr. 605; F. *v.* D., 4 Swab. & Tr. 86; T. *v.* D., L. R. 1 Prob. & Div. 127; U. *v.* J., L. R. 1 Prob. & Div. 460; L. *v.* H., 4 Swab. & Tr. 115, 118; W. *v.* H., 2 Swab. & Tr. 240; Deane *v.* Aveling, 1 Rob. Ecc. 279; Grimbaldeston *v.* Anderson, cited 3 Phillimore 155; *s. c.* 1 Eng. Ecc. 385.

[3] See the next article in this chapter.

[4] See the next article in this chapter.

to order an examination of the body of the person injured, for the purpose of showing the extent of his injuries.[1]

7. In cases of *disputed identity*,[2] and in other cases hereinafter explained.

8. In addition to this, it is the common practice in criminal trials to produce, for the inspection of the jury, the *weapon* with which the crime was committed,[3] any clothing or other articles containing *blood-stains*,[4] or, in general, any material object, capable of being produced in the court-room and exhibited to the jury, the physical characteristics of which speak in evidence, in connection with the oral evidence, concerning the alleged crime.[5]

§ 852. In Cases of Alleged Pregnancy. — Where it became necessary to have an inspection of the body in cases of alleged pregnancy, this inspection, according to the ancient and familiar practice, was made by a *jury of matrons*, under a writ denominated in the ancient law *de ventre inspiciendo*.[6] This mode of trying the fact has been condemned by modern medical authority,[7] on the most unanswerable grounds, supported by historical instances.[8] It is quite too plain for argument that, in many cases, a jury of old women might not be able to distinguish a case of pregnancy from a case of dropsy, and that their conclusions would bear no comparison for accuracy or probability with the conclusions of a commission of expert surgeons. Accordingly, we find that modern statutes have, in some instances, substituted for this inadequate and insufficient mode of trial, a trial by a jury, composed, in whole or in part, of medical men.[9]

[1] *Post*, § 858, *et seq.*

[2] *Post*, § 857.

[3] McDonel *v.* Stare, 90 Ind. 327.

[4] Com. *v.* Twitchell, 1 Brewst. (Pa.) 561, 563.

[5] See, for instance, Com. *v.* Brown, 121 Mass. 69; People *v.* Gonzales, 35 N. Y. 49; Gardner *v.* People, 6 Park. Cr. R. (N. Y.) 155; State *v.* Modecai, 68 N. C. 207; State *v.* Graham, 74 N. C. 646; *post*, § 870.

[6] 1 Beck Med. Jur., ch. 6; Cro. Eliz. 566; Ex parte Wallop, 3 Bro. C. C. 90; Ex parte Aiscough, 2 P. Wms. 591; Ex parte Bellett, 1 Cox Chan. Cas. 297; Marston *v.* Roe, 8 Ad. & El. 14.

[7] Beck Med. Jur. 203, 205, *et seq.*; Taylor's Med. Jur. 154, *et seq.*

[8] In Reg. *v.* Wycherley, 8 Carr. & P. 262, a jury of matrons had the good sense to ask for the assistance of a surgeon.

[9] 2 Rev. Stat. N. Y., ch. 658; 1 Rev. Stat. Mo. 1879, § 1851. The mode of procedure in the case of a writ *de ventre inspiciendo*, executed by a jury of ma-

§ 853. Inspection of the Body in Proceeding for Divorce or Nullity of Marriage. — Inspections of this kind are always indelicate and distressing to the feelings of the parties, and are, therefore, never ordered except when clearly necessary.[1] Nevertheless, it is settled that the courts are not at liberty to decline to order such an inspection on the ground of indelicacy alone. "Courts of law," said Sir William Scott, "are not invested with the power of selection. They must take the law as it is imposed on them. Courts of the highest jurisdiction must often go into cases of the most odious nature, where the proceeding is only for the punishment of the offender. Here the claim is for a remedy, and the court cannot refuse to entertain it on any fastidious notions of its own."[2] But an order for an inspection will never be granted unless the court is satisfied that the complaint is preferred in good faith.[3] A court will be more reluctant to order an inspection of the body of an *old person* than that of a young person; and, for equally obvious reasons, it will be more reluctant to grant an inspection of the body of a *wife* than that of a husband;[4] though an inspection of the wife is sometimes ordered where she herself is the complainant, since the impediment to the consummation of the marriage may exist in her, and since the fact of her virginity may be of itself evidence of his incapacity.[5] By the old law, an inspection would not be granted in a divorce proceeding until after a *triennial cohabitation;*[6] but this doctrine seems to have no place in modern divorce law.[7] It has been doubted, in England, whether a decree of nullity would be granted in any case without a physical

trons, is decribed at length in the modern case of Reg. *v.* Wycherley, 8 Carr. & P. 262, A. D. 1838. See also State *v.* Arden, 1 Bay (S. C.), 487; Reg. *v.* Baynton, 17 How. St. Tr. 598, 631.

[1] 2 Bishop Mar. and Div., § 590; Devenbagh *v.* Devenbagh, 5 Paige (N. Y.), 554, 557.

[2] Briggs *v.* Morgan, 3 Phillimore, 325, 328; *s. c.* 1 Eng. Ecc. 490; 2 Hagg. Con. 324.

[3] *Ibid.*

[4] *Ibid.;* Shafto *v.* Shafto, 28 N. J. Eq. 34; Brown *v.* Brown, 1 Hagg. Ecc. 523; *s. c.* 3 Eng. Ecc. 229; Anon., Dean & S. 333.

[5] 1 Coot. Ecc. Prac. 367; Pollard *v.* Wybourn, 1 Hagg. Ecc. 725; 2 Bishop Mar. and Div., § 596.

[6] Aleson *v.* Aleson, 2 Lee, 576.

[7] See 2 Bishop Mar. and Div., § 585, *et seq.*

examination of the defendant by scientific men; but the English courts appear to have settled upon the doctrine that such an inspection is not required in all cases; that the physical incapacity of the defendant may be proved by any attainable evidence; and that all that is required is that such incapacity be shown to exist, and that there is clearly no collusion between the parties.[1] In this country, the making of such an order has been regarded as *discretionary*, and hence not revisable on appeal.[2] While many decisions emphasize the uncertain results of such inspections, even where the person inspected is the wife and the object is to ascertain whether she is *virgo intacta et apta viro*,[3] and it has been held that a decree of nullity will never be granted upon the evidence furnished by such an inspection alone,[4] — yet it seems to have been the opinion at one time that a decree of nullity would never be pronounced without such an inspection.[5] But this conclusion seems to have been abandoned; [6] and the contrary would seem to be the better conclusion, as applicable to such procedure in this country, where the parties themselves are allowed to give evidence.

§ 854. Order for such Inspection, how Enforced. — If a party in such a proceeding refuses to undergo an inspection which the court has ordered, he or she may be proceeded against for

[1] Harrison *v.* Harrison, 4 Moore P. C. 96, 103.

[2] Anon., 35 Ala. 226. This was a rule of the English chancery practice, which has been adopted in some of our American divorce proceedings by analogy. The Alabama court cite, in support of this conclusion, the following: 2 Danl. Ch. Prac. 1136; Wood *v.* Mann, 2 Sumn. (U. S.) 316; Hammersley *v.* Brown, 2 Johns. Ch. (N. Y.) 428; Moody *v.* Payne, 3 Johns. Ch. 294; Cummings *v.* Gill, 6 Ala. 562; Evans *v.* Bolling, 5 Ala. 550; Bryant *v.* Peters, 3 Ala. 170; Wyatt *v.* Magee, 3 Ala. 94; Planters' &c. Bank *v.* Walker, 7 Ala. 926; McClane *v.* Riddle, 19 Ala. 180; Michan *v.* Wyatt, 21 Ala. 813; Lanier *v.* Driver, 24 Ala. 149.

[3] S. *v.* E., 3 Swab. & Tr. 240, 243; M. *v.* H., 3 Swab. & Tr. 517, 520; M. *v.* B., 3 Swab. & Tr. 550; H. *v.* C., 1 Swab. & Tr. 605; F. *v.* D., 4 Swab. & Tr. 86; T. *v.* D., L. R. 1 Prob. & Div. 127; U. *v.* J., L. R. 1 Prob. & Div. 460; L. *v.* H., 4 Swab. & Tr. 115, 118.

[4] Norton *v.* Seton, 3 Phill. Ecc. 147, 160; *s. c.* 1 Eng. Ecc. 384.

[5] H. *v.* C., 1 Swab. & Tr. 605.

[6] F. *v.* D., 4 Swab. &. Tr. 86, 92. This decision was afterwards reversed on appeal: 34 L. J. (P. & M.) 66.

contempt,[1] and the court may enforce the order by attaching the body of the contemning party.[2] In the case of the absence of the defendant, the English Court of Divorce has sometimes taken the course of suspending its decree of nullity, in order to give the petitioner an opportunity of having the defendant inspected, if he or she should afterwards be found within the jurisdiction.[3] In such a case, where the absent defendant was the wife, an order of the court directed that her alimony *pendente lite* should be withheld, in case she refused to appear and submit to an inspection;[4] and in another case it was suggested that the court might suppress the defendant's testimony in case of her refusal.[5] It is scarcely necessary to add that the complaining party will not be prevented from having a decree of divorce or nullity, through the misconduct of the defendant in placing himself or herself beyond the jurisdiction of the court so that an inspection cannot be had, provided it clearly appear that there is no collusion.[6]

§ 855. Mode of Inspection in Such Cases. — Where, as in some American jurisdictions, divorce cases have been committed to courts of chancery, a *reference* has been ordered to a *master*, directing him to conduct such an examination and report the result thereof.[7] An *ex parte* examination by the party's own physician will not satisfy the demands of justice, but the defendant will be required to submit to an inspection by one or more respectable gentlemen of the medical profession, to be named for that purpose by the complainant with the sanction of the court.[8] In another case a commissioner was appointed to take proofs, to select disinterested physicians, and through them to

[1] Harrison *v.* Sparrow, 3 Curt. Ecc. 1; *s. c.* 7 Eng. Ecc. 357; *s. c. sub nom.* Harrison *v.* Harrison, 4 Moore P. C. 96.

[2] B. *v.* L., L. R. 1 Prob. & Div. 639.

[3] T. *v.* N., L. R. 1 Prob. & Div. 31. See also H. *v.* H., 3 Swab. & Tr. 517 and 592; *s. c.* 33 L. J. (P. M. & A.) 159, and 34 L. J. (P. M. & A.) 12.

[4] Newell *v.* Newell, 9 Paige, 25.

[5] Anon., 35 Ala. 226, 228.

[6] Wybourn *v.* Wybourn, 1 Hagg. Ecc. 725, 729; *s. c.* 3 Eng. Ecc. 308.

[7] Devenbagh *v.* Devenbagh, 5 Paige (N. Y.), 554, 558.

[8] Newell *v.* Newell, 9 Paige, 25. See this case at length for the mode of conducting such an examination.

make such an examination.[1] In the English Ecclesiastical Court the examination was conducted by medical inspectors, generally two physicians and a surgeon, or two surgeons and a physician, nominated by the complainant, with the privilege conceded to the adverse party of naming one or more of them.[2] They, of course, take an *oath*, faithfully to perform the duty required of them.[3] They certify to the court the result of their examination.[4] Their certificate merely states the *result* of their inspection, in conformity with the oath which they have taken, but does not give the *reasons* for their conclusions.[5] In this regard it resembles a special verdict. In addition to requiring a written certificate, delivered under the obligation of the oath which they have taken, it is the constant practice of the English Ecclesiastical courts to examine them as *witnesses*, touching the result of their inspection.[6]

§ **856. Inspection of the Child in Filiation Cases.** — In the trial of an action involving the question of the legitimacy of a child, who was alleged to be of mixed African blood, it was held proper to allow the child to be exhibited to the jury; since "when the question is whether a certain object is *black* or *white*, the best evidence of color would be the exhibition of the object to the jury. The eyes of the members of the jury must be presumed to be as good as those of medical men. Why should a jury be confined to hearing what other men think they have seen,

[1] Le Barron *v.* Le Barron, 35 Vt. 365, 372.

[2] Coot. Ecc. Prac. 388. See also Dean *v.* Aveling, 1 Rob. Ecc. 279, where the proceedings appear in full. In more recent times the practice has been to appoint but *two* medical or surgical inspectors: S. *v.* E., 3 Swab. & Tr. 240; M. *v.* H., 3 Swab. & Tr. 517; M. *v.* B., 3 Swab. & Tr. 550; F. *v.* D., 4 Swab. & Tr. 86; L. *v.* H., 4 Swab. & Tr. 115.

[3] 2 Bishop Mar. & Div., § 598; Coot. Ecc. Prac. 389; Browne Div. Prac. (4th ed.) 622, 623. The form of the oath is given in 2 Bishop Mar. & Div., § 598.

[4] For forms of such certificates, see L. *v.* H., 4 Swab. & Tr. 115; W. *v.* H., 2 Swab. & Tr. 240; S. *v.* E., 3 Swab. & Tr. 240.

[5] Pollard *v.* Wybourn, 1 Hagg. Ecc. 725, 727.

[6] Deane *v.* Aveling, 1 Rob. Ecc. 279; W. *v.* H., 2 Swab. & Tr. 240, 242; S. *v.* E., 3 Swab. & Tr. 240; M. *v.* H., 3 Swab. & Tr. 517, 520; M. *v.* B., 3 Swab. & Tr. 550, 553.

and not be allowed to think for themselves?"[1] In a previous case in the same State, it was held no ground of new trial that the mother of the bastard child was put upon the stand having the child in her arms, and that the solicitor called the attention of the jury to the child's features, and afterwards commented upon its appearance in his address to the jury, — the defendant having taken no objection. The court said that it had long been the practice in that State, in bastardy cases, to exhibit the child to the jury.[2] In a similar case in another jurisdiction, it was held not error to allow a bastard child about *two years old* to be exhibited to the jury, for the purpose of enabling them to determine whether there was a *family resemblance* between the child and the defendant.[3] But in another case in the same court, it was held error to allow a child *three months* old to be thus exhibited.[4] The distinction drawn by the court between these two cases was that, where a child has reached a considerable maturity, family resemblances will appear; whereas all extremely young babies look substantially alike.[5]

§ **857. On a Question of Personal Identity.** — In an English revenue case a defendant, against whom an information had been filed for importing prohibited goods, was, on his own application, brought, on a particular day, by a *habeas corpus ad testificandum*, into court, in order that he might be present at the trial, so as to avail himself of the only point of defense which he made, which was that the person who had actually committed the offense had personated him.[6] The report does not disclose why this extraordinary step was necessary — why the defendant

[1] Warlick *v.* White, 76 N. C. 179. The court quoted the following passage from Horace: —

"Aut agitur res in scenis, aut acta refertur:

"Segnius irritant animos demissa per aurem,

"Quam quæ sunt oculis subjecta fidelibus, et quæ

"Ipse sibi tradit spectator. — *Hor. ad Pisones.*

[2] State *v.* Woodruff, 67 N. C. 89.

[3] State *v.* Smith (Ia.), 6 N. W. Rep. 153; *s. c.* 22 Alb. L. J. 43; *s. c.* 54 Ia. 104.

[4] State *v.* Danforth, 48 Ia. 43; *s. c.* 30 Am. Rep. 387.

[5] *Note by the printer:* The judge who made this ruling must have been an old bachelor.

[6] Attorney-General *v.* Fadden, 1 Price, 403.

would not necessarily be present at the trial without being so brought up; and why a form of the *habeas corpus* implying that he was brought up *as a witness*, should have issued, when the law rendered him incompetent to testify. The inference is that he was brought up for the purpose of inspection merely.

§ 858. Exhibiting Injured Parts of the Human Body to the Jury. — On the trial of actions for damages for a personal injury, where there is a question as to the character and extent of the injury, it is not error to allow the injured person to exhibit the injured portion of his body to the jury,[1] unless this would involve an indecent exposure of the person, which ought not to be permitted in a judicial proceeding.[2] The objection that such an exhibition has a tendency unduly to excite the sympathies of the jurors, is not tenable.

§ 859. Compulsory Physical Examination of Plaintiff in Actions for Personal Injuries. — In modern trials of civil actions for physical injuries, the question has frequently arisen whether the court has power to order an inspection of the body of the plaintiff or person injured, for the purpose of ascertaining the nature and extent of the injuries. Some of the courts, carrying in their minds no higher conception of a judicial trial than the conception that it is a combat, in which each of the gladiators is permitted, within certain limits, to deceive and trick the antagonist and the umpire, have denied the right of the defendant to have an order for such inspection.[3] Other courts, taking the more enlightened view that the object of a judicial

[1] Hiller *v.* Sharon Springs, 28 Hun (N. Y.), 344; Mulhado *v.* Brooklyn City R. Co., 30 N. Y. 370; Jordan *v.* Bowden, 46 N. Y. Super. 355; Barker *v.* Perry, 67 Ia. 146.

[2] *Post*, § 861.

[3] Stuart *v.* Haven, 17 Neb. 211, 214; Sioux City &c. R. Co. *v.* Finlayson, 16 Neb. 578, 588; Loyd *v.* R. Co., 53 Mo. 515 (overruled it seems by Shephard *v.* Mo. Pac. R. Co., 85 Mo. 629); Parker *v* Enslow, 102 Ill. 272, 279 (where the point is slurred over without discussion); Neuman *v.* Third Avenue R. Co., 50 N. Y. Super. 412; Roberts *v.* Ogdensburgh &c. R. Co., 29 Hun (N. Y.), 154. In Texas it is ruled that the court will not compel a plaintiff, suing for personal injuries, to submit his body to examination, unless it is essential to the ends of justice. International &c. R. Co. *v.* Underwood, 64 Tex. 464.

trial is to enable the State to establish and enforce justice between party and party, have held that it is within the power of the trial court, in the exercise of a sound *discretion*, in proper cases, upon an application seasonably made, under proper safeguards designed to preserve the rights of both parties, to order such an inspection, and to compel the plaintiff or injured person to submit to it.[1] Another court has held that where the plaintiff in such an action alleges that his injuries are of a permanent nature, the defendant is entitled, *as a matter of right*, to have the opinion of a surgeon, based upon a personal examination, unless there is already an abundance of expert evidence, in which case the court, in its discretion, may refuse to order an examination.[2] Another court has ruled that the trial court may require the plaintiff in such an action to submit to a medical examination and *dismiss his action*, if he refuses to comply with the order.[3] This conclusion may be placed upon the higher ground that, when a person appeals to the sovereign for justice, he impliedly consents to the doing of justice to the other party, and impliedly agrees in advance to make any disclosure which is necessary to be made in order that justice may be done. The conception of the nature and objects of a judicial trial which denies to the defendant, under proper safeguards, the right of such an inspection, is not higher than that of the old law, which would not even compel a party to produce a deed or private paper, in a civil case, where it was intended to be used in evidence against him,[4] a rule which the court of chancery invaded to prevent failures of justice, and which has almost entirely disappeared from modern civil jurisprudence.[5]

[1] White *v.* Milwaukee &c. R. Co., 61 Wis. 536; Walsh *v.* Sayre, 52 How. Pr. 334; Shephard *v.* Mo. P. R. Co., 85 Mo. 629; *s. c.* 55 Am. Rep. 390; Schoeder *v.* Railway Co., 47 Ia. 375; Miami &c. R. Co. *v.* Baily, 37 Oh. St. 104; Atchison &c. R. Co. *v.* Thul, 29 Kan. 466. See Hatfield *v.* St. Paul &c. R. Co., 18 Am. & Eng. R. R. Cas. 292, where the authorities are collected in a note by the learned editor.

[2] Sibley *v.* Smith, 46 Ark. 275; *s. c.* 55 Am. Rep. 584.

[3] Miami &c. Co. *v.* Baily, 37 Oh. St. 104.

[4] Haldane *v.* Harvey, 4 Burr. 2489; *ante*, § 730 *et seq.*

[5] The power to compel a physical examination of the plaintiff, in an action for personal injuries, has been likened to the power to compel the opposite party to produce books and

§ 860. Before Trial. — It has been held that the court has power, under the New York statute, relating to the examination of parties before trial to compel the plaintiff, in an action for damages for a physical injury, to submit to a physical examination by medical experts, where the defendant, in his application, makes the necessity of such examination appear,[1] otherwise not;[2] but in later cases in the same State this has been denied.[3]

§ 861. Such Examination, how Conducted. — It is needless to add that such an examination will not be ordered *in the presence of the jury*, where it would require an *indecent exposure* of the person;[4] and that, while the court for obvious reasons will not make an order for such an examination to be had *ex parte*, or by surgeons selected by one party alone, without an opportunity for surgeons selected by the other party to be present, — yet where the party has been examined *ex parte* without an order of the court, there is no rule of evidence which will exclude the testimony of the examining surgeons,[5] provided their testimony does not come within the rule which excludes confidential communications between patient and physician.

§ 862. Compelling Plaintiff to Perform Physical Acts before Jury. — From analogy to some of the preceding holdings, it has been concluded that the trial court has power, in a proper case and under proper circumstances, to direct the plaintiff to do a physical act in the presence of the jury, which will show the character of his injuries; and it has been supposed that there may be circumstances where the defendant would have a right to such an order. At the same time, it is said that, "from the very nature of things, the propriety of such an order must usually rest largely in the *discretion* of the trial court, and it would

papers. Walsh *v.* Sayre, 52 How. Pr. (N. Y.) 334.

[1] Shaw *v.* Van Rensselaer, 60 How. Pr. (N. Y.) 143.

[2] *Ibid.*

[3] Neuman *v.* Third Avenue R. Co., 50 N. Y. Super. 412; Roberts *v.* Ogdensburgh &c. R. Co., 29 Hun (N. Y.), 154; disapproving Walsh *v.* Sayre, 52 How. Pr. (N. Y.) 334; and Shaw *v.* Van Rensselaer, *supra*.

[4] Brown *v.* Swineford, 44 Wis. 282, 285.

[5] Louisville &c. R. Co. *v.* Falvey, 104 Ind. 409, 417.

only be in the case of a plain abuse of such discretion" that an appellate court would interfere.[1]

§ 863. Instance where such an Experiment was Properly Refused. — In an action against a railway company for damages it appeared that the plaintiff, while leaving the defendant's cars, fell or was thrown from the platform or steps of the car upon the ground, injuring the sciatic or great nerve of the thigh. The plaintiff, as a witness in her own behalf, testified that this had caused her great and constant pain, had caused the thigh to shrink, had rendered her lame, and had caused her to "limp" in walking. The counsel for the defendant thereupon requested the court to order her to walk across the court room in the presence of the jury, which the court declined to do. The reviewing court saw, under the circumstances, no abuse of discretion in refusing to comply with the request. "Such an act," said the court, "would have furnished the jury little or no aid in determining the extent or the character of her injuries. The only fact it could, by any possibility, have determined, was, whether or not she was lame, or 'limped,' as she testified, in walking. But there was already ample and uncontradicted evidence of this fact. Her own evidence on the point was fully corroborated by that of three or four other witnesses, her neighbors or members of her family, who had seen her almost daily since the accident." [2] It may be doubted whether this was a sound conclusion. The fact that there was considerable evidence, from the plaintiff herself and her neighbors, to prove that she limped, does not make it appear why the defendant was not entitled to an exhibition of her manner of walking before the jury, for the purpose, if possible, of showing the contrary, or at least of showing the extent to which she limped. It is true that the experiment might, if fraudulently performed by her, confirm her testimony and that of her witnesses on the point, but this would seem to be no reason for refusing the experiment on the application of the defendant.

§ 864. Experiments in Preparation for Trial or Hearing. — A suit was instituted to restrain proceedings at law, to recover for work and labor in constructing a sewer, on the ground of fraud on the part of the defendant in equity, in improperly obtaining possession of an

[1] Hatfield *v.* St. Paul &c. R. Co. (Minn.), 22 N. W. Rep. 176; *s. c.* 33 Minn. 130.

[2] Hatfield *v.* St. Paul &c. R. Co. (Minn.), 22 N. W. Rep. 176; *s. c.* 33 Minn. 130.

estimate in writing, and, by a chemical process, removing the figures indicating the price. The document in question having been deposited with the clerk of the records, in pursuance of an order of production, the plaintiff moved for liberty to subject it to *chemical tests*, for the purpose of the trial at law, upon an undertaking by the defendant to produce it to be stamped at the trial at law. The vice-chancellor, upon this undertaking being given, refused to make any order.[1] - - - - In an action against printers, for the infringement of a patent for making type by a certain combination of metals, an application, on the part of the plaintiff, not merely for an inspection of the type used by the defendants' type-founders, but also to be permitted to take specimens thereof for the purpose of analysis, was refused; it appearing that the defendants had purchased their type, and the only ground laid for the application being that, by the analysis it would appear that the composition was similar to that of the plaintiff's type, and amounted to an infringement of the patent. The question was decided under a statute,[2] and the judges seemed to be of opinion that circumstances might arise where the power to order such an inspection would exist.[3]

§ **865. Compelling Inspection of Chattels.** — It has been held that, where the plaintiff, in an action for personal injuries, has been injured by a machine, the court is without power to *compel* the defendant to allow the plaintiff's attorney to inspect it, in order to assist in the cross-examination of the plaintiff by his attorney, the defendant having obtained an order for the plaintiff's examination before the trial;[4] and that a justice of the peace has no power, upon the trial of an action for the *breach of a warranty* in the sale of a chattel, to compel a party to produce the chattel in court for inspection, by means of a subpœna *duces tecum*, or by any other means.[5] In an action for damages for wrongfully and knowingly keeping a *fierce and mischievous dog*, which bit and wounded the plaintiff, it was held that the dog might be *allowed* to be brought into court, and he was brought

[1] Twentyman *v.* Barnes, 2 De Gex & Sm. 225.

[2] The Patent Law Amendment Act, 1852, § 42; Stat. 15 & 16 Vict., chap. 83, § 22.

[3] The Patent Type-Foundry Company *v.* Lloyd, 29 L. J. (Exch.) 207. See also Holland *v.* Fox, 3 El. & Bl. 977, decided under the same statute.

[4] Cooke *v.* Lalance &c. Co., 29 Hun (N. Y.), 641.

[5] Hunter *v.* Allen, 35 Barb. (N. Y.) 42.

into court by his keeper led by a chain, and, at the request of some of the jurors, was released in their presence and examined by them; and they seemed to be of opinion that he was not of a vicious disposition, and gave a verdict for the defendant.[1] It has been ruled that if, in an action for trespass in seizing and detaining a dog, the defendant refuses to *produce the dog upon notice*, during the examination of the plaintiff's witnesses, he will not be allowed to produce it afterwards, for the purpose of invalidating the testimony of those witnesses as to the identity of the dog.[2] This is in conformity with a principle already explained, that a party who refuses to produce a document on notice, will not be allowed afterwards to produce it, for the purpose of rebutting secondary evidence which the party requiring its production has been compelled to give of its contents.[3]

§ 866. Physical Examination of the Defendant in Criminal Trials. — There is a difference of opinion upon the question whether the physical examination of the defendant in a criminal trial will not be ordered against his consent. One view is that this would violate a fundamental principle of Anglo-American jurisprudence,[4] embodied in our American constitutions, that a prisoner shall not be compelled to give evidence against himself.[5] Thus, it has been ruled that the forcible examination, under an order of the coroner, of a female prisoner, by physicians, for the purpose of obtaining evidence that she had been pregnant and had been delivered of a child within two or three weeks previous, was a violation of such a constitutional provision.[6] We find, however, that authority on this question, has not been uniform. Thus, on a criminal trial, the question of the identity of the defendant being in issue, one of the witnesses

[1] Line *v.* Taylor, 3 Fost. & Fin. 731; trial before Erle, C. J., who said that he remembered a case in which Lord Campbell had permitted a similar inspection.

[2] Lewis *v.* Hartley, 7 Car. & P. 405.

[3] *Ante*, § 789.

[4] Reg. *v.* Worsenham, 1 Ld. Raym. 705; Reg. *v.* Mead, 2 Ld. Raym. 927; Rex *v.* Shelley, 3 T. R. 142. Compare Haldane *v.* Harvey, 4 Burr. 2489.

[5] People *v.* McCoy, 45 How. Pr. (N. Y.) 216; State *v.* Jacobs, 5 Jones L. (N. C.) 260; *ante*, § 292.

[6] People *v.* McCoy, 45 How. Pr. (N. Y.) 216.

testified that he knew the defendant, and knew that he had *tattoo marks* (a female head and bust) on his right fore-arm. The court, thereupon, compelled the defendant, against his objection, to exhibit his arm, in such a manner as to show the marks to the jury. It was held that this action of the court was not a violation of the provision of the constitution of the State that no person shall be compelled, "in any criminal case, to be a witness against himself,"—and further, that the action was not erroneous or prejudicial to the defendant in a legal sense. The court construed the constitutional provision as meaning that no person shall be compelled to *testify as a witness* against himself. "To use a common phrase," said Hawley, J., "it closes the mouth of the prisoner. A defendant in a criminal case cannot be compelled to give evidence, under oath or affirmation, or make any statement, for the purpose of proving or disproving any question at issue before any tribunal, court, judge or magistrate. This is the shield under which he is protected by the strong arm of the law, and this protection was given, not for the purpose of evading the truth, but for the reason that, in the sound judgment of the men who framed the constitution, it was thought that, owing to the weakness of human nature, and the various motives that actuate mankind, a defendant accused of crime might be tempted to give testimony against himself that was not true."[1] So, evidence of the condition of the prisoner's hand, if material, may be rehearsed to the jury, although the evidence was obtained by compelling her, against her will, to unwrap and *exhibit her hand* at the coroner's inquest.[2] But with singular absurdity, it was held, on trial of an indictment against the defendant, as a free negro, for carrying weapons, that it was erroneous to allow the State to offer the defendant to the inspection of the jury, in order that they might see that he was a mulatto within the prohibited degree. He was, it seems, to sit during the trial, some where in the court room, where *the jury could not see him*.[3]

[1] State *v.* Ah Chuey, 14 Nev. 79, 83.

[2] State *v.* Garrett, 71 N. C. 95.

[3] State *v.* Jacobs, 5 Jones L. (N. C.) 259. Upon obvious grounds, and in conformity with the maxim *nemo se ipsum accusare tenetur*, the defendant

§ 867. Compulsory Experiments by the Prisoner disclosing Guilt.— In another case a prisoner, indicted for the larceny of growing corn, was compelled by the officer in charge, to *put his shoe in a track* found in the field, for the purpose of comparison, and the result of this comparison was detailed by the officer, as a witness on the trial. It was held that in this there was no error.[1] But on a trial in Georgia, it has been held that a witness should not be permitted to testify that he forced the defendant to put his foot into a shoe track near the scene of the burglary, and that the shoe fitted the track, — it being a violation of the constitutional guarantee that "no person shall be compelled to give testimony tending in any manner to criminate himself."[2] So, where, in a case of murder the prosecution proved that *foot-prints* were found on the premises where the assassination had been perpetrated, and also that the examining magistrate had compelled the accused to *make his foot-prints in an ash-heap*, and that the foot-prints so made corresponded with those found on the premises where the homicide was committed, — it was held that the evidence was admissible, and that it was no invasion of the constitutional guaranty that "one accused of crime shall not be compelled to give evidence against himself."[3] But where a *pan of soft mud* was brought into the court room on the trial, and the prisoner was asked, in the presence of the jury, to put his foot into it, which he declined to do, the conviction was reversed, because the court was satisfied that the jury were improperly influenced by this attempt to compel the prisoner to give evidence against himself.[4]

§ **868. Obscene Photographs.**— On the trial of an indictment for selling an indecent and obscene photograph, it has been held that the photograph itself is a proper instrument of evidence for inspection by the jury. The court say: "As the statute has given this general definition of the character of the acts constituting the offense, it must necessarily have been designed that the drawing, picture, photograph or writing should be exhibited

in a criminal action cannot be compelled to produce or surrender a writing, or other instrument of evidence, to be used against him. McGinnis *v.* State, 24 Ind. 500. It is upon this ground that the courts have held, as already seen, that on an indictment for the larceny of an instrument of writing, parol evidence of its character may be given,—the defendant not being expected to deliver it in conformity with a notice. *Ibid.; ante*, § 773.

[1] State *v.* Graham, 74 N. C. 646.

[2] Day *v.* State, 63 Ga. 667.

[3] Walker *v.* State, 7 Tex. App. 246, 265.

[4] Stokes *v.* State, 5 Baxt. (Tenn.) 619; *s. c.* 2 Tex. Law Journ. 243.

to and observed by the jury, for them to determine, as a matter of fact, in the exercise of their good sense and judgment, whether or not they were obscene and indecent." [1]

§ 869. **Photographic and Stereoscopic Views.** — Next to the inspection of the object itself, a photograph becomes its most accurate and convenient representation; and where an inspection of the object is proper, but impracticable, a photograph of it may be exhibited to the witnesses as an aid in identification,[2] and may be admitted in evidence,[3] and, in the discretion of the court, examined by the jury through a *stereoscope*,[4] or other magnifying glass,[5] and taken by them to their room.[6] Accordingly, in an action for damages for an injury to real property, a photograph of the premises taken at the time, is admissible, for the purpose of showing the nature and extent of the injury.[7]

§ 870. **Plans and Diagrams.** — Plans and diagrams of premises, which are the scenes of transactions under investigation, may be referred to by witnesses and exhibited to a jury, for the purpose of explaining their testimony and rendering it more intelligible. "They are often formally admitted in evidence, and

[1] People *v.* Muller, 32 Hun (N. Y.), 209. This was considered the proper course to be pursued in Reg. *v.* Hicklin, L. R. 3 Q. B. 360.

[2] Ruloff *v.* People, 45 N. Y. 213; *s. c.*, more fully reported, 11 Abb. Pr. (N. S.) (N. Y.) 245.

[3] *Ibid.*; Locke *v.* Railway Co., 46 Ia. 109 (photographs of a railway wreck); Reddin *v.* Gates (ferrotype of the plaintiff's back, taken after a battery, showing his injuries); Blair *v.* Pelham, 118 Mass. 420 (photographs of place of injury on defective highway); German Theological School *v.* Dubuque, 64 Ia. 736 (stereoscopic view of premises injured by water); Udderzook *v.* Com., 76 Pa. St. 340 (photographs of the deceased, on a trial for murder); Marcy *v.* Barnes, 16 Gray (Mass.), 161 (magnified photographic copies of a signature). The correctness of the photograph must be verified by the testimony of a witness, or it is inadmissible. Hollenbeck *v.* Rowley, 8 Allen (Mass.), 473. And whether it is sufficiently verified is a preliminary question of fact, to be decided by the trial judge, whose decision thereon is not subject to exception. Blair *v.* Pelham, 118 Mass. 420; *ante*, chap. XIII. Objection that the photograph exhibits only a *partial view* of the premises untenable. Locke *v.* Railway Co., 46 Ia. 109, 112.

[4] Rockford *v.* Russell, 9 Bradw. (Ill.) 229.

[5] Barker *v.* Perry, 67 Iowa, 146.

[6] *Ibid.*

[7] Cozzens *v.* Higgins, 1 Abb. App. Dec. (N. Y.) 451.

are proper for the consideration of the jury, so far as they are shown to be correct, not as independent testimony, but in connection with other evidence to enable the jury to understand and apply such evidence." [1] In testifying as to a disputed boundary line, a surveyor may use a diagram to illustrate his evidence or make it intelligible to the jury, although the diagram was not made by himself, and is not shown to contain a perfectly accurate description of the lines. Peters, C. J., in giving the opinion of the court, said: "A witness may as well speak by a diagram or linear description, when the thing may be so described, as by words. It is a common and usual method of pointing out localities and lines. Even savages resort to it, in lieu of words, in describing the course of rivers, and the line of the seashores. It is enough if it serves the purpose of the witness in the explanation of the lines and localities he is seeking to exhibit." [2]

§ 871. Indicia of Crime — Blood-Stained Clothing, Burglar's Tools, etc. — As already stated, it is common, on criminal trials, to submit to the inspection of the jury burglar's tools and other *indicia* of crime, found in the possession of the prisoner, in connection with evidence tending to show that they were used in the commission of the crime.[3] It has been held not improper, in a case of murder, to allow the State to exhibit to the jury the *bones* of the vertebral column of the deceased, where it serves to show to the jury the attitudes and relative positions of the parties when the fatal shot was fired. The court said: "It was not an unnecessary parade of the bones of the dead man to excite prejudice against his slayer, but was legitimate and proper evidence; and a party cannot, upon the ground that it may harrow up feelings of indignation against him in the breasts of the jury, have competent evidence excluded from consideration." [4] So, on such a trial the *skull* of the deceased may be produced in court and exhibited to an expert surgeon, who may testify whether the fractures therein could have been caused by blows from a gun,

[1] State *v.* Lawlor, 28 Minn. 216, 218, and cases cited: *ante*, § 844.

[2] Shook *v.* Pate, 50 Ala. 91, 92.

[3] People *v.* Larned, 7 N. Y. 445.

[4] State *v.* Wieners, 66 Mo. 14, 29; affirming *s. c.* 4 Mo. App. 492.

as testified to by other witnesses.[1] So, the prosecuting attorney may exhibit to the jury the articles of *clothing* found upon the body of the deceased, as well as articles of personal property found near the body.[2] So, on the trial of an indictment for homicide, the exhibition to the jury of *blood-stained clothing*, worn by the deceased at the time of his arrest, shortly after the commission of the crime, has the sanction of immemorial usage.[3] "In short," in the language of Starkie, "upon the trial of a charge of homicide or burglary, all circumstances connected with the state of the body found, or house pillaged, the tracing by stains, marks or impressions, the finding of instruments of violence or property, either on the spot or elsewhere,—in short, all visible *vestigia* are part of the transaction, are admitted in evidence for the purpose of connecting the prisoner with the act. Such facts and circumstances have not improperly been termed *inanimate witnesses*." [4]

§ 872. When Court will not assume Labor of examining Natural Evidence. — Where a party tenders material things in evidence, there is authority to the effect that the court is not obliged to assume the labor of examining them, without the assistance of witnesses. Thus, the defendant agreed to buy from the plaintiff a *book* which should correspond with a prospectus which was exhibited to him. In an action for the price, the plaintiff introduced the book in evidence, but put in no other evidence tending to show that it complied with the prospectus. It was held that the plaintiff had not proved his case; that he

[1] Gardiner *v.* People, 6 Park. Cr. (N. Y.) 157.

[2] *Ibid.*

[3] People *v.* Fernandez, 35 N. Y. 49, 64.

[4] 1 Stark. Ev. (9 Am. ed.) 66, quoted with approval in People *v.* Fernandez, 35 N. Y. 49, 64. The provisions of the constitution of Georgia that "no person shall be compelled to give testimony tending in any manner to criminate himself" (Ga. Code, § 4998) does not extend so far as to prevent the *clothing* or *other articles*, taken from the person of the accused, from being given in evidence or exhibited to the jury, where the same tend to show his guilt. It means that, when a person is *sworn as a witness*, he shall not be compelled to testify to facts that may tend to criminate him. Drake *v.* State, 75 Ga. 413, 415.

could not impose upon the court the obligation of examining the book to see whether it corresponded to the prospectus.[1]

Article II. — View of Things out of Court.

Section

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SECTION
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§ 875. In Real and Mixed Actions under the Common-Law Practice. — "In most real and mixed actions, in order to ascertain the identity of land claimed with that in the tenant's possession, the tenant is allowed, after the demandant has counted, *to demand a view* of the land in question, or, if the subject of claim be rent, or the like, a view of the land out of which it issues." [1]

§ 876. UNDER THE STATUTE OF ANNE. — A statute passed in the reign of Anne, "for the amendment of the law, and the better advancement of justice," extended the view seemingly to all civil actions, by enacting "that from and after the first day of Trinity Term, in any actions brought in any of Her Majesty's courts of record at Westminster, where it shall appear to the court in which such actions are depending, that it will be proper and necessary that the jurors who are to try the issues in any such action, should have the view of the messuages, lands, or place in question, in order to their better understanding the evidence that will be given upon the trials of such issues, — in every such case, the respective courts, in which such actions shall be depending, may order special writs of *distringas*, or *habeas corpora* to issue, by which the sheriff, or such other officer to whom the said writs shall be directed, shall be commanded to have six out of the twelve of the jurors named in such writs, or some greater number of them, at the place in question, some convenient time before the trial, who, then and there, shall have

[1] Bouv. Law Dict. tit. *View;* citing Vin. Abr., View; Com. Dig., *View;* Booth, 37; 2 Saund. 45 *b.;* 1 Reeve Hist. Eng. Law, 435. In Vin. Abr., tit. *View*, the old practice is set out at very considerable length; from which it appears that a view could be had only in real and mixed actions. It was much questioned whether it was demandable in the action of *dower unde nihil habet*. According to Viner's Abridgement, it was not demandable in such actions. Vin. Abr., *View*, A. 2. There is a well condensed and well written article on this subject, in the *Central Law Journal* for May 4, 1888, by J. C. Thomson, Esq., of St. Paul, to which the writer is indebted for citations to many authorities here examined.

the matters in question shown to them by two persons in the said writs named, to be appointed by the court; and the said sheriff, or other officer who is to execute the said writs, shall, by a special return upon the same, certify that the view hath been had according to the command of the said writs." [1]

§ 877. Under the Statute of Geo. II. — In the reign of George II. a law was passed "for the better regulation of juries," which contains the following proviso: "Provided always that, where a view shall be allowed in any cause, that in such case six of the jurors named in said panel, or more, who shall be mutually consented to by the parties or their agents on both sides, or, if they cannot agree, shall be named by the proper officers of the respective courts of King's Bench, Common Pleas, Exchequer at Westminster, or Grand Session in Wales, and the said Counties Palatine, for the causes in their respective courts, or, if need be, by a judge of the respective courts where the cause is depending, or by the judge or judges before whom the cause shall be brought on to trial respectively, — shall have the view, and shall be first sworn, or such of them as appear, upon the jury to try the said cause, before any drawing as aforesaid, and so many only shall be drawn to be added to the viewers who appear, as shall, after all defaulters and challenges allowed, make up the number of twelve to be sworn for the trial of such cause." [2]

§ 878. Under the Statute of Geo. IV. — In the time of George IV. these statutes were re-enacted in a modified form, in the "act for consolidating and amending the laws relating to jurors and juries," wherein it was provided "that, where in any case, either civil or criminal, or on any penal statute, depending in any of the said courts of record at Westminster, or in the Counties Palatine, or Great Sessions in Wales, it shall appear to any of the respective courts, or to any judge thereof in vacation, that it will be proper and necessary that some of the jurors who are to try the issues in such case, should have the view of the place in question, in order to their better understanding the evidence that may be given upon the trial of such issues, in every such case such court, or any judge thereof in vacation, may order a rule to be drawn up containing the usual terms, and also requiring, if such court or judge shall so think fit, the party applying for the view to deposit in the hands of the under-sheriff a sum of money to be named in the rule, for pay-

[1] Stat. 4 Anne, chap. 16, § 8. [2] Stat. 3 Geo. II, chap. 25, § 14.

ment of the expenses of the view, and commanding special writs of *venire facias*, *distringas* and *habeas corpora*, to issue, by which the sheriff or other minister to whom the said writ shall be directed, shall be commanded to have six or more of the jurors named in such writs, or in the panels thereto annexed (who shall be mutually consented to by the parties, or, if they cannot agree, shall be nominated by the sheriff or such other minister as aforesaid), at the place in question, some convenient time before the trial, who then and there shall have the place in question shown to them by two persons in the said writs named to be appointed by the court or judge; and the said sheriff or other minister, who is to execute any such writ, shall, by a special return upon the same, certify that the view hath been had according to the command of the same, and shall specify the names of the viewers."[1]

§ 879. In what Cases granted under these Statutes. — Notwithstanding the unrestrained terms of these statutes, the courts would not, as a rule, order a view, except in actions of a *local nature* such as *trespass quare clausum fregit*, *nuisance*, and the like. They would not grant it in an action of *assumpsit* for work done by a carpenter or bricklayer upon a house;[2] for the judge had no power to make an order for the plaintiff, or his witnesses, to enter the defendant's premises, in order to inspect the work done.[3] Prior to the last statute above quoted, they would not grant it in a *criminal prosecution*, without consent, and this was the practice before the statute of Anne.[4]

§ 880. Old Practice in Conducting a View. — "Before we make a rule for a view," said Ld. Holt, C. J., "the *venire facias* must be returned, and then we make a rule that so many of the panel shall view the premises."[5] A view was never granted without *affidavit*, except in actions of *waste*;[6] nor without hearing both parties and examining into the propriety of it, unless the opposite party consented.[7]

§ 881. The subject Regulated by Statute in America. — In this country the subject is generally one of statutory regulation.

[1] Stat. 6 Geo. IV., chap. 50, § 23.

[2] Stones *v.* Menhem, 2 Exch. 382. So held in Richmond *v.* Atkinson, 58 Mich. 413; *post*, § 883.

[3] Turquand *v.* Guardians, 8 Dowl. P. C. 201.

[4] Rex *v.* Redman, 1 Keny. 384.

[5] Anon., 2 Salk. 665. See also another case called Anon., on same page, also 1 Reeve Hist. Eng. Law, 435.

[6] Com. Dig. *View*, A.

[7] *Ibid.*

It has been held not competent for the court to order a view, against the objection of a party, except in cases where a view is authorized by statute, the court proceeding upon the conception that it is more in consonance with the theory and method of judicial trials, that the jury should base their findings solely upon sworn testimony taken in open court, or upon depositions taken as provided by law. [1]

§ **882. Provisions of American Statutes.** — The provisions of some of these statutes will next be considered.

(1.) California — [Civil Procedure]. — "When, in the opinion of the court, it is proper for the jury to have a view of the property which is the subject of litigation, or of the place in which any material fact occurred, it may order them to be conducted, in a body, under the charge of an officer, to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury are thus absent, no person other than the person so appointed, shall speak to them on any subject connected with the trial." [2]

(2.) California — [Criminal Procedure]. — "When, in the opinion of the court, it is proper that the jury should view the place in which the offense is charged to have been committed, or in which any other material fact occurred, it may order the jury to be conducted in a body, in the custody of the sheriff, to the place, which must be shown to them by a person appointed by the court for that purpose; and the sheriff must be sworn to suffer no person to speak or communicate to the jury, nor to do so himself, on any subject connected with the trial, and to return them into court without unnecessary delay and at the specified time." [3]

(3.) Indiana. — "Whenever, in the opinion of the court, it is proper for the jury to have a view of real or personal property which is the subject of the litigation, or of the place in which any material fact occurred, it may order them to be conducted in a body, under the charge of a sworn officer, to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury are thus absent, no person, other than the person so appointed, shall speak to them on any subject connected with the trial." [4]

[1] Doud *v.* Guthrie, 13 Bradw. (Ill.) 653; Smith *v.* State, 42 Tex. 444; Bostick *v.* State, 61 Ga. 635.

[2] Cal. Code Civ. Proc., § 610.

[3] Cal Code Crim. Proc., § 1119

[4] Rev. Stat. Ind. 1881, § 538.

(4.) Iowa — [Civil Procedure]. — "Whenever, in the opinion of the court, it is proper for the jury to have a view of the real property which is the subject of the controversy, or of the place in which any material fact occurred, it may order them to be conducted in a body, under the charge of an officer, to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury are thus absent, no person, other than the person so appointed, shall speak to them on any subject connected with the trial." [1]

(5.) Kansas — [Civil Procedure]. — "Whenever, in the opinion of the court, it is proper for the jury to have a view of the property which is the subject of the litigation, or of the place in which any material fact occurred, it may order them to be conducted, in a body, under the charge of an officer, to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury are thus absent, no person, other than the person so appointed, shall speak to them on any subject connected with the trial." [2]

(6.) Kansas — [Criminal Procedure]. — "Whenever, in the opinion of the court, it is proper for the jury to have a view of the place in which any material fact occurred, it may order them to be conducted in a body, under the charge of an officer, to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury are thus absent, no person other than the officer and a person appointed to show them the place, shall speak to them on any subject connected with the trial." [3]

(7.) Maine. — The statute of Maine merely provides: "In any jury trial, the presiding justice may order a view by the jury." [4] And also: "The court may order a view by any jury in a criminal case." [5]

(8.) Massachusetts. — "The jury in a case may, at the request of either party, be taken to view the premises or place in question, or any property, matter, or thing relating to the controversy between the parties, when it appears to the court that such view is necessary to a just decision: *provided*, the party making the motion advances a sum sufficient to defray the expenses of the jury, and the officers who attend

[1] Miller's Rev. Code Ia. 1886, § 2790.

[2] Dass. Comp. Laws Kan. 1885, p. 638, § 277.

[3] Dass. Comp. Laws Kan. 1885, p. 759, § 316.

[4] Rev. Stat. Me. 1883, p. 705, § 82.

[5] *Ibid.*, p. 945, § 23.

them in taking the view; which expenses shall be afterwards taxed like other legal costs, if the party who advances them prevails in the suit." [1]

(9.) Michigan. — "When any court of record in which an issue of fact is tried by a jury, shall deem it necessary that the jury view the place or premises in question, or any property or thing relating to the issue between the parties, such court may, on the application of either party and the advancement of a sufficient sum to pay the expenses of the jury and officers attending them in taking such view, order such view to be had, and direct the manner of effecting the same." [2]

(10.) Minnesota — [Civil Procedure]. — "Whenever, in the opinion of the court, it is proper that the jury should have a view of real property which is the subject of the litigation, or of the place in which any material fact occurred, it may order the jury to be conducted in a body, in the custody of proper officers, to the place, which will be shown to them by the judge, or by a person appointed by the court for that purpose. While the jury are thus absent, no person, other than the judge or person so appointed, shall speak to them on any subject connected with the trial." [3]

(11.) Nebraska — [Civil Procedure]. — "Whenever, in the opinion of the court, it is proper for the jury to have a view of property which is the subject of litigation, or of the place in which any material fact occurred, it may order them to be conducted in a body, under the charge of an officer, to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury are thus absent, no person, other than the person so appointed, shall speak to them on any subject connected with the trial." [4]

(12.) Nebraska — [Criminal Procedure]. — "Whenever, in the opinion of the court, it is proper for the jury to have a view of the place in which any material fact occurred, it may order them to be conducted in a body, under the charge of the sheriff, to the place, which shall be shown to them by some person appointed by the court. While the jury are thus absent, no person other than the sheriff having them in charge, and the person appointed to show them the place, shall speak with them on any subject connected with the trial." [5]

[1] Pub. Stat. Mass. 1882, p. 999, § 43.

[2] 2 How. Mich. Stat. 1882, § 7620.

[3] Gen. Stat. Minn. 1881, p. 743, § 228.

[4] Gen. Stat. Neb. 1873, p. 573, § 284; *Id.* 1887, p. 775, § 284.

[5] *Ibid.*, p. 829, § 479; *Id.* 1887, p. 952, § 479.

(13.) New Hampshire. — "In the trial of actions involving questions of right to real estate, or in which the examination of places or objects may aid the jury in understanding the testimony, the court, on motion of either party, may, in their discretion, direct a view of the premises by the jury, under such rules as they may prescribe.[1] The costs of such view shall be subject to such adjudication, as to the whole or any part thereof, as the court may deem equitable." [2]

(14.) New Jersey. — "In action in the Supreme Court, or any circuit court or court of common pleas, where it shall be proper or necessary that the jurors who are to try the issue should view the messuages, lands, or place in question, in order to their better understanding the evidence that will be given on the trial, the court, or a judge thereof, may order a special writ of *venire facias* to issue, by which the sheriff, or other officers to whom the same shall be directed, shall be commanded to have six or more of the first twelve of the jurors, named in the panel to such writ annexed, at the place in question, at a day therein named, prior to the first day of the court, who then and there shall have the matters in question shown to them by two persons in the said writ named, to be appointed by the court, or judge; and the sheriff or other officer who is to execute the said writ, shall, by a special return on the same, certify under his hand that the view hath been had according to the command of the said writ." [3]

(15.) Rhode Island. — "In all cases relating to the realty, either party may have the jury to view the place in question, if the court

[1] Gen. Laws N. H. 1878, chap. 537, § 17.

[2] *Ibid.*, § 18.

[3] Rev. Stat. N. J. 1877, p. 529, pl. 25. The next section provides for a view by a *struck jury*, in which case twelve jurors are to attend at the view. The next section provides that, although a view may have been ordered, the trial shall proceed if it is not taken, and that no objection shall be made by either side for want of a view. The next section provides that the expense of the view shall be equally borne by both parties, and that no evidence shall be given on either side at the time of taking the view. Then follows the following section, drawn more in conformity with modern statutes: "The court in which any cause, of a criminal or civil nature, is pending, may, at any time after the jury for the trial of the same is drawn, or at any time during the trial, order that the jury impaneled for the trial thereof, shall view any lands or place, if, in the judgment of the court, such view is necessary to enable the jury better to understand the evidence given in the cause; and such view shall thereupon be had in such manner as the court shall direct." *Ibid.*, p. 530, pl. 29.

shall be of opinion that such view is necessary." [1] "To entitle himself to such view, the party moving therefor shall advance such reasonable sum of money to the sheriff, to defray the expenses of the jury on such view, as the court shall order; and the amount of such expenses shall be taxed against the adverse party, if he who advanced the same shall recover costs in the suit." [2]

(16.) South Carolina. — "The jury in any case may, at the request of either party, be taken to view the place or premises in question, or any property, matter or thing, relating to the controversy between the parties, when it appears to the court that such view is necessary to a just decision; *provided*, the party making the motion advances a sum sufficient to pay the actual expenses of the jury and the officers who attend them in taking the view, which expenses shall be afterwards taxed like other legal costs, if the party who advanced them prevails in the suit." [3]

(17.) Virginia and West Virginia — [Civil Cases]. — "The jury may, in any case, at the request of either party, be taken to view the premises or place in question, or any property, matter or thing, relating to the controversy between the parties, when it shall appear to the court that such view is necessary to a just decision; provided the party making the motion shall advance a sum sufficient to defray the expenses of the jury and the officers who attend them in taking the view, which expenses shall be afterwards taxed like other legal costs." [4]

(18.) Wisconsin. — "The jury may, in any case, at the request of either party, be taken to view the premises or place in question, or any property, matter or thing, relating to the controversy between the parties, when it shall appear to the court that such a view is necessary to a just decision; *provided*, the party making the motion shall advance a sum sufficient to defray the expenses of the jury and the officers who attend them in taking the view; which expenses shall afterwards be taxed like other legal costs, if the party who advanced them shall prevail in the action." [5]

[1] Pub. Stat. R. I. 1882, chap. 214, § 1.

[2] *Ibid.*, § 2.

[3] Rev. Stat. So. Car. 1873, p. 524, § 35.

[4] Code Va. 1887, § 3167; Va. Code 1849, p. 629, § 10; 2 Rev. Stat. W. Va. 1879, chap. 109, § 36.

[5] Rev. Stat. Wis. 1878, § 2852; Rev. Stat. Wis. 1858, chap. 118, § 32.

§ 883. **When Discretionary.** — Under these statutes, it has been frequently ruled that the granting or refusing a view is purely a matter of *discretion* with the trial court, which discretion is not reviewable on appeal except in cases of manifest abuse.[1] Although a view is authorized by statute, the refusing of it will not be ground of reversing a judgment, where it does not appear that there was any difficulty in deciding the question upon the whole evidence, or that there was any difficulty which might have been removed by a view. A mere contradiction in the evidence, without more, does not enable an appellate court to see that a view was necessary.[2] In such a case it has been said: "It would be an exceedingly difficult matter to show that the court had abused its discretion in *refusing* to make an order of this kind. It appears that, in this case, a *map* was used upon the trial [a proceeding to condemn land], showing the farm and the right of way through it, and the witnesses described fully the situation of the premises, and we suppose the court was correct in holding that a view of the farm was not necessary to enable the jury to understand and properly apply the evidence in this case, and reach a just determination of the rights of the parties."[3] In an *action for work and labor done* and materials furnished in repairing a house, a view was requested and denied, and it was held that there was nothing which made it appear that the discretion of the trial court was abused.[4]

§ 884. **In Equity Cases.** — In equity cases the verdict of the jury is *advisory merely*, and therefore a view of the *locus in quo* by the jury is not as important as in cases where their decision,

[1] Pick *v.* Rubicon &c. Co., 27 Wis. 433, 446; Boardman *v.* Westchester Fire Ins. Co., 54 Wis. 364; Smith *v.* St. Paul City R. Co., 32 Minn. 1, 7; Clayton *v.* Chicago &c. R. Co., 67 Ia. 238; King *v.* Iowa Midland R. Co., 34 Ia. 458; Richmond *v.* Atkinson, 58 Mich. 413; People *v.* Bonney, 19 Cal. 426; Baltimore &c. R. Co. *v.* Polly, 14 Gratt (Va.) 447, 470.

[2] Baltimore &c. R. Co. *v.* Polly, 14 Gratt. (Va.) 447, 470.

[3] Clayton *v.* Chicago &c. R. Co., *supra*. Circumstances under which discretionary to refuse a view under Kansas statute in a proceeding to condemn land for a railway: Kansas Central R. Co. *v.* Allen, 28 Kan. 285.

[4] Richmond *v.* Atkinson, 58 Mich. 413; *ante*, § 879.

subject to the power of the judge to set it aside for good cause, is final. The difference between the relation of the judge to the finding of the jury, in cases in equity and in cases at law, is this: in cases in equity the judge, having heard the evidence, is at liberty *to adopt* the verdict, if he thinks fit; in cases at law, he is at liberty *to set it aside*, if he thinks fit. In either case, in order to enable him to exercise this office discreetly and justly, he ought to hear and see all the evidence which the jury hear and see. If the jury make a view of the premises out of court, the judge ought to make the same view. In point of fact, however, he never accompanies them in making the ordinary statutory view, except under special statutory provisions, such as the statute of Michigan relating to the condemnation of land for public uses, hereafter considered.[1] Nevertheless, we find that it has been held that where, in an equity case, the jury view the premises, the *judge should accompany them;* since he is not in a position to review and affirm or set aside their verdict, unless he has the same means of information which they had. In such a case the judge, finding himself in no position to review the verdict intelligently, properly, it was held, granted a new trial.[2]

§ **885. In Criminal Cases.** — It thus appears[3] that, in criminal cases, we have no warrant in the English practice for sending the jury out to make a view, except where such a course is authorized by statute. Before the enacting of any statute authorizing a view in criminal cases, a view in such a case was reluctantly granted by the Supreme Judicial Court of Massachusetts. The case was a prosecution for murder, and a view of the house, where the murder was alleged to have been committed, was at first *refused*, although moved for by the prisoner and consented to by the attorney-general,— the court saying: "We refused such a request in another case, and it does not appear to us that a view is necessary. It is attended with many inconveniences. We

[1] *Post*, § 911.

[2] Fraedrich *v.* Fliette, 64 Wis. 184, 188; *s. c.* 25 N. W. Rep. 28.

[3] *Ante*, § 879.

know not what the jury may hear, and what impressions may be made upon them while they are taking the view. The case should be decided by the evidence given in court." Upon a second trial of the same case, the jury themselves requested that they might be permitted to see the place of the murder, and the counsel on both sides expressed their desire that permission should be *granted*. The prisoner likewise gave his consent. The court granted the request, but with hesitation, because they said this course was without precedent, and if it should turn out to be incorrect, they had doubts whether they could hold the prisoner to his consent. The court directed that no person should go with the jury, except the officers having them in charge, and that no person should speak to them, under penalty of a contempt. Plans were exhibited and explained to the jury in court, and they were permitted to take them with them.[1] This doubt was relieved by a statute subsequently enacted, which recited that "the court may order a view by a jury impaneled to try a criminal case."[2] With this statute in force, the court could, of course, have no doubt of its authority to grant a view, if it deemed it expedient. Thus, in the celebrated trial of Prof. Webster for the murder of Dr. Parkman, the attorney-general, after opening the case, suggested that it would be desirable that the jury should be permitted to go to the medical college, and take a view of the premises where the murder was alleged to have been committed. The court said, referring to the above statute, that they had no doubt of their authority to grant a view, if they deemed it expedient; and that views had been granted of late in several capital cases in that county. "And the court afterwards, on adjourning for the day, directed that the jury should be permitted to take a view of the medical college on the next morning, before the coming in of the court, attended by two officers, and one counsel on each side."[3] But in Texas, where there was no statute authorizing a view in

[1] Com. *v.* Knapp, 9 Pick. (Mass.) 496, 515.

[2] R. S. Mass. 1843, ch. 137, § 10; Gen. Stats. Mass. 1860, ch. 172, § 9. See *ante*, § 882, subsec. 8.

[3] Com. *v.* Webster, 5 Cush. (Mass.) 295, 298.

criminal cases, it was held that, for the court to permit a view, was error for which a conviction would be reversed. The case in which it was so held was a case of hog-stealing. There was a controversy as to the *identity* of the animal alleged to have been stolen. The jurors were permitted by the court to leave the court room during the trial, and to inspect the animal alleged to have been stolen, with a view of thus solving, in connection with the evidence detailed by the witnesses, the question of identity and ownership. The court set aside the verdict and ordered a new trial.[1] So, in Georgia, in a case of murder, the court asked the defendant's counsel whether he objected to the jury making a view of the premises, and received an answer that he did not, and thereupon sent them out in charge of a bailiff to make such a view. It was held that this was error such as required a reversal of the conviction. The court said: "This extraordinary proceeding on the part of the court was error. The court had no legal right to require the defendant's counsel to say whether he objected to that extraordinary proceeding or not, especially in the presence of the jury, and the fact that he did not object under the circumstances did not legalize that extraordinary proceeding."[2]

§ 886. View that the Prisoner must Accompany the Jury. — Where a view takes place under the authority of a statute, in a criminal case, the prisoner must, according to several recent holdings, accompany the jury; since it is reasoned that, for the view to take place in his absence, is a violation of his constitutional privilege of meeting the *witnesses* against him face to face, — the conception being that no species of *evidence* can be communicated to the jury in any way except in his presence.[3]

[1] Smith *v.* State, 42 Tex. 444.

[2] Bostock *v.* State, 61 Ga. 635, 639, opinion by Warner, C. J.; *ante*, § 881.

[3] State *v.* Bertin, 24 La. Ann. 46; Carroll *v.* State, 5 Neb. 32, 35; Benton *v.* State, 30 Ark. 328, 348; People *v.* Bush (Cal.), 10 Pac. Rep. 169; *s. c.* 71 Cal. 602 (overruling People *v.* Bonney, 19 Cal. 426). Compare Eastwood *v.* People, 3 Park Cr. (N. Y.) 25; 3 Whart. Cr. L. (7th ed.), § 3160.

Some of the cases[1] also take the view that this supposed constitutional right of the prisoner cannot be *waived* by him.[2]

§ 887. **A Contrary View.** — There is equally good authority and reason in support of the contrary view. In Massachusetts it was not supposed necessary in the cases of Knapp and Webster,[3] to send the prisoner with the jury when they made the view. In England, it has been held, in the Court for Crown Cases Reserved, that no irregularity is committed in a criminal case, by allowing a jury to view the premises on which the alleged criminal act was committed, even after the case has been summed up and the jury have commenced their deliberations, the prisoner not consenting, his counsel being absent at the time, and neither the prisoner nor his counsel going with the jury to make the inspection.[4] The statute of Kansas is similar to that of Arkansas and California; but, nevertheless, the Supreme Court of Kansas hold that it is not necessary for the prisoner to accompany the jury in making the view; and that his right so to accompany them is a right which he may *waive*, and which he does waive by not demanding the privilege.[5] So, in Oregon,

[1] Notably the case of People *v.* Bush (Cal.), 10 Pac. Rep. 169; *s. c.* 71 Cal. 602 (overruling People *v.* Bonney, 19 Cal. 426).

[2] This proposition is denied in a vigorous argument by Brewer, J., in State *v.* Adams, 20 Kas. 311, 324.

[3] *Ante*, § 885.

[4] Reg. *v.* Martin, L. R. 1 Cr. Cas. Res. 378. In this case another very serious question was presented. While the jurors were making the view, they asked the witnesses, who had testified in court, to point out the precise spot where they, the witnesses, had stood, and the place and the position in which the prisoners were standing, when the witnesses saw the prisoners do the alleged criminal act; and then the jurors placed themselves in the same position as that occupied by the witnesses, and looked in the same manner in which the witnesses stated they had looked. It was observed that if these facts had been *found* by the court below, instead of being merely *recited*, a very serious question would have arisen, upon which it would have been necessary to examine several authorities; but as the facts were not found, the question was not presented to the reviewing court for decision.

[5] State *v.* Adams, 20 Kan. 311, 324. The reasoning of the court is not as clear as its conclusion. It introduces the fiction that, although the prisoner does not accompany the jury in making the view, he is, nevertheless, with them, because they are in legal contemplation in the presence of the court. On this point, Brewer, J.,

where, in a case of murder, a view was directed, and the order omitted to provide for the presence of the defendant or his counsel thereat, no application having been made therefor by them, it was held no error, since the right to be present was one which the accused might *waive*, — the court saying: "We consider the better doctrine to be, that the failure of the accused to be present when the jury were making their view, is no ground of error. We are unable to see what good his presence would do, as he could neither ask nor answer any question, nor in any way interfere with the acts, observations, or conclusions of the jury. He would only have been a mute spectator while there." [1]

§ 888. **Irregular to send out Witnesses with Jury.** — For the court to send a *witness* with the jury, on making the view, with directions to show them the position where the witness stood during the transaction in question, and where other persons stood, is a violation of the provision of a statute against suffering persons to communicate with the jury, for which a conviction will be reversed.[2]

§ 889. **Theory that Impressions acquired by the View are not Evidence.** — The foregoing theory,[3] that for the view to take place without the presence of the accused is a violation of his constitutional right to have *all the evidence* which the jury receive presented to them in his presence, is reduced to nonsense by another class of holdings, one of them in the same court, to the effect that the knowledge acquired by the jurors in making the

said: "In contemplation of law, the place of trial is not changed. The judge, the clerk, the officers, the records, the parties, and all that go to make up the organization of the court, remain in the court room. The jury retire to discharge one duty connected with the trial, and yet, though absent while discharging that duty, inasmuch as it is done under the direction of the court, and while in charge of an officer appointed by the court, they are, in legal contemplation, in the presence of the court. Though the defendant may not go with them into their place of retirement, he is nevertheless personally present during that portion, as well as the rest of the trial." This reminds one of the fiction by which the Roman emperors, although sitting at ease in their capital, *personally commanded* in battles fought in the most distant parts of their empire.

[1] State *v.* Ah Lee, 8 Ore. 214, 217.

[2] People *v.* Green, 53 Cal. 60.

[3] *Ante*, § 886.

view is *not evidence at all;* that the view is not allowed for the purpose of furnishing evidence upon which a verdict is to be founded, but for the purpose of enabling the jury better to understand and apply the evidence which is given in court;[1] that it is therefore error to instruct them that, in making it, they are to take into consideration in any degree[2] the knowledge thus acquired;[3] and that, though a view has been had and the bill of exceptions discloses nothing which took place at the view, it contains *all the evidence.*[4]

§ 890. Reasons Adduced in Support of this View. — The reasons adduced in the support of this view will appear from the following quotations: "In authorizing a court to send the jury to view the premises in litigation, it was not the purpose of the statute to convert the jurors into silent witnesses, acting on their own inspection of the land, but only to enable them the more clearly to understand and apply the evidence. If the rule were otherwise, the jury might base its verdict wholly on its own inspection of the premises, regardless of an overwhelming weight of evidence to the contrary, and the losing party would be without remedy by a motion for a new trial. It would be impossible to determine how much weight was due to the inspection by the jury, as contrasted with the opposing evidence, or (treating the inspection as in the nature of evidence), whether it was sufficient to raise a substantial conflict in the evidence. The cause would be determined, not upon evidence given in court, to be discussed by counsel and considered by the court in deciding a motion for a new trial, but upon the opinions of the jurors, founded on a personal inspection, the value or the accuracy of which there would be no method of ascertaining. The statute could not have been intended to produce such results as these, in authorizing the jury to view the premises."[5] - - - - "The question then arises as to the purpose and intent of this statute.[6] It seems to

[1] Chute *v.* State, 19 Minn. 271, 281; Brakken *v.* Minneapolis &c. R. Co., 29 Minn. 41, 43. That this was the original conception of the office of a view will appear from the English statutes already quoted. *Ante*, §§ 876, 878.

[2] Close *v.* Samm, 27 Ia. 503, 507, (Wright, J., dissenting).

[3] Wright *v.* Carpenter, 49 Cal. 607, 609; Heady *v.* Vay Turnp. Co., 52 Ind. 117, 124.

[4] Jeffersonville &c. R. Co. *v.* Bowen, 40 Ind. 545 (overruling Evansville &c. R. Co. *v.* Cochran, 10 Ind. 560).

[5] Wright *v.* Carpenter, 49 Cal. 607, 609.

[6] Referring to the Iowa statute, *ante*, § 882, subsec. 4.

us that it was to enable the jury, by the view of the premises or place, to better understand and comprehend the testimony of the witnesses respecting the same, and thereby the more intelligently to apply the testimony to the issues on trial before them; and not to make them silent witnesses in the case, burdened with testimony unknown to both parties, in respect to which no opportunity for examination or correction of error, if any, could be afforded either party. If they are thus permitted to include their personal examination, how could a court ever properly set aside their verdict as being against the evidence, or even refuse to set it aside, without knowing the facts ascertained by such personal examination by the jury? It is a general rule, certainly, if not universal, that a jury must base their verdict upon the evidence delivered to them in open court, that they may not take into consideration facts known to them personally, but outside of the evidence produced before them in court. If a party would avail himself of the facts known to a juror, he must have him sworn and examined as other witnesses." [1]

§ 891. Instructions held Erroneous under this View. — Under this view it has been held error to instruct the jury that, in estimating the damages, they are to use their own judgment, as well as the judgment of the witnesses.[2] Under the same view it has been held error to give the following instruction: "You must determine the question of damages from the evidence before you, giving the same and each part thereof, the weight you think it entitled to, and no more; as a part of the evidence in the case, such information as you derived from the view of the premises through which the road is proposed, and on the line of the said proposed road." The court quoted and approved the reason-

[1] Close *v.* Samm, 27 Ia. 503, 507, opinion by Cole, J. From the foregoing decision Wright, J., dissented. In the course of his opinion, he said: "If the only object of the statute was to enable the jury to better understand, and the more intelligently to apply, the testimony of the witnesses, then I confess that I do not see why, upon this basis alone, they might not, in determining the ultimate facts, 'include' or make use of, this 'personal examination.' If they are to use it to enable them 'to understand and apply the testimony,' then, it seems to me, they are possessed of facts unknown to the parties; and whether the impressions received and the applications of the testimony are true or false, can no more be discovered than if they have actually 'burdened' themselves with *testimony*." *Ibid.* 511. The learned judge extended his observations at considerable length upon the question, with reference to the particular case before the court.

[2] Brakken *v.* Minneapolis &c. R. Co., 29 Minn. 41, 43.

ing of the Iowa court in the case next cited.[1] This view has been pushed to the extreme of holding that an instruction which allows the jury to base their verdict *in any degree* upon their personal examination of the premises, is error. It was so held of the following instruction: "You will determine from all the evidence in the case, and all the facts and circumstances disclosed on the trial, including your personal examination, whether the water was, by the act of the defendant, backed up on the premises of the plaintiffs, to the damage of their water power, as alleged."[2]

§ 892. Instance, under this Theory, of a proper Instruction to a Jury before sending them out. — On the third trial of an action for the recovery of land in California, it became material to determine whether the land was *swamp* and *overflowed land*, such as passed under the patent under which the plaintiff claimed. The court, upon ordering a view, instructed the jury as follows: "The jury will go with the sheriff, examine the land, examine the quality of the soil, of the growth upon it; but you are not to have any conversation with each other, or any body else, in relation to the quality of the land. Avoid forming an opinion as to its quality until you have finally heard all the evidence, and retired to your jury room to consider a verdict." It was held that this instruction was not erroneous. It did not authorize the jury to take into consideration, when they should retire into the jury room, the result of their own examinations of the land, as independent evidence in the case.[3]

§ 893. Contrary Opinion that Knowledge Acquired by the View is Evidence. — There is no sense in the conclusion that the knowledge which the jurors acquire by the view is not evidence in the case. The conception that what a body of jurors *see* themselves, relevant to the issue to be decided by them, is not evidence, but something to be considered by them in weighing oral evidence, is nonsense. What they see is evidence in a primary sense, and what is detailed to them concerning the same subject matter by witnesses, is evidence in merely a secondary sense. An objective lesson always impresses itself more

[1] Heady *v.* Vevay &c. Turnp. Co., 52 Ind. 117, 124.

[2] Close *v.* Samm, 27 Ia. 503, 507 (Wright, J., dissenting).

[3] Wright *v.* Carpenter, 50 Cal. 556; *s. c.* on former appeals, 49 Cal. 608 and 47 Cal. 436.

vividly upon the mind than an oral lesson. Such a conclusion is tantamount to saying that they are to take the trouble of going in a body to inspect land, or other material object, out of court, and that when they come to make up their verdict they must resolutely forget the impressions acquired from such inspection. The conception that a body of freeholders, residing in the vicinity, shall view the land in controversy, in a proceeding to expropriate it for public use, and then shall put out of sight, in making their estimate of damages, their own knowledge of the value of land in that vicinity, applied to the character of the particular land as they have observed it, is also nonsense. Impressed with this view, the Supreme Court of Wisconsin, speaking through Lyon, J., has said: "We understand that the object of a view is to acquaint the jury with the physical situation, condition and surroundings of the thing viewed. What they see they know absolutely. If a witness testified to anything which they know by the evidence of their senses on the view is false, they are not bound to believe, indeed cannot believe, the witness, — and they may disregard his testimony, although no other witness has testified on the stand to the fact as the jury know it to be. For example, if a witness testified that a certain farm is hilly and rugged, when the view has disclosed to the jury, and to every juror alike, that it is level and smooth, or if a witness testify that a given building was burned before the view, and the view discloses that it had not been burned, — no contrary testimony of witnesses on the stand is required to authorize the jury to find the fact as it is, in disregard of the testimony given in court." That court accordingly has held that the knowledge which the jurors acquire in making the view, is evidence to be considered by them in assessing damages, in a proceeding for the condemnation of land for public use[1] upon which they may act to the exclusion of contradictory evidence;[2] and similar views prevail in other jurisdictions.[3]

[1] Washburn *v.* Milwaukee &c. R. Co., 59 Wis. 364, 368.

[2] Neilson *v.* Chicago &c. R. Co., 58 Wis. 517; *post*, § 598.

[3] Toledo &c. R. Co. *v.* Dunlap, 47 Mich 456; *post*, § 899; Parks *v.* Boston, 15 Pick. (Mass.) 198 (as seen in next section); Remy *v.* Municipality No. 2 (still stronger view, as seen in § 897, *post*).

§ 894. [Continued.] **The same View taken by Chief Justice Shaw.** — Opposed to the foregoing authorities[1] is a well considered case, in which the opinion was written by a judge no less eminent than Chief Justice Shaw. The proceeding was instituted for the purpose of assessing the damages sustained by a property owner, by the act of the City of Boston in widening a street. The judge *instructed the jury*, "that they, having viewed the land taken, and having heard the testimony of witnesses, and enlightened their consciences as fully as they could, must give a verdict according to their own opinion and conviction; that if any one of them knew any fact of his own knowledge, which bore upon the case, he ought to disclose it, and testify to it in court; that, in making up their verdict, they should take counsel of their own experience and knowledge of like subjects, and should consider, not only what the witnesses had testified, but what they themselves had seen in the view which they had taken; and that, if witnesses had sworn to matters of opinion, which the jury, in the exercise of their good sense, did not believe to be correct, they should disregard such testimony." The propriety of this instruction was challenged. "It appears to me," said Shaw, C. J., "that the direction of the court in this respect was singularly well guarded, and expressed with great accuracy and strictly comformably to law. The cases cited tend to show that, where a juror knows of a fact material to the issue, he must disclose and testify to it, in court; but in the case before us, the jurors were referred to their own experience and knowledge of like subjects, especially that acquired by the view, to test the accuracy of the witnesses in matter of opinion. Were this a common-law action, therefore, I should feel strongly inclined to the opinion that this instruction was strictly and legally correct; but what we think puts it beyond any exception here is, that this was not an action, but an estimate of damages, in laying out a highway." The learned judge then referred to certain statutes, as showing that the practice had been for the jury to go upon the land and there make the appraisement or estimate,

[1] Those examined in § 889, *et seq.*

and continued thus: "The locating committee, and the sheriff's jury are to make an estimation upon view; and, speaking for myself, I cannot percieve why they might not, in both cases, have estimated the damages upon their own experience and judgment, without any evidence *aliunde*, though they might be at liberty to enlighten their own judgments by the aid of testimony. And there seems to be no substantial difference established by the mode of trial in this city. The whole city being within an easy walk of the court, it was manifestly a wise and convenient provision that, after having taken a view of the place, they should return into court and have the cause there conducted before the judge, and in conformity with the usual forms, rather than elsewhere before the sheriff. But the object of inquiry is still the same; it is to estimate the plaintiff's damages, and upon view, if either party desire it. The jury must, therefore, I think, exercise their own knowledge and experience fully; and perhaps, in most instances, with a competent and intelligent jury, such judgment could not be much aided by the estimates of others, though under oath in the form of testimony. It may follow as a consequence, as suggested by the learned counsel for the complainant, that it would be difficult, if not impossible, to set aside a verdict in such a case, on the ground of being contrary to the weight of evidence given on the trial; though probably the same result might be obtained by proving, by other evidence, such an excessive over or under-valuation as to show that the jury might have been misled by error or prejudice."[1]

§ **895. But Jurors not to Disregard other Evidence.** — But the evidence which the jurors may acquire from making the view is not to be elevated to the character of exclusive or predominating evidence. They are not to disregard *other evidence* in regard to the character and value of the property; and an instruction which conveys to them the impression that they may do so, is erroneous. It was so held concerning instructions which embraced the following sentences: "You are to determine it [the compensation] from the whole evidence that has been given

[1] Parks *v.* Boston, 15 Pick. (Mass.) 198, 199, 209.

you in the case — from your view — you to take the view you make; you take your own knowledge, your own judgment, your own good sense." "If a witness, from his manner and appearance upon the stand, from his want of knowledge of the subject-matter, *or from other causes* apparent to you and your judgment — his evidence does not convince your mind that he is right, you should disregard it, because it is not evidence in the case. On the other hand, if, from his knowledge, from his experience, from his appearance and manner, he does convince you, and your judgment, your knowledge acquired by your view, your good sense, together with all the evidence given in the cause — determines in your mind that the damages are so much, that should be your verdict, — more or less." [1] The court held that these, and other similar sentences in the charge, were of a character to convey to the jurors the idea that they might assess the damages according to the impressions which they had acquired from the view, disregarding other evidence in the case. The court, continuing the language already quoted,[2] said: "But if the fact of which the jury may thus become cognizant is only one of many elements which must be considered, to determine some other fact which can only be satisfactorily determined by a resort to professional or expert testimony, the case is very different. Such are these cases. The jury were to assess the value of the land taken for the use of the railway company, and the damages to the other adjacent lands of the respective owners resulting from such taking. To do this intelligently, it became necessary to determine the location, quality, and condition of the land, the uses to which it was or might be applied, its market value, the manner in which the taking of a part of the tract would affect the residue, and perhaps other conditions affecting such value and damages. Some of these conditions, and more especially the value of the land, could not be definitely determined by the view alone, and cannot properly be said to be within the common knowledge of the jury. The opinions of witnesses acquainted

[1] It should be observed in passing, that this was probably an oral charge, taken down by a court stenographer, which accounts for the defects of grammatical construction.

[2] *Ante*, § 893.

with the values of such property, are essential to an intelligent judgment. At the common law, a view might have been had in a real action, and by statute in any action, to the end that the jury might see the land, or thing claimed, to enable the jurors better to understand the evidence on the trial.[1] We think such is still the office of a view. Hence, whatever the jury in each of these cases learned of the lands in question by the view, was available to enable them to determine the weight of conflicting testimony, respecting value and damage, but no further. * * * As to how far jurors may make up their verdict on their own knowledge, independently of the testimony, or against the testimony, the true rule is indicated by what has already been said concerning the view. A jury is not bound to give, and cannot give, any weight to testimony which, although undisputed by witnesses, is contrary to what every person of ordinary intelligence knows to be true. To illustrate, should a witness testify that at Boston on a certain day the sun arose at midnight, or that the Mississippi River empties into Lake Michigan, or that white is black, the testimony would be rejected at once. So, in matters of mere opinion, in cases where the testimony of experts is not required, if the jury know all the facts, they are not necessarily controlled by the opinions of witnesses, if such opinions have been received. In such cases, the jury are as competent as the witnesses to form an opinion, and the opinions of witnesses, if objected to, are inadmissible. Beyond this the jury cannot properly go. To allow jurors to make up their verdict upon their individual knowledge of disputed facts material to the case, not testified to on oath in court, or upon their private opinions, would be most dangerous and unjust. It would deprive the losing party of the right of cross-examination, and the benefit of all the tests of credibility which the law affords. Besides, the evidence of such knowledge, or of the grounds of such opinions, could not be preserved in a bill of exceptions, or questioned on appeal. It would make each juror the absolute judge of the accuracy and value of his own knowledge or opinions, and compel an appellate court to affirm judgments on the facts, when all of

[1] Citing Jacob Law Dict., tit. *View*.

the evidence is before it, and there is none whatever to support the judgment. The court would be obliged to presume that the jury, or some juror, had, or at least thought he had, some personal knowledge of the facts outside the testimony, or contrary to it, which would sustain the judgment. Such a ruling in a case, the procedure in which was governed by common-law rules of evidence, we presume was never heard of. We think the correct rule in these cases is that above cited, to wit, if the testimony of value and damages is conflicting, the jury may resort to their own general knowledge of the elements which affect the assessment, in order to determine the relative weight of conflicting testimony; but their assessment must be supported by the testimony, or it cannot stand." [1]

§ 896. Illustration of this View. — Further to illustrate this view, Lyon, J., gave the following supposed case: "If no witness had estimated the compensation, to which a plaintiff was entitled, at less than $500, or more than $1,000, a verdict for less than $500 or more than $1,000, should be set aside, because unsupported by the evidence;" [2] which means that an estimate of values made exclusively upon the evidence furnished by a view, is to be set aside as unsupported by substantial evidence.

§ 897. When Jury decide upon their Personal Knowledge.—In proceedings for the expropriation of land for public uses, under the Civil Code of Louisiana,[3] the court, pushing this theory still further, hold that the jurors are entitled to rely upon their personal knowledge of the property in forming their conclusion, although they may be aided, especially if they request it, by the opinions of witnesses. "A jury," said the court, "are in truth experts; and we suggest that a personal examination of the premises by the jury in a body, after it is impaneled, should be a feature of every proceeding under this article of the code." [4]

[1] Washburn *v.* Milwaukee &c. R. Co., 59 Wis. 364, 367 (approving Close *v.* Samm, 27 Ia. 503).

[2] Washburn *v.* Milwaukee &c. R. Co., 59 Wis. 364, 370.

[3] Civ. Code La., art. 2608.

[4] Remy *v.* Municipality No. 2, 12 La. Ann. 500, 503. As to the nature of the proceeding under this statute, see also Police Jury *v.* Manning, 16 La. Ann. 182.

§ 898. Not Error to exclude Evidence of Facts which the Jury have learned from the View. — On a similar theory, where the jury have made a view of the premises, it has been held not error to exclude testimony of witnesses, as to matters concerning which they could form an opinion from the view as intelligently as could the witnesses. "Opinions in such cases are entirely outside the range of authorized expert testimony." [1]

§ 899. [MICHIGAN.] — SCOPE OF THE POWERS OF THE JURY IN CONDEMNATION PROCEEDINGS. — It is said in Michigan that, in such cases, the constitution as well as the principles of the common law, makes the jurors *judges of the law and fact*.[2] "Their conclusions are not based entirely on testimony. They are expected to use their own judgment and knowledge, from a view of the premises, and their experience as freeholders, quite as much as the testimony of witnesses to matter of opinion. And while an appellate court is bound in such cases to set aside proceedings which appear to be based on false principles, it can not properly deal with rulings as if they were excepted to on a common-law trial, or dispose of the controversy on a merely technical motion." [3]

§ 900. Difficulty of Reviewing on Appeal the Finding of the Jury. — The absurd conclusion in which, as already seen,[4] several of the courts have landed themselves, that what the jurors *see and know* in consequence of making the view is to be shut out from their minds as evidence — even if this were possible — when they come to make up their verdict, has grown out of the difficulty which appellate courts have had in dealing with such verdicts when challenged as being unsupported by the evidence; and their conclusion has been that the knowledge which the jurors acquired in making the view is *not evidence*, because it cannot be got into a bill of exceptions so as to be conveyed to the minds of the appellate judges. They have been staggered by the thought of the consequences which would ensue, in a cap-

[1] *Ante*, § 893; Neilson *v.* Chicago &c. R. Co., 58 Wis. 517, 524.

[2] Chamberlin *v.* Brown, 2 Doug. (Mich.) 120; Toledo &c. R. Co. *v.* Dunlap, 47 Mich. 456, 466.

[3] Toledo &c. R. Co. *v.* Dunlap, *supra*, opinion by Campbell, J.

[4] *Ante*, § 889.

ital case, for instance, in dealing with a verdict thus challenged, where, in addition to the oral testimony of witnesses, the record should disclose the fact that the jurors had made a view of the scene of the supposed crime; but they have not stopped to reflect that, to hold that, because a species of evidence may be presented to the jury which was not even presented to the trial judge, and which, in the nature of things, could not be presented to the appellate judges, therefore it is to be regarded as not being evidence at all, and the jury are to be so instructed, — proves altogether too much, even for an ordinary criminal case; since, as already seen,[1] it has been the immemorial practice in criminal trials to exhibit to the jury burglars' tools, blood stained clothing, and other *indicia* of crime. Although the knowledge acquired by the jurors from such an inspection can never be accurately conveyed to the minds of the appellate judges through a bill of exceptions, would any court therefore fall into the wild dream of holding that the jurors should be instructed to disregard the evidence thus acquired?

§ **901. How Courts have dealt with this Difficulty.** — The difficulty of dealing with the verdicts of juries, when challenged on the ground of being unsupported by evidence, where a view has been had, is exhibited in several reported cases. It has been said in Nebraska that, in a proceeding to condemn land for a railway, where there has been a view, "it is difficult to review the judgment as being against the weight of evidence, because all the evidence before the court cannot, from the nature of the case, be incorporated in the record; and in these cases there is no such discrepancy between the evidence in the records and the verdicts, as to justify the court in setting them aside, which the court would not do, unless it was clear that the jury had erred."[2] In California, in a contested election case, the evidence showed that one Twist voted in precinct A., and the question was as to the location of the boundary between that and another precinct, with reference to Twist's residence. The trial court found that he

[1] *Ante*, § 871.

[2] Omaha &c. R. Co. *v.* Walker (Neb.), 23 N. W. Rep. 348, 350; *s. c.* 17 Neb. 432, opinion by Maxwell, J.

voted illegally, and, on appeal, the question was whether there was evidence to support the finding. The record did not clearly show the location of the boundary line between the precincts; but, as it appeared that the trial judge (who acted as trier of the facts) visited, with the consent of the parties, the locality, it was held that the finding should not be disturbed. The court said: "As the case is presented in the transcript before us, we cannot reverse the decision of the court below upon this question. The record does not clearly show the relative positions of the natural objects referred to in the testimony, so that we can intelligently determine where the line runs with reference to the house of Twist, or with reference to his lands, or to his enclosure, as the same existed when the line was established. The judge below, with the consent of the parties, visited the locality, and certainly had better opportunities for determining satisfactorily the question in dispute than have we." [1] In Indiana it was originally held that, where the jury have made a view, their finding in respect of value cannot be reviewed on appeal; because, although the bill of exceptions recites that it contains all the evidence, yet in point of fact it shows that it does not; since it contains nothing relative to the examination of the premises which was made by the jury, or in regard to the information conveyed to their minds by such examination. "Evidence," said Hanna, J., "is that which produces conviction on the mind as to the existence of a fact. An ocular examination of the premises alleged to have been injured, might have had that effect, as well as an oral detail of circumstances, as in this instance." [2] But in a subsequent case the court receded from this view, and held that, although the jury have made a view, yet a bill of exceptions which contains only the testimony which was presented at the trial in open court, contains *all the evidence*, so that an appellate court has before it the same means of revising the verdict as it would have if no view had taken place, or as it would have if the appellate judges could have ac-

[1] Preston *v.* Culbertson, 58 Cal. 198, 210.

[2] Evansville &c. R. Co. *v.* Cochran, 10 Ind. 560.

companied the jury in making the view.[1] The grounds which induced the court to change its view, were thus pressed upon the attention of the court by counsel, and thus rehearsed by the court in its opinion: "It is urged that, to follow that case is to say that in no case where a jury has had a view of the place in which any material fact occurred, as contemplated by the statute,[2] can the evidence be got into the record, as it would be impossible to put into the bill of exceptions the impressions made upon the minds of the jury by such view; and that in this way all benefit of appeal to this court, so far as any question is concerned which depends upon all the evidence being in the record, would be wholly cut off. It is further contended that, whether the jury shall have a view of the place, etc., is a matter entirely within the discretion of the court, and that the court may thus, in its discretion, deprive a party of the right to have questions depending on the evidence reviewed in this court, even in cases of the greatest moment. It is urged that, under the rule in that case, a party might be convicted and sentenced to be hanged on wholly insufficient evidence; yet if the prosecutor has got an order for the jury to view the place, and they have done so, it would be impossible to get the judgment reversed, no matter how insufficient the evidence might have been. These reasons have so much force in them, that we feel compelled to overrule the case of *Evansville &c. R. Co. v. Cochran*,[3] and other cases which have followed it, and to hold that the bill of exceptions may contain all the evidence, notwithstanding the jury may have viewed the property which is the subject of the litigation, or the place in which any material fact occurred, in accordance with the sections of the codes above cited."[4] These holdings strikingly illustrate the effect upon law which is produced by the effort of trained minds to reduce its rules to scientific precision, — a thing

[1] So held in Jeffersonville &c. R. Co. *v.* Bowen, 40 Ind. 545; overruling Evansville &c. R. Co. *v.* Cochran, *supra*.

[2] Referring to 2 Gav. & Hord. Ind. Stat. p. 427, § 164, and to the like provision of the criminal code, — *Id.* 202, § 328.

[3] 10 Ind. 560.

[4] Jeffersonville &c. R. Co. *v.* Bowen, 40 Ind. 545, 548.

which, in the nature of things, is impossible. In the same jurisdiction (California), as above seen, a view furnishes evidence in a criminal case, so that it is a fatal error for the accused not to be present when it takes place;[1] but it does not furnish evidence in a civil case, even where the question is whether the land which the jurors have inspected is dry land or swamp land;[2] and it does furnish evidence in an election case, so as to preclude an appellate court from sitting aside a verdict based on it.[3] Again, in order that it shall not be evidence, the jurors are to be commanded by an instruction from the bench to reverse the involuntary mental processes by which conviction or belief is attained.

§ **902. Observations on this Subject.** — This is emphatically what Goethe called the "nonsense of reason."[4] The true solution of this difficulty is that cases where there has been a view stand, on appeal or error, on a *special footing;* that, although what the jurors have learned through the view is evidence to be considered by them, — yet, on grounds of public policy, having reference to the known imperfections which attend the conclusions of jurors, and even of judges in the haste of *nisi prius* work, a reviewing court should set aside a verdict based partly on a view, unless it is supported by *substantial testimony*, delivered by *sworn witnesses*. It is necessary to have at least the testimony of *one* sworn witness, although ignorant, dishonest, partial to the party by whom he is brought into court, or otherwise not deserving of credit, to support the verdict of *twelve* persumably impartial men, not selected by either party,

[1] *Ante*, § 886.

[2] *Ante*, §§ 889, 890, 892.

[3] Preston *v.* Culbertson, *supra*.

[4] "Laws, like inherited disease descend,
And slyly wind their way from age to age,
And glide almost unseen from place to place;
Reason to nonsense grows, a blessing to a worry."

Or thus, according to Bayard Taylor's translation:

"All rights and laws are still transmitted,
Like an eternal sickness of the race,—
From generation unto generation fitted,
And shifted round from place to place.
Reason becomes a sham, beneficence a worry."

Goethe, *Faust, Scene IV.*

who are sworn to decide according to the evidence, and who deliver a verdict based upon the evidence of their senses.[1]

§ 903. The Report of Road Viewers not Evidence on Appeal. — Where, in a special proceeding to lay out a road and assess damages against property holders whose property has been taken for the same, a land-owner appeals to the circuit court, the reports of the "viewers and reviewers" who acted in the proceeding below, are not evidence at all, but the cause is to be tried *de novo* upon original evidence.[2]

§ 904. Unauthorized View. — Jurors must base their findings upon evidence adduced in their hearing in court, or upon a view authorized by the court. For a juror to go out of court, of his own motion, and make an inspection of the premises or thing in dispute, will be good ground of setting aside the verdict; though, if the party entitled to complain have knowledge of the irregularity and remain silent, it will be deemed *waived*.[3] But it has been held that the bare fact of the jury having visited, during the trial of an *indictment for burglary*, the premises where it was alleged that the defendant had committed the crime, is not a sufficient ground for discharging the jury; some prejudice to the prisoner must appear.[4] Thus, where, in a *capital case*, after the court had closed, and the jurors were, pursuant to leave given by the court, walking out for exercise in charge of an officer, several of them came accidentally upon the place of the homicide and inspected it, — it was held that this irregularity was ground for setting aside a conviction, on the principle that, after a cause is submitted to a jury, if they receive any kind of evidence which can have the remotest kind of bearing upon the case, it will be fatal to their verdict.[5] The fact that certain jurors, *in a civil case*, while passing into court, stopped and examined the *horse* which was the subject of the injury sued for, in the presence of the plaintiff, who made no objection thereto, nor any objection to proceeding with the trial, afforded no ground

[1] *Ante*, § 896.
[2] Conyer *v.* Boyd, 55 Ind. 166.
[3] Stampofski *v.* Steffens, 79 Ill. 303.
[4] People *v.* Hope, 62 Cal. 291.
[5] Eastwood *v.* People, 3 Park. C. R. (N. Y.) 25, 52.

of new trial, — since any objection grounded on such an irregularity was *waived*.[1]

§ 905. **Experiments before Jury out of Court.** — The privilege of making *experiments* in the presence of the jury is generally refused, on the ground that such experiments, in the hands of skillful persons, are as likely to deceive as to enlighten them.[2] Thus, in an action brought to recover damages for personal injuries, alleged to have been caused by a collision between two street railway cars of the defendant, on one of which the plaintiff claimed to have been a passenger, it was held no error for the trial court to refuse an application to allow the jury to proceed to the car-house of the defendant and witness experiments with those cars, as bearing upon the question of the nature of the alleged collision. "The case was not within the provisions of the statute allowing a view by the jury, and, if such procedure were authorized or proper in any case, the question would be one resting in the *discretion* of the court."[3] In an action to recover the value of lumber burned by a fire, alleged to have been caused by a locomotive operated upon the defendant's railroad, the jury, by consent of the parties and the sanction of the court, were permitted to make an inspection of the railroad and the locality of the fire. While making the inspection, experiments were made in their presence by employés of the defendant, for the purpose of showing that the defendant's engines could be run over the section of the defendant's road contiguous to the fire, without the use of steam, and consequently without the emission of sparks. The trial court regarded this experiment as an irregularity sufficient to require the verdict (which was for the defendant) to be set aside; but the Supreme Court took a different view, declined to say that it was not proper and authorized by law, held that in the particular case it was not prejudicial, and reversed the judgment of the trial court and remanded the cause for judgment on the verdict.[4] Most of the

[1] Whitcher *v.* Peacham, 52 Vt. 242.

[2] *Ante*, § 620.

[3] Smith *v.* St Paul City R. Co., 32 Minn. 1, 7.

[4] Stockwell *v.* Railway Co., 43 Ia. 470.

analogies would sustain the conclusion of the trial court, and disaffirm that of the reviewing court in this case. Experiments made by the jury *in a criminal case*, outside of the court and in the absence of the prisoner, may afford ground for setting aside their verdict. It was so held where the counsel for a defendant in a criminal case, in the course of his argument, told the jurors that they had a right to try for themselves whether worn-out boots, like those described by the witness for the State, would make such *tracks* in the dust or sand as they described, and advised the jurors to make the experiment. Several of them did accordingly make the experiment, out of court, without the court's leave, and in the absence of the defendant. A fine sense of technicality held that, although the prisoner's counsel had led the jury into this irregularity, it was ground of setting aside the verdict.[1]

§ 906. **Misconduct in making a View.** — If the jury are guilty of misconduct in making a view, the party claiming to be injured by it must bring it to the attention of the trial court and obtain a distinct ruling thereon, which he may embody in his bill of exceptions, — otherwise it will not be the subject of revision on appeal.[2] Upon principles more fully explained in a subsequent part of this work,[3] *improper communications with the jury* while making the view, as where a person presumes to rehearse *evidentiary matters* in their hearing, will require the granting of a new trial, unless it clearly appear that no prejudice resulted; since "the *court* is the place in which causes are to be tried, and to suffer them to be tried *elsewhere*, destroys confidence in the trial by jury, and brings the administration of justice into contempt."[4] Thus, where, in a case of homicide, it appeared that, when the jury arrived at the premises which they were sent to inspect, they there found a person who had never been sworn as a witness in the case, and who, in response to questions addressed to him by members of the jury, pointed out to them all the special features of the premises, — for this irregu-

[1] State *v.* Sanders, 68 Mo. 202.

[2] See Boardman *v.* Westchester Fire Ins. Co., 54 Wis. 364, 367.

[3] *Post*, § 2353, *et seq.*

[4] Hayward *v.* Knapp, 22 Minn. 5.

larity a conviction was reversed, the court saying: "Whether his answers were correct or incorrect cannot be known. They may have been false and extremely prejudicial to the defendant, but whether they were or not, makes no difference. It cannot be denied that the jury received material and vitally important evidence out of court from a witness who was not sworn, who was not confronted with the defendant and as to whom there was no opportunity of cross-examination." [1]

§ 907. [CONTINUED.] GIVING THE JURY REFRESHMENTS. — On principles hereafter stated,[2] any tampering with the jury, by extending undue favors to them in the way of *food*, *drink* and *entertainment*, while making the view by or in the interest of the successful party, will demand the setting aside of their verdict; but this does not extend to *ordinary civilities*, such as the act of the deputy sheriff in charge of the jury in furnishing them with a pitcher of cider at the house of the petitioner, upon their request for refreshments.[3] And where, in making the view, the jurors, with the consent of the unsuccessful party, were treated several times to *liquid refreshments* at the house of the successful party, this was not deemed sufficient cause for setting aside the verdict. It was not regarded as the result of a sinister motive, but as the result of a motive of hospitality and kindness, for which the citizens of Virginia were generally distinguished. Moreover, the consent of the unsuccessful party cured the irregularity, under the principle *omnis concensus tollit errorem*.[4] So, in Rhode Island, the *consent* of the unsuccessful party to such an irregularity was held a *waiver* of an exception to it[5] on the principle declared in another case,[6] "that where an irregularity has been committed, the party who *consents* to a proceeding which he might have prevented by resisting on that ground, *waives* thereby all exceptions to such irregularity. Where the jury went eight miles from the court house to view the *locus in quo*, the fact that the bailiff, by order of the sheriff, procured and caused *dinner* to be served at the house of the successful party, without his solicitation or the solicitation of the jury, — there being no other convenient place to procure it, the bailiff undertaking to pay for it, and no improper com-

[1] State *v.* Lopez, 15 Nev. 407, 413.

[2] *Post*, §§ 2560, 2564, 2565.

[3] Tripp *v.* Commissioners, 2 Allen (Mass.), 556.

[4] Coleman *v.* Moody, 4 Hen. & M. (Va.) 1, 16, 21.

[5] Patton *v.* Hughesdale Man. Co., 11 R. I. 188.

[6] Tingley *v.* Providence, 9 R. I. 388.

munication having been had with the jurors, — furnished no cause for setting aside their verdict.[1]

§ 908. View granted at what Stage of the Trial. — Where there is a statute authorizing a view, without prescribing at what stage of the trial it shall be made, this is committed to the sound *discretion* of the court.[2] In Pennsylvania an application for a view presented during the week in which the case is set for trial, is not in time. Such an application will not be granted, where it would delay the trial of the cause.[3]

§ 909. Rule for a View continues through subsequent Trials. —Under the New Jersey statute,[4] where a rule for a view by a jury is once entered, it continues in force until the cause is tried, or the rule discharged.[5]

§ 910. Personal Notice in Condemnation Proceedings. — It has been thought unnecessary to give the defendant personal notice, in a proceeding to condemn land for a railway, of the time and place of the meeting of the jury, in the absence of any statute requiring notice to be given in this manner.[6]

§ 911. Costs of the View. —Courts of law have the power to allow reasonable expenses for surveys and views in proper cases, and the ordinary fee-bill does not apply to the expenses of such proceedings.[7] In the Federal courts, under the provisions of section 914 of the Revised Statutes of the United States, the rule prescribed by the statute of the State in which the court sits, will be adopted as determining the assessment of the costs of a view, in civil suits other than in equity or admiralty.[8] The plaintiff in *trespass quare clausum*, who recovered less than *forty*

[1] Johnson *v.* Greim, 17 Neb. 417.

[2] Galena &c. R. Co. *v.* Haslam, 73 Ill. 494.

[3] Bare *v.* Hoffman, 79 Pa. St. 71.

[4] *Ante*, § 882, subsec. 14.

[5] Houston *v.* Woodward, 17 N. J. L. 344. 345.

[6] Harper *v.* Lexington &c. R. Co., 2 Dana (Ky.), 227.

[7] Stockbridge Iron Co. *v.* Cone Iron Works, 102 Mass. 80, 89 (in which case the sum of $4,800, was allowed as the expenses of the view).

[8] Huntress *v.* Epsom, 15 Fed. Rep. 732.

shillings, was not entitled to costs for increase, merely because a view was granted before trial, though upon the application of the defendant.[1]

§ **912. Attended by the proper Officer.**— It should appear that the jurors were attended by the proper officer.[2] The sheriff should accompany the jury, and keep them together in a body while making the view. It is irregular to tell the jurors that such of them may go and view the premises as choose to do so.[3]

§ 913. [MICHICAN.] — OFFICE OF JUDGE OR COURT COMMISSIONER WHEN ATTENDING. — The Michigan statute allows the judge to "attend said jury, to decide questions of law and administer oaths to witnesses." But the same statute allows him to designate a circuit court commissioner for the same purpose, and also allows the jury to proceed without either. In view of these provisions, it is held that the functions of the judge, when so attending the jury, are merely *advisory*. The jury, being, as before seen,[4] judges of both the law and the fact, the judge, it seems, ought not, when attending them, to control their conduct, to admit or exclude evidence, or to instruct them, as upon a regular trial;[5] though the fact of his having done so will not be ground of setting aside their award, unless it appear that the complaining party was prejudiced thereby.[6] In such a proceeding under the Michigan statute, the inquest may be conducted by the jury without legal assistance, and a *liberal practice* in the admission or rejection of evidence is *allowable;* nor will the conclusions of the jury therein be disturbed, except for rulings which were manifestly inaccurate and contrary to substantial justice. The court say: "When the law provided how the tribunal should be constituted for these cases, and prescribed the method to be observed, it obviously contemplated that the practice respecting the admission of testimony should be as simple as a due regard to substantial justice would permit. It was not intended to leave the fate of the determination had in view, to any fine-spun theories, or to the refinements which are not uncommon in trials at the circuit. They were

[1] Flint *v.* Hill, 11 East, 184.

[2] Patchin *v.* Trustees, 2 Wend. (N. Y.) 377, 384.

[3] Brooklyn *v.* Patchen, 8 Wend. (N. Y.) 47, 84.

[4] *Ante*, § 899.

[5] Toledo &c. R. Co. *v.* Dunlap, 47 Mich. 456, 466.

[6] *Ibid.*

not supposed to be necessary to the fundamental purpose or beneficial working of inquests of this nature, and no provision was made for the certain attendance of any one presumptively qualified to deal with them. The statute plainly assumes that the jury may conduct the inquiry without the aid of any legal expert, and under circumstances in which it would be difficult, if not impracticable, to preserve technical or hair-drawn questions in a shape to be reviewed. And were the niceties of *nisi prius* to be insisted on, the proceeding would speedily break down under the perplexities and embarrassments due to its own methods. The conclusion to which these and other considerations lead is, that a very large *discretion* in admitting and rejecting testimony, is left *to the jury*, or the attending officer, whenever there is one, and that, when the case is brought here by appeal, the award cannot be disturbed on account of such decision, unless it is fairly evident, in view of the facts and circumstances, that the ruling was not only inaccurate, but was a cause of substantial injustice to the appellant in the matter of the result." [1]

§ **914. Showers appointed under the Old Practice.** — Persons called showers were appointed under the old practice, whose office it was to accompany the jury to the land to be viewed.[2] Under the old New York practice, following the English, where an application for a view was demanded by either party, showers were appointed to show the premises, under the direction of the sheriff, [3] and such also was the practice under the New Jersey statute.[4] The showers were at liberty to show marks, boundaries, etc., to enlighten the viewers; and might say to them, "these are the places which, on the trial, we shall adapt our evidence to." [5] The practical directions given in Bagley's Practice for the appointment of showers are, "that, if the opposite party refuses to name a shower, the attorney on the other side is to get an appointment from the master to name a shower; that a

[1] Michigan Air Line Ry. *v.* Barnes, 44 Mich. 223, 226, opinion by Graves, J.

[2] See the English statutes already quoted, §§ 876, 878. These functionaries were called in the old books "shewers"; but I use the modern spelling, though somewhat suggestive of a *wet day* for making the view.

[3] Brooklyn *v.* Patchen, 8 Wend. (N. Y.) 47.

[4] See the statute, *ante*, § 882, subsec. 14; also next section.

[5] Symons *v.* Clark, Barnes, 457 (1790).

memorandum of the rule, with the name and place of abode of the one shower, and of the shower nominated by the adverse party, or by the master on his default, is to be taken to the office, and the clerk will draw up the rule."[1] The practice was thus stated by Archbold: "Draw up a *præcipe* or memorandum of the rule you want. Get from the opposite attorney a memorandum of the name and place of abode of his shower, and take it, together with a similar memorandum of your own shower, and also of the time and place of meeting, etc., to one of the masters, and draw up the rule."[2]

§ 915. **Obstructing the Showers in Running Lines.** — In a curious old case in New Jersey (anno 1823), a special rule for a view for a particular line was made, supported by an affidavit that the land-owner had obstructed a shower who had already been upon it, in running a line. The court said: "The party is entitled to the special view. We can never suffer justice to be defeated by the obstinacy of the party in preventing a line being run. In the great patent line, to the running of which great opposition was made, a rule of this kind was obtained by the late Mr. Stockton, and the *power of the county* went with him. In the Cumberland case, the agent of the plaintiff went to run the lines, and the persons in possession cut his saddle to pieces: the court granted him the power of the county and ordered the sheriff to accompany him. There is no doubt of the power of the court to grant the rule, and we think it should be granted."[3] The "special rule" established in New Jersey at an early day, seems to have authorized the sheriff to take the jury of view *over any land* which might be deemed necessary, and to run the lines which bounded the premises in dispute, upon whose land soever the same might be; but this rule was not granted, on the grounds of unfairness, injustice and expense, unless there was reason to believe that the viewers would be obstructed in the performance of their duty.[4]

[1] Bag. Prac. 228.
[2] Arch. Prac. 407, 6th Eng. ed.
[3] Snyder *v.* Van Natta, 7 N. J. L. 25.
[4] Den *v.* Woodward, 4 N. J. L. 122.

§ **916. Competent to show Change in Premises after the Fact in Controversy, and before the View.**— Where the jury is permitted to view the *locus in quo*, evidence is competent, tending to show that, after the fact out of which the controversy arose, and before the making of the view, the character of the premises was materially changed.[1]

[1] Morton *v.* Smith, 48 Wis 265, 270.

TITLE IV.

ARGUMENT OF COUNSEL.

CHAPTER XXVIII. — OF THE RIGHT OF ARGUMENT GENERALLY.
CHAPTER XXIX. — OF THE RIGHT TO ARGUE QUESTIONS OF LAW TO THE JURY.
CHAPTER XXX. — ABUSES OF THE RIGHT OF ARGUMENT.

CHAPTER XXVIII.

OF THE RIGHT OF ARGUMENT GENERALLY.

SECTION
920. Right of Parties to Argument by Counsel.
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922. Waiver of Right of Argument.
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§ 920. Right of Parties to Argument by Counsel. — It is said that every party to a trial, civil or criminal, has the legal as

well as the natural right to be heard in his own cause, by himself or counsel, and that no rule of practice can deprive him of this right, if, at the proper time and in the proper way, he offers to exercise it.[1] Another court has said that a party to a civil action "has a right to be heard, not only in the testimony of his witnesses, but also in the arguments of his counsel. It matters not how weak and inconclusive his testimony may be; if it is enough to present a disputed question of fact upon which he is entitled to the verdict of the jury, he has a right to present, in the arguments of his counsel, his view of the case. This is no matter of *discretion* on the part of the court, but an absolute right of the party."[2] But it is conceived that a distinction must be taken between the right to *appear* and *defend* by counsel and the right to be *heard in argument* by counsel. The right to appear and defend is undoubtedly an absolute right, existing in all cases, civil and criminal, of which no court possesses the power to deprive a party. But the right to be heard in argument in a particular case, is plainly not a right of this absolute nature; it does not exist at all unless there is something to argue which is fairly debatable. The true office of counsel is that of *aids* or *helps* to the court and jury in the administration of justice.[3] Clearly, it is within the power of the court, in a *civil case*, to dispense with this aid or help, where it is not necessary. It is not error to deny the right of argument in such a case, where the evidence is all on one side and there is nothing to argue; nor will a judgment in such a case be reversed merely to allow a lawyer to make a speech.[4] Nor is a judge, even in a criminal case, bound to hear argument upon a question of law, in respect of which his opinion is so fixed as to render discussion unavailing.[5]

[1] Sodousky *v.* McGee, 4 J. J. Marsh. (Ky.) 271; *post*, § 1010.

[2] Douglas *v.* Hill, 29 Kan. 527.

[3] See Garrison *v.* Wilcoxson, 11 Ga. 154, 159, for an eloquent passage on this subject by Nisbet, J.

[4] Harrison *v.* Park, 1 J. J. Marsh. (Ky.) 170, 173; Neidig *v.* Cole, 13 Neb. 39.

[5] Howell *v.* Commonwealth, 5 Gratt. (Va.) 664, 668. It has been held in Georgia, in a criminal case, not *error* but an *irregularity*, for the trial court to refuse, under circumstances, to hear argument in favor of a motion to arrest the judgment and to grant a new trial. Long *v.* State, 12 Ga. 295, 331.

It is scarcely necessary to say that the right of argument may be *waived* in civil cases.[1]

§ 921. **In Criminal Cases.** — In *criminal cases* the right of accused persons to be defended by counsel is a right of a very high nature, which is guaranteed by the constitution of the United States[2] and by the constitutions of most of the States. Under these constitutional guaranties, it is the unquestioned right of every person tried upon a charge of crime to be heard by the court and jury, upon the whole case,[3] through the lips of counsel learned in the law. "If," said Scott, J., "there be any point involved in the issue before the jury, on which their minds may be enlightened or their consciences satisfied by argument, the accused has an undoubted right to all the advantage that may be derived from that source, and this right would be utterly destroyed if it were allowed to the court to prohibit argument merely because, *in its opinion*, the evidence is so clear that argument cannot vary it. Neither is this the only case in which an argument before the jury might be of importance to the accused, however direct and uncontradicted the evidence against him might be."[4]

§ 922. Waiver of Right of Argument. — Where, after the submission of a cause to the court without a jury, the court states to defendant's counsel that plaintiff's counsel do not wish to argue the case, and

[1] It has been held that, when counsel decline to argue the case to the jury, after the evidence is closed on both sides, this is a *waiver* of their right of argument; and that, when the right is thus waived, it is not revived by allowing either party to read from a record book a piece of evidence which has, in the course of the trial, been properly read to the jury, although such second reading is permitted after the jury have been charged, and have retired and returned into court and informed the court that they cannot agree. Cotton *v.* Rutledge, 33 Ala. 111, 115. Compare Prosser *v.* Henderson, 11 Ala. 484. Obviously, the refusal of the trial court to allow counsel to address the jury cannot be reviewed on error, unless the ruling is excepted to and preserved in a *bill of exceptions*. Wilkins *v.* Anderson, 11 Pa. St. 399.

[2] U. S. Const. Amendments, art. VI. This amendment extends only to the Federal tribunals.

[3] Word *v.* Commonwealth, 3 Leigh (Va.), 743, 759.

[4] *Ibid.*

asks the defendant's counsel whether they wish to make an argument, and they make no reply, and the court thereupon renders a decision adverse to the defendant, — defendant's counsel cannot thereafter claim the right of argument; it has been *waived*.[1]

§ 923. Limiting Time of Argument. — The rule, both in civil[2] and in criminal[3] cases, is that the courts have power, in the exercise of a *sound discretion*, to impose reasonable limitations upon the time which is to be allowed to parties for argument by counsel, which discretion will not be revised on error or appeal except in cases of manifest abuse. On the one hand, a reasonable exercise of this power is upheld as being absolutely necessary to enable the courts to dispatch the public business; on the other hand, a plain abuse of it, which has resulted in denying to an accused person the constitutional right of defense by counsel, or of unreasonably abridging this right, will afford ground for setting aside the judgment in a criminal case and granting a new trial.[4] Just observations have been made upon the impropriety, even in civil cases, of curtailing the time of argument, where it can be avoided without detriment to the public business; pointing out the difficulty of the court undertaking to prescribe in advance the time which may be necessary for the proper presentation by counsel of his client's cause, and dwelling upon the fact that such a restriction has a tendency to hamper the efforts of counsel and to impair the public confidence in the administration of justice.[5] While the rule which reposes this discretion in the trial

[1] Piatt *v.* Head, 35 Kan. 282.

[2] Cory *v.* Silcox, 5 Ind. 370; Rosser *v.* McColly, 9 Ind. 587; Burson *v.* Mahoney, 6 Baxt. (Tenn.) 304, 307; Freligh *v.* Ames, 31 Mo. 253; Dobbins *v.* Oswalt, 20 Ark. 619, 624; Musselman *v.* Pratt, 44 Ind. 126; Trice *v.* Hannibal &c. R. R. Co., 35 Mo. 416. *Contra*, in Iowa, Hall *v.* Wolff, 61 Iowa, 559, 562.

[3] Brooks *v.* Perry, 23 Ark. 32; State *v.* Page, 21 Mo. 257 (Scott, J., dissenting); Lynch *v.* State, 9 Ind. 541; Weaver *v.* State, 24 Ohio St. 584; State *v.* Collins, 70 N. C. 241 (Bynum, J., dissenting); Dille *v.* State, 34 Ohio St. 617; People *v.* Kelly, 94 N. Y. 527; State *v.* Donnelly, 2 Dutch. (N. J.) 463; Sullivan *v.* State, 46 N. J. L. 446; People *v.* Keenan, 13 Cal. 581, 584; Sullivan *v.* State, 47 N. J. L. 151.

[4] White *v.* People, 90 Ill. 117; Dille *v.* State, 34 Ohio St. 617; Hunt *v.* State, 49 Ga. 255; People *v.* Keenan, 13 Cal. 581, 584.

[5] Burson *v.* Mahoney, 6 Baxt. (Tenn.) 304, 307.

courts extends even to *capital cases*;[1] yet it has been suggested that if such a limitation is imposed at all in such cases, it should be done only in very extraordinary and peculiar circumstances.[2]

§ 924. What Limitations of Time Have Been Upheld. — Applying these principles, it was held in Missouri, in a criminal prosecution for cutting timber upon school lands, that no abuse of discretion appeared in an order of the trial court limiting the time of argument allowed the counsel for the defendant, to fifteen minutes. Cicero having been allowed but half an hour to defend Caius Rabirius before the tribune of the people on a charge of murder, the court concluded that "a quarter of an hour allowed to a modern orator, in a petty case of cutting down timber on school lands, cannot be considered an inhibition to be heard in defense of his client."[3] - - - - In the same State, where the action was for damages against a railway company for killing the plaintiff's hogs, and the defendant introduced no evidence, the Supreme Court could not say that the trial court abused its discretion in limiting counsel on either side to ten minutes.[4] - - - - Where, in a civil action in Tennessee, the trial court limited counsel to five minutes on each side, the Supreme Court, after giving extended observations upon the impropriety of unnecessarily restricting the time for argument, said that, in a case involving larger interests, they would have made it a ground for reversing the judgment; but as it was, they allowed the judgment to stand.[5] - - - - Complaint was made, in a civil case in Indiana, that the trial court had limited the argument of counsel for the plaintiff to ninety minutes; but it appearing that the defendant's counsel had declined to make any argument, the Supreme Court held, on plain

[1] State *v.* Collins, 70 N. C. 241; People *v.* Keenan, 13 Cal. 581.

[2] People *v.* Keenan, *supra*. See also Kizer *v.* State, 12 Lea (Tenn.), 564.

[3] State *v.* Page, 21 Mo. 257, 259. Scott, J., strongly dissented, taking the ground that no limitation of time should be attempted in advance, but that this control should be exercised on the circumstances as they should transpire. He said: "It is not for man in his weakness to declare, before a defense is begun, how long it should be reasonably continued. If a court can limit the time of speaking to fifteen minutes, it can take away the right of making a defense; for I repeat it, that no counsel who had any regard for his reputation would attempt to make a defense in fifteen minutes, in a case in which it was really necessary to make one."

[4] Trice *v.* Hannibal &c. R. R. Co., 35 Mo. 416.

[5] Burson *v.* Mahoney, 6 Bax. (Tenn.) 304, 307.

grounds, that there was no abuse of discretion.[1] - - - - On less doubtful grounds the same court upheld the limitation of an hour and a half to the plaintiff and an hour to the defendant in a civil action for slander.[2] - - - - In a criminal case in Ohio, where the subject was well considered by the Supreme Court, two days had been consumed in taking testimony in the trial court. The court had adjourned over Christmas day, and had also adjourned in order to allow one of the jurors to attend the funeral of a relative. It was held that, in limiting the time of argument to five hours on each side and in extending the defendant's time twenty minutes without interruption, the trial court did not abuse its discretion.[3] - - - - Nor did the Supreme Court of Nebraska see an abuse of discretion, in a trial of murder, in limiting argument to two hours and a half on each side, and afterwards extending the defendant's time to three hours.[4] - - - - On an appeal from a conviction under an indictment for an assault with intent to kill, the Court of Appeals of New York went so far as to uphold a limitation of half an hour to the defendant, it appearing that not many witnesses had been sworn, that the questions of fact were not numerous, and that the evidence on both sides had been submitted during the same day.[5] - - - - Reasoning upon such a case, it was conceded that a restriction to five minutes, in a case of felony, was one which could rarely be sustained while allowing the largest limits to the discretion of the trial court, if the question were properly presented for review.[6] - - - - In a capital case where the prisoner was defended by *three counsel*, and the court limited counsel to one hour and ten minutes on each side, the reviewing court was unable to say, on a general exception merely, that the discretion of the court had been abused, though it intimated an opinion that the time had been unnecessarily restricted.[7]

§ 925. What Limitations Have Been Held an Abuse of Discretion. — On the other hand, on the trial of an indictment for larceny, where four witnesses had been examined in chief for the prosecution, three for the defense and two for the prosecution in rebuttal, it was held, on obvious grounds, an abuse of discretion to limit counsel on either side to five minutes.[8] - - - - On the trial of an indictment for burglary and larceny, seven witnesses were examined for the State and

[1] Rosser *v.* McColly, 9 Ind. 587.
[2] Musselman *v.* Pratt, 44 Ind. 126.
[3] Weaver *v.* State, 24 Ohio St. 584; approved in Dille *v.* State, 34 Ohio St. 617.
[4] Hart *v.* State, 14 Neb. 572.
[5] People *v.* Kelly, 94 N. Y. 527.
[6] Williams *v.* Com., 82 Ky. 640, 643.
[7] Kizer *v.* State, 12 Lea (Tenn.), 564.
[8] White *v.* People, 90 Ill. 117.

four for the defense. Half a day was occupied in taking the testimony. It was entirely circumstantial, and there were serious conflicts in it. It was held by a majority of the court, on appeal, that a limitation of thirty minutes to the defendant's counsel was an abuse of discretion for which there must be a new trial.[1] - - - - In Georgia, on the trial of an indictment for an assault with intent to murder, where the evidence was conflicting as to whether the stabbing was done in self-defense, the Supreme Court held that, in limiting the defendant's counsel, against his protest, to thirty minutes, the trial court committed "a grave error," which was not cured by extending the time to forty minutes, which error had resulted in denying the defendant the privilege and benefit of counsel in his defense, as contemplated by the constitution.[2]

§ **926. Question how Presented for Review.** — Although it has been held in California that this question may be presented for review in an appellate court by *affidavits*,[3] yet the better and prevailing rule of practice is that the counsel complaining of the limitation of time must promptly object to it, and save an *exception*, which must be shown to the reviewing court by a bill of exceptions. There is a further view that the mere fact that counsel excepts to the order of the court, is not sufficient to bring the abuse of discretion by the court, if such it be, to the attention of the reviewing court; but counsel must "*ask for further time*, or at least in some way inform the judge that, in his opinion, injustice will be done him by the restriction, and not content himself with a mere exception."[4] The fact, then, that a court limits the time of argument to an extremely short period, will not be ground of new trial where counsel make no claim at the time that the period is too short. It was so held in a case of felony, where the court limited each side to *five minutes*.[5]

§ 927. Practice of Limiting the Time of the Advocates Among the Ancients. — In a case in Missouri,[6] where this question was un-

[1] Dille *v.* State, 34 Ohio St. 617.

[2] Hunt *v.* State, 49 Ga. 255.

[3] People *v.* Keenan, 13 Cal. 581, 584. See also Hall *v.* Wolff, 61 Iowa, 559, 561; Dowdell *v.* Wilcox, 64 Iowa, 721, 724; Turner *v.* State, 68 Tenn. (4 Lea) 206; State *v.* Comstock, 20 Kan. 650.

[4] Williams *v.* Com., 82 Ky. 640; Kizer *v.* State, 12 Lea (Tenn.), 564. Compare Sewell *v.* Com., 3 Ky. Law Rep. 86.

[5] Williams *v.* Com., *supra*.

[6] State *v.* Page, 21 Mo. 257, 259

der discussion, Ryland, J., thus stated the practice among the Greeks and Romans, without stating from what historical sources he derived his information: "This matter of limiting the time to be occupied in the prosecution of causes before courts of justice is of very ancient origin. It is found among the Greeks, and was carried thence to Rome. The Greeks had their instruments by which they measured time in the halls of judicature. The *clepsydra* was used. It was an instrument by which they measured time by means of the flowing of water through it; and so frequent and common was the practice of limiting the time to the speakers by water flowing through these instruments, that the word "water" was used metaphorically for time. When a speaker was allowed to speak so long, they said he was allowed so much water. The Greeks had an officer in their courts of justice whose duty it was to watch this measuring of time, and when a certain amount was allotted to a speaker, if there were any documents to be read during his speech, the time the reading of such documents consumed was not to be estimated as any part of what had been allotted to him; therefore this officer, whose station was near the *clepsydra*, stopped the water while the documents were being read. The orator did not waste his water in reading documents. Pliny tells us that he was allowed ten large *amphoræ* of water once, and so important was the cause in which he was engaged that the judges added four more to the amount. He says he spoke five hours. He tells us likewise that he himself used to allow the accused as much water as he wanted. The tribune of the people, Titus Sabienus, only allowed half an hour to Cicero to speak in defense of Caius Rabirius when he was prosecuted for murder. This, too, on an appeal from the judgment of the *Duumviri* to the people. The orator complained of being cramped by the narrow space of time; for though it would be nearly enough to make the defense for his client, it would not be enough for preferring the complaints he had a right to bring forward. 'I have spoken the time allowed me,' he said, when about to conclude; and in no part of the monument erected by his genius to its own immortality will you find a more polished or more brilliant gem than this half hour's work."

§ 928. Limiting Number of Counsel and Number of Speeches.[1] — The principle which vests in the trial courts the

[1] As was done in Dille *v.* State, 34 Ohio St. 617. See also Wilkins *v.* Anderson, 11 Pa. St. 399; Roeder *v.* Studt, 12 Mo. App. 566; Bradshaw *v.* State, 22 N. W. Rep. 361; Bullis *v.* Drake (Neb.), 29 N. W. Rep. 282;

discretionary power of limiting the *time* of counsel, must also operate to give them the like power to limit the *number* of counsel who may be heard in behalf of a single party. It has been suggested that the constitutional right of being heard by counsel is satisfied where the party is allowed the privilege of being heard by *one* counsel, and that he cannot demand, as a matter of right, that he be allowed to be heard by a greater number.[1] Where several persons voluntarily *join* as parties, so that they constitute, in contemplation of law, but a single party to the litigation, they cannot of right claim to be heard by more than one counsel, speaking for them collectively.[2] But *where* several persons are, against their wills, *joined as defendants* in an action, whose interests are diverse and repugnant to each other, and who have an interest in discharging upon each other the burden which the plaintiff is endeavoring to cast upon them all,—in such a case any one of such parties, where not represented by counsel appearing for the others, may of right claim to be heard in his separate behalf by at least one counsel. But, as was said by Robertson, C. J., "while the general right is acknowledged, the courts should be careful lest it may be abused and perverted to purposes of vexation, inconvenience and injustice. Before a defendant can insist on such a right he should be prepared to show very clearly that he is justly entitled to the enjoyment of it. The bare fact that he has employed other counsel than those who were employed by his co-defendants, would not of itself entitle him to be heard, after two speeches had been made by the defense. If the interests of the defendants seem to be in unison, if the argument for one includes or benefits the others, and if they all act in concert, the court might refuse to permit more than two of the counsel to be heard, and leave it to the defendants to make the selection."[3] It was ruled

Mulcairns *v.* Janesville (Wis.), 29 N. W. Rep. 565; McLain *v.* State, 24 N. W. Rep. 720, 724; Rudolph *v.* Landwerlen, 92 Ind. 34, 35; State *v.* Anderson, 10 Ore. 448, 457; Commonwealth *v.* Scott, 123 Mass. 239; State *v.* Abrams, 11 Ore. 169, 172; State *v.* Caveness, 78 N. C. 484, 489.

[1] Sodousky *v.* McGee, 4 J. J. Marsh. (Ky.) 267.

[2] *Ibid.*

[3] Sodousky *v.* McGee, 4 J. J. Marsh. (Ky.) 267, 271, where the propriety of the above conclusions is very forcibly argued by Robertson, C. J.

by Mr. Justice Curtis, of the Supreme Court of the United States, at circuit, that in a capital case the *junior counsel* has the right to argue the law and the facts, but that only one counsel has the right to close. In the particular case, however, as all the witnesses were government witnesses, and as none were called for the defendant except those whom the government had declined to examine, two counsel were permitted to close in full on the law and facts — not, however, making a precedent for cases in which the prisoner's counsel should call witnesses not examined by the grand jury and sworn on the part of the defendant.[1] A statute of Texas provides that "in prosecutions for felony the court shall never restrict the argument to a less number than two on a side."[2] It is held that this statute applies only to cases where the prisoner has more than one counsel, and that it was not intended to confer upon him the benefit of having two speeches where he has but one counsel.[3]

§ 929. Statutory Rules Prohibiting such Limitations. — In *North Carolina*, about the year 1874, a circuit judge, in a criminal case, restricted the prisoner's counsel to an hour and a half in addressing the jury, allowing two of his counsel to divide this time between them. To this ruling exceptions were taken, and, on an appeal from a conviction, the Supreme Court, while expressing its disapprobation of the manner in which the trial judge had exercised his discretion, nevertheless held that it was a power vested in him, the exercise of which could not be controlled by a reviewing court.[4] The decision of the Supreme Court was unsound, in that it held that the discretion of the trial court was absolute, and not subject to control by the appellate tribunal in a case of manifest abuse. Thereupon the legislature passed the following extraordinary statute: "Any counsel appearing in any civil or criminal case, in any of the courts of this State, shall be entitled to address the court or the jury for such a space of time as, in his opinion,

[1] United States *v.* Mingo, 2 Curt. C. C. 1.

[2] Texas Code Crim. Pro., art. 3051.

[3] Morals *v.* State, 1 Tex. App. 494, 499. It was also reasoned that, even on the contrary view of the statute, it would be incumbent upon the counsel intending to make two speeches to notify the court of such intent before the commencement of his argument, failing in which he would be deemed to have waived the right.

[4] State *v.* Collins, 70 N. C. 241.

may be necessary for the proper development or presentation of his case." It is to be noticed that the statute begins by vesting this right in "*any* counsel appearing in any civil or criminal case." If, therefore, the whole bar appear, as they frequently do in the country circuits in important cases, on the one side or the other, "*any*" (and consequently *every*) counsel so appearing may exercise the right of addressing the court or jury as long as, in his discretion, it may be necessary. The statute thus places it within the absolute power of a combination of lawyers, by following each other and "speaking against time," to protract trials until the term lapses by operation of law, to produce mistrials, to prevent other causes from being heard, and totally to obstruct and prevent the dispatch of the public business. That discretionary control over the conduct of causes in the courts of *nisi prius* which is absolutely essential to dispatch litigation and prevent denials of justice, is taken away from the judge and vested, not in the bar as an aggregate body, but in any particular lawyer or lawyers who may presume to exercise it. "What we suppose is meant," said Reed, J., commenting on this remarkable piece of legislation, "is that it is left to the discretion of *counsel* instead of to the discretion of the *presiding judge*, how they shall address themselves to the court and jury. It must be left either to the judge or the counsel, and the legislature has left it with the counsel. It may be that the confidence is not misplaced. But one instance is recorded[1] where any counsel has felt himself at liberty to abuse his privilege to the obstruction of the due administration of the law, and that was before many of the profession had many of the advantages which they now possess, and, it may be, before it was fully known that 'we cannot do evil that good may come of it.' At any rate, the law is plain, and the experiment has to be made whether it is prudent to entrust the discretion in the courts to the *counsel* instead of to the *judge*."[2] The court also ruled that, under a proper interpretation of the statute, the trial court does not possess the power to limit the *number* of counsel who shall speak; in other words, that the trial court cannot limit the *time* which the counsel for a party shall employ in arguing his cause by limiting the *number* who shall speak.[3] - - - - By statute, in *Iowa*, "the court may restrict the time of an attorney in any argument to itself, but shall not do so in any case before the jury."[4] With this statute in force, the judges in that State

[1] He referred to the instance stated in the dissenting opinion in State *v.* Collins, 70 N. C. 241.

[2] State *v.* Miller, 75 N. C. 73, 75.

[3] *Ibid.*

[4] Miller Rev. Code Ia., § 2783.

are often driven to the expedient of *vacating the bench* during an argument to a jury and engaging in the trial of another cause in another room. That State, so far as the writer knows, is the only jurisdiction in which this abominable practice has been sanctioned by an appellate tribunal. "In this State," said Rothrock, J., "a *nisi prius* judge is not permitted to limit counsel in their argument to jurors; and it often occurs that, in order to dispose of the business of the court, and keep court expenses within some limit, by consent of the parties and counsel, the judge transacts other business during part of the time taken in arguments to juries. Now, in such a case, counsel are bound to argue the case made in the record. If not disposed to do so, it would be an unjust rule that would require an opposing counsel to make objection which is usually unavailing, and call upon the judge to return to the court-room and correct the error." And the court hold that the fact that such prejudicial remarks were made in argument, under such circumstances, may be shown by affidavit.[1] - - - - Where there is a statute providing that the whole time occupied in the argument of a cause shall not exceed two hours on either side, unless the court, for special reasons, shall otherwise permit, it is not error for the court, against the objection of a party, to limit his argument to a shorter time. The statute is merely a limitation upon the power of the court to extend the time for argument unless for special reasons, and does not take away its discretion of making a reasonable curtailment of the time.[2]

§ 930. Order of Making the Argument. — This has been already much considered in a former chapter,[3] wherein it is seen that, as a general rule, the order of argument is a matter of right and follows the burden of proof. But there is an extensively prevailing view that, "in the absence of any positive rules upon the subject, the order of argument to the jury is matter of practice, within the control of the trial judge, and an appellate court will not interfere, unless there is a clear abuse of discretion, and there is good ground for believing that the party complaining has been injured by a wrong ruling as to such matters."[4]

[1] Hall *v.* Wolff, 61 Iowa 559, 562.

[2] Hurst *v.* Burnside, 12 Ore. 520, 526.

[3] *Ante*, chap. IX.

[4] Marshall *v.* American Express Co., 7 Wis. 1; Central Bank *v.* St. John, 17 Wis. 157; Savings Bank *v.* Shakman, 30 Wis. 333; Bonnell *v.* Jacobs, 36 Wis. 59; Austin *v.* Austin, 45 Wis. 523; Kaime *v.* Omro, 49 Wis. 371, 378; *ante*, § 226, n. 4.

§ 931. **The Approved Order Suggested.** — The old and approved practice is said to be, that each party shall open his case to the jury just before introducing his evidence, and that, when the evidence is all in, the defendant's counsel may sum up to the jury, and plaintiff's counsel may then close.[1]

§ 932. **Effect of Waiver of Opening Statement.** — Where the plaintiff's counsel, after having waived his right to open his case to the jury, is not confined by the trial court to a *strict reply* to the arguments of the defendant's counsel, there is no ground of reversal, if it does not appear that he was permitted to *wander from the issues* in the case.[2]

§ 933. **Scope of the Opening Statement.** — The scope of the opening statement has been already considered;[3] but it may not be amiss to notice two or three cases which have come to the attention of the writer since those paragraphs were printed. It is, of course, no objection in a criminal case that the State's attorney, in his opening statement, sets out fully what he expects to prove against the accused; but this is rather a benefit to him, since it notifies him of the case which he must be prepared to meet.[4] Where the States' counsel, in opening the case to the jury exhibited to them a photograph of the deceased, a young girl, the same having been afterwards identified by a witness as a photograph of her, it was held that no error was presented, such as could be reviewed by an appellate court, and secondly, the court regarded it as not an error such as would produce a reversal; since if the jurors had known the deceased, they would not for that reason have been incompetent, and if the people's counsel had described her personal appearance in argument, that would not have been such an abuse as would have required a new trial.[5] It cannot be as-

[1] Kaime *v.* Omro, 49 Wis. 371.

[2] Kaime *v.* Omro, 49 Wis. 371 (qualifying *dicta* in Brown *v.* Swineford, 44 Wis. 282).

[3] *Ante*, § 261, *et seq.*

[4] Dowda *v.* State, 74 Ga. 12.

[5] Walsh *v.* People, 88 N. Y. 458, 463. The principal difficulty which the court had was that, under the Revised Statutes (2 R. S. N. Y., p. 736, § 21), the matter was not the subject of exceptions, but addressed itself only to the discretion of the trial court on a motion for new trial, or to the governor on appeal for executive clemency. On this point the court cite: People

signed for error that the judge directed counsel not to spend time on certain issues in their opening statement, where, though an exception was taken to the ruling, no suggestion was made at the time that anything had been omitted from the statement, and no evidence was afterwards offered to establish the issues as to which an opening statement had been excluded.[1] The interruption by opposing counsel of the opening statement to raise questions as to its competency, or the restriction of the opening by the court, is unjustifiable, except in very clear cases of abuse; and any question raised upon it should be disposed of summarily and without argument.[2] In discussing this question in the case first cited, Cooley, C. J., said: "Since the decision in the case of *Scripps* v. *Reilly*,[3] an impression seems to have prevailed with some members of the bar that the opening statement of counsel might be challenged step by step, and questions of the relevancy and materiality of evidence raised and considered, and even argued at length, on counsel stating what he proposed to prove. Under this impression, the practice of interrupting counsel and demanding the judgment of the court on the competency of what he proposed to show, has in some cases been carried to extraordinary lengths, and elaborate arguments have been indulged in over the question whether counsel should be suffered to make certain statements of proposed evidence to the jury. Any such practice is a great abuse, and in a desperate criminal case, might be resorted to for the purpose of defeating the ends of justice, by breaking the force of a connected statement of the case to the jury, and by prolonging the trial until the trouble and expense should dishearten the authorities, and result in a relaxation of effort for conviction. The cases must be rare in which counsel would be justified in interrupting the opening of his antagonist to raise questions of competency; and when he does so, the questions ought to be disposed of summarily and without argument."[4]

v. Thompson, 41 N. Y. 1; Gaffney *v.* People, 50 N. Y. 416; Willis *v.* People, 32 N. Y. 715.

[1] Frazier *v.* Jennison, 42 Mich. 206.

[2] People *v.* Wilson, 55 Mich. 506, 513; Porter *v.* Throop, 47 Mich. 313.

[3] 38 Mich. 10.

[4] People *v.* Wilson, 55 Mich. 506, 513.

§ 934. What must be Stated in the Opening Argument. — Bearing in mind, then, that the State has, in every case where a different rule is not prescribed by statute, the right to make both the opening and the concluding argument, it becomes an important inquiry how far the prosecution is required, in its opening argument, to develop and present its case, in order not to take the accused at a disadvantage. It is the constant effort of unfair and disingenuous advocates, who represent the side of the issue which has the right to open and close, to attempt, by waiving the opening argument, to put the other party at the disadvantage of making his argument without knowing the argument which he will have to meet, the prosecuting counsel thus acquiring the advantage of delivering his entire argument in conclusion without giving to the defending counsel any right of reply to the positions which he may take. This practice ought never to be tolerated. Where the prosecution waives the opening argument and throws the burden of opening upon the defendant, the court should allow the defendant to close; for it is but just that the defendant should have a right to reply to the positions taken by the prosecution, and a spirit of fair play would dictate that the party which has the burden of opening should have the advantage of closing. To obviate such an unfair method of argument, courts have adopted the rule requiring the party possessing the right to the opening and closing arguments to deliver to the court and to the opposite counsel the points upon which he means to insist,[1] and to confine his concluding argument to the points thus delivered.[2] Under a statute[3] giving the State's counsel the right to make the concluding address to the jury in all cases, it has been ruled that the presiding judge should require him in his opening speech fairly to develop his case, and to present the law on which he relies; and that if he should fail to do this until his second speech, the presiding judge, in his discretion, would be authorized to allow the defendant's counsel again to address the jury.[4]

[1] Main *v.* Newson, 3 Johns. (N. Y.) 542; Schmidt *v.* Union Ins. Co., 1 Johns. (N. Y.) 63; Wynn *v.* Lee, 5 Ga. 217.

[2] Wynn *v.* Lee, *supra*.

[3] Texas Code Crim. Pro., art 3050.

[4] Morales *v.* State, 1 Tex. App. 494, 500. This ruling was also made with

In Missouri, a statute prescribing that "unless the case be submitted without argument, the counsel for the prosecution shall make the opening argument, the counsel for defendant shall follow, and the counsel for the prosecution shall conclude the argument," [1] is held to be mandatory. The prosecuting attorney must therefore make the opening argument, in which he must apprise the accused of the theory of the prosecution and of the positions which it takes, in order that the accused may be able to reply: and if the State's counsel refuses to make such an opening argument, he cannot be permitted to argue at all.[2] Where the statute required the counsel for the people to open and close, allowed two counsel to argue on each side, and gave the court a discretionary power to change the order thus prescribed, [3] it was held that the court committed no error in denying the concluding argument to the defendant's counsel and in allowing the counsel for the prosecution and the accused to follow each other alternately, the prosecution opening and concluding.[4]

§ 935. Limits of the Concluding Argument. — In order not to be unfair to the accused, the concluding argument must, then, be confined to the grounds stated and points of law announced in the opening argument; [5] and if counsel, in opening, refers to authorities merely, without reading them, he is understood to waive the right of reading them; and, unless they are referred to by the opposing counsel in his argument, the opening counsel cannot take them up again in his reply.[6] But if the counsel for the defendant, in his argument, comments upon a decision which is handed to him by counsel for the plaintiff, this obviously will give to the counsel for the plaintiff the right to comment upon the decision in his reply.[7] It thus appears that the concluding argument sustains an analogy to evidence in rebuttal. Its proper

reference to another Texas statute (*ante*, § 928), which allows two arguments on each side in a criminal trial.

[1] Rev. Stat. Mo. 1879, § 1908.

[2] State *v.* Honig, 78 Mo. 249, 253.

[3] Nev. Stat. 1861, chap. 472, §§ 355, 356, 357.

[4] State *v.* Pierce, 8 Nev. 291, 296.

[5] Wynn *v.* Lee, 5 Ga. 217.

[6] Cutler *v.* Estate of Thomas, 24 Vt. 647.

[7] Linsey *v.* Ramsey, 22 Ga. 627, 637.

limit is a reply to what has been brought out in the defendant's argument. As the plaintiff (or, in a criminal case, the State) is not allowed to establish its case in chief by evidence introduced for the first time in rebuttal, so the plaintiff's counsel (or the State's counsel) ought not to be allowed, in the concluding argument, to take new grounds, to state new points of law, or to read new authorities in support of the positions which he has assumed. But, as the court possesses the power, in the exercise of a sound *discretion*, of permitting evidence which should have been offered in chief to be introduced in rebuttal, provided it has been inadvertently overlooked or not availed of at the proper time by reason of accidental circumstances,[1] so it rests within the sound discretion of the trial court to permit counsel, in their concluding argument, to comment upon matters not referred to by the opposite counsel, and to which the opposite counsel are afforded no opportunity to reply, —which discretion will not be reviewed by an appellate tribunal except in a clear case of prejudice.[2]

§ 936. Cutting off Plaintiff's Right to Reply. — In a civil case in Michigan the somewhat novel question was discussed whether the defendant can, by waiving argument after the opening argument has been made, cut off the right of the plaintiff to his concluding argument. The conclusion was that the matter addressed itself to the sound *discretion* of the trial court; but, at the same time, it was pointed out that the defendant has not an absolute right to produce such a result, and that it ought to be prevented by the trial court. In the course of the opinion of the court, Campbell, J., said: "Usually the plaintiff's opening must indicate what the defendants are expected to meet. They

[1] Rucker *v.* Eddings, 7 Mo. 115; Brown *v.* Burruss, 8 Mo. 26; Curren *v.* Connery, 5 Binn. (Pa.) 488; Richardson *v.* Lessee &c., 4 Binn. (Pa.) 198; Dozier *v.* Jerman, 30 Mo. 216, 220; Blake *v.* Powell, 26 Kan. 320, 327; Rheinhart *v.* State, 14 Kan. 322; George *v.* Pilcher, 28 Gratt. (Va.) 300, 310; Farmers' Mutual Fire Ins. Co. *v.* Bair, 87 Pa. St. 124; Huntsman *v.* Nichols, 116 Mass. 521; Taylor *v.* Shemwell, 4 B. Mon. (Ky.) 577; Clayes *v.* Ferris, 10 Vt. 112; *ante*, § 345, *et seq.*

[2] Hull *v.* Alexander, 26 Iowa, 569. Compare Barden *v.* Briscoe, 36 Mich. 255, 258.

have a right to know what arguments are to be alleged against them, and this they can only learn from the opening, inasmuch as they have no reply. In most cases, if they do not think the opening requires any arguments to fortify their case against it, they may fairly let the case go to the jury as it stands, and no reply is needed where there is nothing to be replied to. But while this is true in theory, it is also true that, when all the testimony is in, the defendants know perfectly well, before the opening, what the line of argument against them must be, and that its effect upon the jury will depend more or less upon the skill or force of opposing counsel in presenting the facts. As only one counsel opens, and as, where there are more than one, the ground is usually divided, and the junior commonly precedes, the effect of cutting off a reply would be to prevent the whole case from being thoroughly presented. We cannot think that there is any absolute right in a defendant to produce such a result. Every court is bound in fairness to prevent such abuses. But inasmuch as the propriety of interference must depend upon circumstances, we think the matter comes within those discretionary rules which must, unless in extreme cases, leave the trial judge to determine the course of procedure." [1]

[1] Barden *v.* Briscoe, 36 Mich. 255, 257.

CHAPTER XXIX.

OF THE RIGHT TO ARGUE QUESTIONS OF LAW TO THE JURY.

SECTION

940. How far Juries are Judges of the Law.
941. In Civil Cases.
942. Jurisdictions in which Counsel not Permitted to argue Questions of Law to the Jury.
943. Contrary Doctrine that Counsel should be Permitted to argue Questions of Law to the Jury.
944. Arguing against the Law as laid down by the Court.
945. Right to read Books of the Law to the Jury.
946. Court may Curtail this Right within Reasonable Limits.
947. Counsel not Permitted to read Law Books upon Questions of Fact.
948. Reading a Former Decision of the Supreme Court in the Same Case.
949. Reading or Stating Good Law to the Jury.
950. Stating Bad Law to the Jury.
951. [Conclusion.] Discretion, Cautions, Instructions.

§ **940. How far Juries are Judges of the Law.** — The question to be discussed in this chapter is involved in another question upon which a great amount of useless judicial casuistry has been expended, — namely, in what sense and to what extent are juries judges of the law? The question assumes practical shape only in so far as it affords the key to the answers to the following questions: 1. To what extent are counsel permitted to argue questions of law to the jury? 2. What instructions shall the court give to the jury touching their authority as judges of the law? It is not proposed to consider this preliminary question now; it more properly belongs to the next title, where the whole subject of the relative provinces of court and jury is considered.

§ **941. In Civil Cases.** — The question may be at once laid out of view, so far as *civil cases* are concerned, by the statement that in no such case, except according to some early conceptions in actions for damages for slander or libel, are the jury in any sense judges of the law. In such cases the jury must take

the law from the court, and not from the counsel. The latter ought not to be allowed to argue questions of law to the jury, or to read them in argument from books of the law.[1] It has been doubted by one court whether counsel might not properly be permitted to read books of the law to the jury in civil cases, for the purpose of illustration merely;[2] but at a later period the same court held, on fuller consideration, that even such a practice is improper.[3]

§ 942. Jurisdictions in which Counsel are not Permitted to argue Questions of Law to the Jury. — In the courts of the United States,[4] and in the courts of most of the States, it is settled that counsel cannot be permitted to argue to the jury questions of law which have been decided by the court.[5] Juries have no power to judge of the *constitutionality* of acts of the legislature, and consequently counsel have no right to argue such questions to them.[6]

[1] Delaplane *v.* Crenshaw, 15 Gratt. (Va.) 457, 481; Philpot *v.* Taylor, 75 Ill. 309; Chicago *v.* McGiven, 78 Ill. 347; Sprague *v.* Craig, 51 Ill. 289; Tuller *v.* Talbot, 23 Ill. 357; Heagy *v.* State ex rel., 85 Ind. 260. See *contra*, for a local and peculiar rule in Georgia, Robinson *v.* Adkins, 19 Ga. 398; Ransone *v.* Christian, 56 Ga. 351, 355.

[2] Tuller *v.* Talbot, *supra*.

[3] Chicago *v.* McGiven, *supra*.

[4] Commonwealth *v.* Zimmerman, 1 Cranch C. C. (U. S.) 47; United States *v.* Columbus, 5 Cranch C. C. (U. S.) 304; United States *v.* Riley, 5 Blatchf. (U. S.) 204, 207.

[5] State *v.* Anderson, 44 Cal. 65, 70.

[6] Franklin *v.* State, 12 Md. 236, 246, 249; Callender's Case, Whart. St. Tr. 688, 710; United States *v.* Riley, 5 Blatchf. (U. S.) 204, 207. Callender's Case, *supra*, was a prosecution, by indictment, for a seditious libel, in the Circuit Court of the United States for the district of Virginia, in the year 1800. William Wirt, in addressing the jury on behalf of the defendant, undertook to argue to them the constitutionality of an act of the legislature of Virginia, but, after several rude interruptions by the presiding judge (the Hon. Samuel Chase), was obliged to take his seat. Mr. Wirt's reasoning was summed up in his concluding sentence: "Since the jury have a right to consider the law, and since the constitution is the law, the conclusion is certainly syllogistic that the jury have the right to consider the constitution." The conduct of Mr. Justice Chase on this trial, and, among other things, this particular ruling, was made one of the grounds for his impeachment before the Senate of the United States. The Supreme Court of Indiana take the same view of this question which was taken by Mr. Wirt, holding that as the constitution is a part of the law, it follows as a necessary corollary of

§ 943. Contrary Doctrine that Counsel Should be Allowed to Argue the Law to the Jury. — As hereafter seen,[1] the contrary view prevails in Massachusetts, Maine, Indiana, Illinois and other States, that in criminal cases counsel have the right to argue the law to the jury. In *Georgia* the right is extended even to civil cases. But the origin of the doctrine in that State is found in the peculiar provisions of the constitution of 1777 and that of 1798, which need not be further considered. The Georgia courts, under these provisions, uphold the right to argue the law as well as the facts to the jury in civil cases, subject to the corrective power of the court in charging the jury and in granting new trials.[2] The Supreme Court of *Tennessee* in upholding the right to argue the law to the jury in criminal cases, overruled the decision of a very able criminal judge.[3] The court placed its conclusion upon a principle thus expressed in its opinion by Turney, J.: "It is impossible to understand how counsel can make out a case from facts, while he is forbidden to state and argue the law applicable to the facts. It requires both facts and law to make a prosecution or defense in either civil or criminal proceedings. Without facts there is no law to operate. To hold that the facts shall be argued, but the law shall not be presented with these facts, is to deny the benefit of counsel. The value of facts depends upon the law, and that governs them. No lawyer can discuss propositions, except in a combination of facts and law."[4] The leading case in support of this doctrine is a decision of the Supreme Judicial Court of *Massachusetts*, in which the subject was discussed in an ample manner and with great

the rule, that the jury are the judges of the constitution as well as of any other part of the law, and consequently may determine the constitutionality of a statute. Lynch *v.* State, 9 Ind. 541. In United States *v.* Riley, 5 Blatchf. (U. S.) 204, 207, Mr. District Judge Shipman held that it was not error, in a criminal trial, to require counsel to argue the question of the constitutionality of the law to the court, instead of arguing it to the jury. See also on this question, Commonwealth *v.* Murphy, 10 Gray (Mass.), 1.

[1] *Post*, § 2140.

[2] Robinson *v.* Adkins, 19 Ga. 398, 401. But query? *Post*, p. 1509.

[3] Judge Horrigan, of the Criminal Court of Shelby County.

[4] Hannah *v.* State, 74 Tenn. (11 Lea) 201.

ability by counsel, and considered in an important opinion of Chief Justice Shaw. The court upheld the right of counsel in criminal cases, to argue the law as well as the facts to the jury, both upon principle and in view of the practice which had long existed in that commonwealth. The question was reasoned with the massive force which distinguish the opinions of that eminent judge upon important questions. The decision is perhaps the leading American judgment upon the question in what sense juries are to be deemed judges of the law. Omitting those portions of the opinion which deal with that question, and referring to those portions which deal with the immediate question of the right of counsel to argue the law to the jury, one or two extracts will be given: "In thus conducting a jury trial in a criminal case, with a view to the return of a general verdict, it is obvious that the whole matter, of law as well as of fact, must be stated and explained to the jury, so that they may fully understand and apply it to the facts; because, as we have seen, in the form of a general verdict, they are to declare the law as well as the fact. For this purpose it must be necessary, and in our State it is the usual practice, for the parties respectively, by their counsel, to state the law to the jury, in the presence and subject to the ultimate direction of the judge, because, unless the jury understand the rule of law, with its exceptions, limitations and qualifications, they cannot know how to apply the evidence, and determine the truth of the material facts necessary to bring the case of the accused within it. In thus presenting their respective views of the law to the jury under the direction of the court, for the better information of both the judge and jury, great latitude has been allowed in the practice of this commonwealth, and counsel have been permitted to state and enforce their views of the law, especially in capital cases, by definitions and cases from such works of established authority as the court may approve. In this great latitude has been allowed, in tenderness to the accused, and a liberal confidence reposed in counsel called to defend the accused in the hour of his trial. But such an address, whether it be upon the matter of fact or matter of law, and whether in fact it be directed to the court or jury, is, in legal effect and actual oper-

ation, an address to both; not because they have not several duties to perform and distinct questions to pass upon, but because it is one trial, carried on at once before court and jury, in which the judge must have a clear comprehension of the evidence conducing to the proof of facts, which may or may not render the accused amenable to the law, in order that he may give such directions in matter of law as the state of the evidence may require; and the jury must have a clear comprehension of the rules of law, in order to determine whether the facts proved bring the accused within them; and because the minds of both judge and jury, acting within their respective departments, must result in that general verdict of acquittal or conviction which is the proper determination of the cause. Considering the latitude which has been allowed in this commonwealth by a long course of practice, and the difficulty of drawing an exact line of distinction between that full statement and exposition of his views of the law, which counsel may properly make in a general address to the court and jury, upon the questions embraced in the issue and involved in the general verdict, and the address to the jury separately upon questions of law, we are of opinion that a party may, by his counsel, address the jury upon questions of law, subject to the superintendence and controlling power of the court to decide questions of law, by directions to the jury, which it is their duty to follow. In ordinary cases such directions to the jury, upon questions arising in the cause, are not given until the parties, by their counsel, have submitted their respective views of the law and facts in an argument to the court and jury. * * * As the jury have a legitimate power to return a general verdict, and in that case must pass upon the whole issue, this court are of opinion that the defendant has a right by himself or his counsel, to address the jury, under the general superintendence of the court, upon all the material questions involved in the issue, and, to this extent and in this connection, to address the jury upon such questions of law as come within the issue to be tried. Such address to the jury, upon questions of law embraced in the issue, by the defendant or his counsel, is warranted by the

long practice of the courts in this commonwealth in criminal cases."[1]

§ 944. Arguing Against the Law as Laid Down by the Court. — If the court is the official mouthpiece of the law, and if the jury are bound to receive and administer the law as laid down by the court, it follows as a conclusion that counsel have not the right to argue to the jury the law contrary to the views expressed by the court. But if the jury are the judges of the law, and if the views of the court upon questions of law are merely advisory to the jury, which they are at liberty in their discretion to disregard, then it would seem to follow that counsel should be allowed to argue the law to the jury fully and freely, and in order to argue it fully and freely, to argue it, if necessary, contrary to the declarations of the court. Upon this question there is fortunately not very much controversy. It is held in the Federal[2] and in most of the State jurisdictions[3] that counsel

[1] Commonwealth *v.* Porter, 10 Metc. (Mass.) 263, 283, 287. What the court distinctly ruled was, that the trial court erred in interrupting counsel, and in prohibiting counsel from arguing to the jury, before the court had delivered its charge to them, propositions of law which were opposed to views of the law entertained by the court. This case is therefore a distinct authority, opposed to the cases cited in the preceding paragraph, which hold that counsel ought not to be allowed to controvert, in argument to the jury, the views which the court has expressed concerning the law.

[2] United States *v.* Morris, 1 Curt. C. C. (U. S.) 23, 48 (fugitive slave case — able opinion by Mr. Justice Curtis); Commonwealth *v.* Zimmerman, 1 Cranch C. C. (U. S.) 47; United States *v.* Columbus, 5 Cranch C. C. (U. S.) 304. Compare United States *v.* Watkins, 3 Cranch C. C. (U. S.) 443.

[3] Dejarnette *v.* Commonwealth, 75 Va. 867, 882; Davenport *v.* Commonwealth, 1 Leigh (Va.), 585, 597; Delaplane *v.* Crenshaw, 15 Gratt. (Va.) 457, 481; Smith *v.* Morrison, 3 A. K. Marsh. (Ky.) 81; Harrison *v.* Park, 1 J. J. Marsh. (Ky.) 170, 173; Edwards *v.* State, 22 Ark. 253. Baltimore &c. R. Co. *v.* Boyd (Md.), 7 Centr. Rep. 435, 438. See also Bell *v.* State, 57 Md. 120; Sowerwein *v.* Jones, 7 Gill & J. (Md.) 335. Thus, the court has an undoubted right to state to the jury the *legal effect of evidence* which has been introduced and submitted to their consideration. McHenry *v.* Marr, 39 Md. 522; Wheeler *v.* State, 42 Md. 570; *post*, § 2244. If counsel do not except to such statements, they become the law of the case. Hogan *v.* Hendry, 18 Md. 128; Davis *v.* Patton, 19 Md. 128; Dent *v.* Hancock, 5 Gill (Md.), 127; and, being the law of the case, counsel are not at liberty to argue against them. Bell *v.* State, 57 Md. 109, 120; Sowerwein *v.* Jones, 7 Gill & J. (Md.) 341.

have no right to argue to the jury propositions of law contrary to those which have been laid down by the court. The courts which so hold proceed upon the view that to permit this to be done would be contrary to the respect which the court owes to itself, and that it would be a perversion of the law to allow an appeal from the court to the jury for the purpose of correcting the errors of law committed by the court, instead of correcting them by an appeal to the proper appellate tribunal provided by the constitution and the laws for that purpose. On the contrary, in the most important American judgment which is to be found upon the question of the power of juries to judge of the law as well as of the facts, it was distinctly ruled, in an opinion given by Chief Justice Shaw, that the trial court committed error in interrupting the argument of counsel to the jury, and in preventing counsel from expressing to the jury views of the law contrary to those entertained by the court.[1] In Indiana, where counsel have the right to argue law to the jury, where it is sought to put the trial court in error, for the reason that the counsel for the accused was prohibited from commenting on instructions which the court had announced its purpose to give, under the provisions of a statute, it must appear *what the comments were* which the counsel desired to make.[2]

§ **945. Right to Read Books of the Law to the Jury.** — If the right exists to argue the law of the case to the jury, it must follow that the right exists to read books of the law to them, as authority and for illustration, in like manner as counsel would do in arguing the law to the court. This right has accordingly been upheld in those jurisdictions where the right to argue the

[1] Commonwealth *v.* Porter, 10 Metc. (Mass.) 263, 283, 287. It is not understood that counsel in this case attempted to argue to the jury against any *previous ruling* of the judge. He argued against the views of the judge, and was interrupted, and it was held that the judge had no right to do this. See also Lynch *v.* State, 9 Ind. 541; White *v.* People, 90 Ill. 117. In Kansas, counsel may argue against the court's instructions, in criminal prosecutions for libel. State *v.* Verry (Kan.), 13 Pac. Rep. 838.

[2] Blizzard *v.* Applegate, 77 Ind. 527, 572.

law to the jury exists,[1] — those courts holding that a substantial denial or deprivation of it is error for which a new trial will be granted.[2] Another view remits the question, almost entirely to the *discretion* of the trial court.[3]

§ 946. Court May Curtail this Right Within Reasonable Limits. — It seems to be everywhere agreed that the court may curtail this right within reasonable limits.[4] Accordingly the trial court is not obliged to allow the reading of numerous authorities to the jury, or the unnecessary consumption of public time in discussing to the jury such authorities, especially where the court is familiar with them, and is prepared in its charge to announce to the jury the propositions of law which they contain, so far as applicable to the case on trial.[5] The refusal of the trial court to allow the counsel of the accused to read to the jury the whole of the statute upon one section of which the prosecution is founded, presents no question for review, if it appear that counsel was allowed to read those parts of the statute which, in

[1] Commonwealth *v.* Austin, 7 Gray (Mass.), 51; Jones *v.* State, 65 Ga. 506; Johnson *v.* State, 59 Ga. 142; Lynch *v.* State, 9 Ind. 541; Harvey *v.* State, 40 Ind. 516; Stout *v.* State, 96 Ind. 407 (overruling Carter *v.* State, 2 Ind. 617, and it seems Murphy *v.* State, 6 Ind. 490). A qualified rule exists in Georgia, applicable to civil cases, to the effect that counsel may argue to the jury their view of the law, or what they expect the court to charge as the law subject to the correction of the court. Ransone *v.* Christian, 56 Ga. 351, 355.

[2] McMath *v.* State, 55 Ga. 304; 308; Warmock *v.* State, 56 Ga. 503.

[3] Thus, in *Texas* the rule is now established by repeated decisions that the extent to which counsel may read to the jury from *books of the law and of science*, as a part of their argument, is a matter left largely to the discretion of the trial judge, and one which will not be revised on appeal, unless that discretion has been clearly abused to the prejudice of the appellant. Smith *v.* State, 21 Tex. App. 278, 307; Wade *v.* De Witt, 20 Tex. 398; Dempsey *v.* State, 3 Tex. App. 429; Hines *v.* State, 3 Tex. App. 483; Foster *v.* State, 8 Tex. App. 249; Cross *v.* State, 11 Tex. App. 84; Lott *v.* State, 18 Tex. App. 627. As to books of science, see *post*, § 995.

[4] Commonwealth *v.* Austin, 7 Gray (Mass.), 51; Murphy *v.* State, 6 Ind. 490; Commonwealth *v.* Murphy, 10 Gray (Mass.), 1; Mayfield *v.* Cotton, 37 Tex. 229, 232; Curtis *v.* State, 36 Ark. 284, 292; Winkler *v.* State, 32 Ark. 539; People *v.* Anderson, 44 Cal. 65, 70.

[5] Mayfield *v.* Cotton, 37 Tex. 229, 232.

his opinion, affected the construction of that section, and to comment to the jury upon the whole statute.[1] Nor does the trial court commit any abuse of discretion in refusing to permit counsel to read to the jury legal authorities which have no pertinency to the facts of the case on trial.[2] In Massachusetts, where the right to argue the law to the jury is upheld, it has been held, that the refusal of the presiding judge to allow the counsel of the accused to read to the jury an *adjudication* of the highest court of *another State*, holding that a statute similar to the one upon which the prosecution was founded was contrary to the *constitution* of that State, presented no ground of exception. "This," said Chief Justice Shaw, "was a purely local decision, on a different *constitution* and different statute, and all merely local, of no force here. Without laying down any general rule respecting the reading of books on a trial, the court are of opinion that this was rightfully rejected." [3]

§ 947. Counsel not Permitted to Read Law Books upon Questions of Fact. — Counsel have no right, in argument, to introduce any evidentiary matters to the jury which have not been regularly offered and admitted in evidence, in presenting the evidence in support of the action of the defense.[4] The toleration

[1] Commonwealth *v.* Austin, 7 Gray (Mass.), 51.

[2] Curtis *v.* State, 36 Ark. 284; 292; Winkler *v.* State, 32 Ark. 539.

[3] Commonwealth *v.* Murphy, 10 Gray (Mass.), 1.

[4] State *v.* Lee, 66 Mo. 165; State *v.* Kring, 64 Mo. 591; Yoe *v.* People, 49 Ill. 410, 412; Hennies *v.* Vogel (Ill.), 7 Cent. L. J. 18; *s. c.* 87 Ill. 242; State *v.* Smith, 75 N. C. 306; Mitchum *v.* State, 11 Ga. 615, 633; Tucker *v.* Henniker, 41 N. H. 317; Hatch *v.* State, 8 Tex. App. 416, 423; Brown *v.* Swineford, 44 Wis. 282, 293; Berry *v.* State, 10 Ga. 511, 522; Thompson *v.* State, 43 Tex. 268, 274; Festner *v.* Omaha &c. R. R. Co., 17 Neb. 280; Rolfe *v.* Rumford, 66 Me. 564; Union Central Life Ins. Co. *v.* Cheever, 36 Ohio St. 201, 208; *s. c.* 38 Am. Rep. 573; Walker *v.* State, 6 Blackf. (Ind.) 2; Hoxie *v.* Home Ins. Co., 33 Conn. 471; Bulloch *v.* Smith, 15 Ga. 395; Dickerson *v.* Burke, 25 Ga. 225; Doster *v.* Brown, 25 Ga. 24; Cook *v.* Ritter, 4 E. D. Smith (N. Y.), 254; Loyd *v.* Hannibal &c. R. R. Co., 53 Mo. 509; Bankard *v.* Baltimore &c. R. R. Co., 34 Md. 197; Saunders *v.* Baxter, 6 Heisk. (Tenn.) 369; Bill *v.* People, 14 Ill. 432; Jenkins *v.* North Carolina Ore Dressing Co., 65 N. C. 563; State *v.* Williams, 65 N. C. 505; Devries *v.* Haywood, 63 N. C. 53; Gould *v.* Moore, 40 N. Y. Super. (8 Jones & S.) 387, 395; Northington

of such conduct on the part of the prosecuting counsel in a criminal trial has been justly regarded as a substantial invasion of the right of trial by jury, which is guaranteed to accused persons by American constitutions.[1] Applying these principles, it is held, even in those jurisdictions where counsel are permitted to argue the law to the jury, that they cannot be allowed, under pretense of reading legal authorities to the jury, to read passages from such books which bear upon questions of fact which are before the jury for consideration, thus introducing to the minds of the jurors evidentiary matters which have not been regularly admitted by the presiding judge.[2] Thus, where the question of fact for decision was whether a *draft* was presented for payment within a reasonable time, it was held error to allow counsel to read to the jury and to comment upon cases found in the books of reports upon this subject.[3] So, where the case was a civil action against a municipal corporation, for *negligence* in allowing an obstruction in its highway, whereby the plaintiff had been injured, it was error to allow the plaintiff's counsel, against the objection of the defendant, to read extracts from reported cases in which large damages had been held not excessive.[4]

§ 948. Reading a Former Decision of the Supreme Court in the Same Case. — It has been held upon the clearest grounds, that counsel have no right, in arguing the cause to the jury, to read to them a previous decision of the Supreme Court in the same case,[5] — the conclusion being that the court may, in its discretion, reserve the opinion of the Supreme Court for its own guid-

v. State, 78 Tenn. (14 Lea) 424; Flint *v.* Commonwealth, 81 Ky. 186; Sullivan *v.* State, 66 Ala. 48; Grosse *v.* State, 11 Tex. App. 364, 367; Brown *v.* State, 60 Ga. 210, 212; Buliner *v.* People, 95 Ill. 396.

[1] Tucker *v.* Henniker, 41 N. H. 317, 324; Mitchum *v.* State, 11 Ga. 615, 633.

[2] Dempsey *v.* State, 3 Tex. App. 429; Phœnix Ins. Co. *v.* Allen, 11 Mich. 501, 512; Evansville *v.* Wilter, 86 Ind. 414; Baldwin's Appeal, 44 Conn. 37. Compare Warren *v.* Wallis, 42 Tex. 472.

[3] Phœnix Ins. Co. *v.* Allen, 11 Mich. 501, 512.

[4] Evansville *v.* Wilter, 86 Ind. 414.

[5] Good *v.* Mylin, 13 Pa. St. 538 (overruling Noble *v.* McClintock, 6 Watts & S. (Pa.) 58); Dempsey *v.* State, 3 Tex. App. 429. Compare Warren *v.* Wallis, 42 Tex. 472.

ance in instructing the jury. But in a State where the right to argue questions of law to the jury is upheld, on the ground that the jury are judges of the law as well as of the facts, it has been held no ground for a new trial that the prosecuting attorney, in a criminal case, in his closing argument to the jury, read to them a previous decision of the Supreme Court.[1]

§ **949. Reading or Stating Good Law to the Jury.** — Under any theory of this question, it is obvious that, if the court allow counsel to argue the law to the jury, and to read to them from books of the law, there will be no ground for a new trial if the passages which the counsel read are good law, applicable to the case before the jury, and contain no matter having a tendency to prejudice their minds in the decision of the case. Thus, in a criminal trial in Georgia, the counsel for the State read to the jury from a book of the law the following passage: "*Alibi*, as a defense, involves the impossibility of the prisoner's presence at the scene of the offense at the time of its commission; and the range of the evidence, in respect to time and place, must be such as to reasonably exclude the possibility of such presence." The Supreme Court of Georgia had previously held that this was the law,[2] and the trial court so charged the jury. It was held that no ground was presented for a new trial.[3]

§ **950. Stating Bad Law to the Jury.** — On a criminal trial, in a State where the instructions of the court precede the argument of counsel, where the court failed to instruct the jury upon a material point, and the prosecuting attorney, in his closing argument, took it upon himself to supply the omission, and, in so doing, stated the law in a manner prejudicial to the prisoner, it was held that the judgment must be reversed.[4] So, where, in his closing argument to the jury, the prosecuting attorney told them that, where the charge was murder in the first degree, the defense of insanity admitted that the charge was proved, and the court refused, on the defendant's motion, to require him to with-

[1] Stout *v.* State, 96 Ind. 407.
[2] Wade *v.* State, 65 Ga. 756, 759.
[3] Johnson *v.* State, 59 Ga. 142.
[4] State *v.* Reed, 71 Mo. 200.

draw the remark, it was held that this was error for which the judgment must be reversed.[1] But it was not error to refuse a new trial, in a criminal case, because the prosecuting attorney stated to the jury, in argument, a proposition of law which, though erroneous, could have no bearing upon the question of the guilt or innocence of the accused, and hence no effect on their verdict.[2]

§ 951. [Conclusion.] **Discretion, Cautions, Instructions.**— A just conclusion seems to be that, in those jurisdictions where the practice of the English courts of law is followed, under which counsel make their arguments to the jury before the charge of the court is given, counsel must be permitted, within reasonable limits, to state and to argue their views and theories of the law applicable to the case; that in every such argument it is necessary to the full presentation of the view upon which the prosecution or the defense rests, that a state of the law applicable to the facts should be assumed to exist, for which reason counsel must be permitted, in the very nature of things, to address the jury upon the whole case, both upon the law and the facts. But while this is so, counsel ought not to be permitted to argue to the jury against propositions of law which have been decided by the court in the particular case, thus presenting the unseemly and indecent spectacle of an attempt to appeal from the judge, who is learned in the law and who is the official mouthpiece of the law, to the jury, who are unlearned in the law, and who are not judges of the law except in the limited sense hereafter stated.[3] It seems reasonably to follow that, in order to allow the proper freedom of argument, the court should not interrupt or check counsel — especially the counsel for the prisoner — in stating or enforcing propositions or conclusions of law which may be contrary to the views of the court, unless the conduct of counsel involves a flagrant and willful attempt to misstate the essential law of the case and to mislead the minds of the jury in respect of it, and unless counsel should deliberately assail or impugn propositions of law which the court has already decided

[1] State *v.* Erb, 9 Mo. App. 588.

[2] State *v.* Dibble, 6 Mo. App. 584.

[3] *Post*, § 2132, *et seq.*

in the case;[1] but that the court should, in ordinary cases, reserve the correction of erroneous statements of the law made by counsel to the jury, to be made in its general charge. In those jurisdictions where the charge of the court precedes the argument of counsel, the counsel should be confined, in their argument from legal premises, to the propositions of law embodied in the court's instructions, and the practice of reading books of the law to the jury ought not to be tolerated, especially where the attempt involves an effort to induce the jury to disregard the court's instructions, or to take the law of the case from the books rather than from the court.[2] If, in reading from books of the law to the jury, counsel read passages which are evidentiary in their nature, the court should, so far as possible, correct the error and remove the prejudice, by instructing the jury that such passages are not to be regarded as evidence in the case.[3] The court ought further, in instructing the jury, to disabuse their minds of any notion which they may have received from the argument of counsel, that, in their office of judges of the law, they have a right to set aside the law, or to refuse to apply the law as expounded to them by the court.[4] Finally, it may be doubted whether

[1] People *v.* Anderson, 44 Cal. 65, 70.

[2] People *v.* Anderson, *supra;* State *v.* Reed, 71 Mo. 200; State *v.* Erb, 9 Mo. App. 588.

[3] Harvey *v.* State, 40 Ind. 515. Contrary to this view, it was held, in a criminal trial in Georgia, where counsel for the defendant had read to the jury in his argument, passages from Phillipps' Remarkable Cases of Circumstantial Evidence, that if the judge had reason to believe that the jury were likely, from any cause, to be misled thereby, it would have been his duty to state to them what evidence was to influence them in arriving at their verdict; but that it was error to instruct them that they "must not be influenced, guided by or accept as law in this case, any imaginary cases taken from works of romance." Jones *v.* State, 65 Ga. 506.

[4] On this point, the charge of Mr. Justice Baldwin, in United States *v.* Wilson, Bald. (U. S.) 78, 108; that of Mr. Chief Justice Jay, in State of Georgia *v.* Braisford, 3 Dallas (U. S.), 1, 4; that of Mr. President Addison, in Pennsylvania *v.* Bell, Add. (Pa.) 156, 160; that of Mr. Justice Story, in United States *v.* Battiste, 2 Sumn. (U. S.) 240, 243, may be referred to as fair models of cautionary instructions. See also and compare Hamilton *v.* People, 29 Mich. 173, 189; Warren *v.* State, 4 Blackf. (Ind.) 150; Townsend *v.* State, 2 Blackf. (Ind.) 151; State *v.* Snow, 18 Me. 346, 348; Lynch *v.* State, 9 Ind. 541 (where the court approved the instructions given on this point in Stocking *v.* State, 7 Ind. 326, and

there is any sounder view of the question of the right to argue the law to the jury and to read to them passages from books of the law, than that which commits the whole subject to the sound *discretion* of the trial court, subject to the corrective power of the appellate courts in cases of abuse.[1]

doubted whether the instruction in Carter *v.* State, 2 Ind. 617, could be sustained).

[1] Curtis *v.* State, 36 Ark. 284, 292; Winkler *v.* State, 32 Ark. 539; Mayfield *v.* Cotton, 37 Tex. 229, 232; Commonwealth *v.* Austin, 7 Gray (Mass.), 51; Murphy *v.* State, 6 Ind. 490; Good *v.* Mylin, 13 Pa. St. 538.

CHAPTER XXX.

ABUSES OF THE RIGHT OF ARGUMENT.

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§ 955. Duty of Judge to Prevent Abuses of this Right. — The right of argument, as seen in a former chapter,[1] is a valuable right, secured to every suitor by the principles of Anglo-American law, which are embodied in American constitutions. But the right has its limits. The judge has power to see that it is not abused, and may, to this end, exercise a reasonable control over the course of the argument.[2] To this end it is his duty to *remain on the bench* during the argument to the jury; and if he vacate the bench, and, while he is absent, counsel, in arguing their client's cause to the jury, overstep the limits of privilege accorded to advocacy, to the manifest prejudice of the opposite party, a new trial will be ordered by an appellate court, in the exercise of a proper superintendence.[3] The presiding judge is not a mere nose of wax; nor is he a mere umpire in a gladiatorial contest;

[1] *Ante*, ch. XXVIII.

[2] Word *v.* Commonwealth, 3 Leigh (Va.), 743, 760.

[3] Brownlee *v.* Hewitt, 1 Mo. App. 360; State *v.* Claudius, *Id.* 551. In Iowa as already seen (*ante*, § 829), a statute prohibiting the curtailment of the time of argument to the jury has enforced a change of rule in this respect. In Connecticut it has been

nor is it merely his office to keep the peace in the court-room while the advocates and the jurors try the case. He not only checks abuses of the privilege of argument, but he decides, in cases of dispute, what evidence has been admitted.[1] In those jurisdictions where the instructions precede the argument, it is his duty to interpose and restrain counsel who is indulging in arguments and illustrations before the jury, which are unwarranted by the instructions of the court, and which will, if unrestrained, be likely to mislead the jury; and it has been well said that "no duty incumbent upon the judge of a trial court is more imperative, nor more important to the fair and orderly administration of justice, than that of interposing to restrain everything in the course of the trial that tends to mislead the jury, and to divert their minds from the strict line of inquiry with which they are charged."[2]

§ 956. To Correct Misrepresentations of Counsel as to the Facts. — It has been said in Georgia: "It is certainly the business of the court, when practicable, to correct the misrepresentations of the testimony by counsel, particularly when that counsel is in conclusion. And it is practicable, when the witness whose evidence is charged to be misrepresented, is in court. He ought to be called to say what he did testify. And it is practicable in cases in which, like this, the law requires the testimony to be taken down, by reference to the brief. We differ with the judge in his opinion that the brief of the testimony taken down, in cases of felony, is but a memorandum for his private use. It is taken for the use of the reprieving and pardoning power, primarily no doubt; and we see no objection, where the witness is not at hand, to its being used to correct a misrepresentation on the argument. Its verity is presumed, because it is taken under as serious sanctions as any act is done by the court or its authority in the progress of the trial. It is

ruled that, while it is the duty of the judge, presiding at a criminal trial, to be present during the whole of the argument, so that he can see and hear all that is done and said, yet it has been held not such an irregularity as would require a new trial, that, for a few moments during the argument of such a case, he went into the retiring room immediately behind the bench, but remained all the time where he could hear what was said, the door being apparently open, so that he could also see what was done. State *v.* Smith, 49 Conn. 376, 383.

[1] Davis *v.* Hill, 75 N. C. 224, 228; Long *v.* State, 12 Ga. 295, 330.

[2] Baltimore & Oh. R. Co. *v.* Boyd (Md.), 10 Atl. Rep. 315; *s. c.* 7 Cent. Rep. 435.

made the duty of the judge to take or cause it to be taken down, and in the event of a conviction and sentence, it is required to be approved by the court and recorded, and upon application for reprieve or pardon, a certified copy of it must accompany the application." The court concluded that the refusal of the trial court to have the testimony of a particular witness set right, either by calling the witness again or by referring to the brief, though not error, was an irregularity.[1] In another case it is said: "The jury can consider the weight and effect of that evidence only, which has been allowed by the court to go to them. In cases where the court is not distinct in his recollection of the testimony, he may, and it is generally advisable, to refer it to the jury for their better recollection. If they have doubts as to the precise terms of the testimony, the court will, at their suggestion, have the witness recalled and re-examined on the doubtful point." [2]

§ 957. Duty of Counsel to Object to Improper Argument. — In the discharge of this office, as of every other, the presiding judge is entitled to reasonable aid from the counsel in the case on trial, or from the parties themselves, where they appear in proper person. Where counsel, in arguing to the jury, exceed the limits allowed to advocacy, the way to correct the prejudicial effect of the argument is either to object to it at the time, to answer it by counter argument, or to ask suitable instructions to the jury with reference to it.[3] After verdict it comes too late;[4] and whether the objection is saved for review by affidavit, or by a recital in a bill of exceptions (according to the practice in the particular jurisdiction), it is equally necessary that the record should show that the objection was made at the time of the misconduct.[5] Where such an objection is thus sea-

[1] Long *v.* State, 12 Ga. 295, 330, opinion by Nisbet, J.

[2] Davis *v.* Hill, 75 N. C. 224, 228.

[3] Learned *v.* Hall, 133 Mass. 417, 419; Turner *v.* State, 68 Tenn. (4 Lea) 206; Roeder *v.* Studt, 12 Mo. App. 566; Rudolph *v.* Landwerlen, 92 Ind. 34, 37; Earll *v.* People, 99 Ill. 123; Jackson *v.* State, 18 Tex. App. 586; *infra*, § 961.

[4] Powers *v.* Mitchell, 77 Me 361, 368; Learned *v.* Hall, *supra;* Dowdell *v.* Wilcox, 64 Iowa, 721, 724; State *v.* Degonia, 69 Mo. 486; Barbour *v.* McKee, 7 Mo. App. 587; State *v.* Forsythe (Mo.), 6 West. Rep. 438. It is scarcely necessary to add that such objections will not be available when made for the first time in an appellate court. State *v.* Pollard, 14 Mo. App. 583.

[5] Dowdell *v.* Wilcox, *supra.*

sonably made, if counsel at once desist from the improper line of argument, there is, as a general rule, no available error; nor can error be predicated upon the silence of the court, where there is no request for an admonition to the jury not to be influenced by the statement.[1]

[1] Worley *v.* Moore, 97 Ind. 15; reaffirmed and applied in Carter *v.* Carter, 101 Ind. 451. To the foregoing rule of procedure an *exception* must be noted in *Texas*. The rules prescribed in that State for the government of procedure in the District Court recite that "counsel shall be required to confine argument strictly to the evidence and to the argument of opposing counsel," and that "the court will not be required to wait for objections to be made when the rules as to argument are violated; but should they not be noticed and corrected by the court, opposing counsel may ask leave of the court to rise and present his point of objection." Tex. Rules, 39, 41. By another rule it is provided that any supposed violation of the rules, to the prejudice of a party, may be saved by bill of exceptions, presented as ground for a new trial, and assigned as error by the party who may have conceived himself aggrieved by such supposed violation. *Id.*, Rule 121. "Under these rules," the Supreme Court of Texas say, "the duty devolves affirmatively, first, upon the counsel, to confine the argument strictly to the evidence and to the argument of opposing counsel; second, upon the court, upon its own motion, to confine counsel to this line of argument. If both the counsel who is making the argument and the court shall fail in the discharge of this duty, then the rules give to opposing counsel the privilege, but do not make it his duty, to then present his point of objection. This discretion given to counsel, as to whether he will make objection at the time, was doubtless based upon the well known embarrassments and often prejudice which generally attend the interruption of the argument of one counsel by another; and was intended to place that as a duty where it properly belongs — upon the presiding judge. Whether counsel, under such circumstances, remain silent or object, may be alike prejudicial to his cause. Silence may be construed into acquiescence; objection may call forth a damaging repartee." Willis *v.* McNeill, 57 Tex. 465, 474, 475. In an important case in Georgia it was ruled, according to the official syllabus, drawn, it is understood, by the judge who wrote the opinion, that for counsel to attempt surreptitiously to get before the jury facts, by way of supposition, which have not been proved, is highly reprehensible; and that the attempt should be instantly repressed by the court, without waiting to be called upon by the opposite party. The statement, however, is to be regarded rather as a *dictum* of the judge than as a decision of the court; since, although the State's counsel was guilty of the misconduct, the prisoner was not for that reason allowed a new trial. In giving the opinion of the court on this point, Lumpkin, J., said: "That the practice complained of is highly reprehensible, no one can doubt. It ought in every instance to be promptly repressed. For counsel to undertake by a side wind to get that in as proof which is merely conjecture, and thus

§ 958. Duty of Presiding Judge to Rebuke the Misconduct. — All courts agree that it is the duty of the presiding judge, either of his own motion[1] or upon the request of the opposing party or his counsel,[2] to interpose and check the party or his counsel in an improper and prejudicial line of argument.[3] It is the duty of the trial judge thus to interpose for the purpose of repressing needless scandal and gratuitous attacks upon private character. This duty is a very plain one, and good care should be taken to discharge it fully and faithfully.[4] It is equally the duty of the court, when thus appealed to, to prevent counsel in argument from misstating the testimony of a witness; but where, in consequence of a disagreement as to his testimony, the witness has been recalled and has restated it, and his restatement has been written down, the judge may properly refuse to allow counsel to argue to the jury that the witness, when thus recalled, made a different statement from that read to the jury by the court.[5] Here, as in other matters relating to the conduct of trials, a very large *discretion* is conceded to the presiding judge.[6]

to work a prejudice in the mind of the jury, cannot be tolerated. Nor ought the presiding judge to wait until he is called upon to interpose. For it is usually better to trust to the discrimination of the jury as to what is and what is not in evidence, than for the opposite counsel to move in the matter. For what practitioner has not regretted his untoward interference, when counsel, thus interrupted, resumes, 'Yes, gentlemen, I have touched a tender spot; the galled jade will wince. You see where the shoe pinches.'" Berry *v.* State, 10 Ga. 511, 522. These observations were quoted, and the rule therein expressed approved by the Supreme Court of Texas, in Willis *v.* McNeill, *supra*.

[1] Berry *v.* State, 10 Ga. 511; Forsyth *v.* Cothran, 61 Ga. 278; Willis *v.* McNeill, 57 Tex. 465, 474; Earll *v.* People, 99 Ill. 123; Brown *v.* Swineford, 44 Wis. 282.

[2] Hoxie *v.* Home Ins. Co., 33 Conn. 471; Fry *v.* Bennett, 3 Bosw. (N. Y.) 200, 242.

[3] Tucker *v.* Henniker, 41 N. H. 317; Bulloch *v.* Smith, 15 Ga. 395; Mitchum *v.* State, 11 Ga. 615; Dickerson *v.* Burke, 25 Ga. 225; Read *v.* State, 2 Ind. 438; Forsyth *v.* Cothran, 61 Ga. 278; Davis *v.* Hill, 75 N. C. 224; State *v.* Caveness, 78 N. C. 484, 488; Clark *v.* Lowell, 1 Allen (Mass.), 180. It is said that "it is within the province, and it is the duty of the court to disentangle the case from any mistakes made by counsel in the statement of testimony, and for this purpose to restate and comment upon the testimony." Read *v.* State, 2 Ind. 438; citing Swan Prac. 910.

[4] Rickabus *v.* Gott, 51 Mich. 227.

[5] Davis *v.* Hill, 75 N. C. 224.

[6] It has been held that where counsel properly interrupt the argument of the opposing counsel to cor-

It has been held that it is within the limits of this discretion for the judge to determine whether he will stop counsel at the time, or wait and correct the error in his *charge* to the jury; although where the abuse of privilege by the counsel has been gross and manifestly prejudicial, the failure of the trial court to stop him then and there will afford just ground for a new trial.[1] Although the court may not, in general, be bound thus to interfere unless appealed to, yet, when appealed to, the duty to interfere in some way is imperative, either by stopping counsel or by correcting the abuse in the court's instructions; since, if this is not done, the jury are, in effect, given to understand that the court is of opinion that they are allowed to take into consideration the erroneous or prejudicial statement thus made.[2] On the other hand, unless the trial judge, on being thus appealed to, fails or refuses to interfere and to administer the proper rebuke or correction, no ground is afforded for a new trial;[3] though it is not error for the court to grant a new trial of its own motion because of such abuse, even though a seasonable objection may not have been interposed by the opposing counsel. The granting of a new trial for such a cause will be within the limits of the discretion of the trial court.[4]

rect an erroneous statement of fact, and a paper, not at hand, is needed to settle the point in dispute, the court is not bound to allow time to search for the disputed paper; and where counsel having the floor exclaimed, upon such an interruption (in a way too frequently practiced), "The shoe pinches!" and the interrupting counsel complained of this as improper, and subsequently showed, by producing the lost paper, that the statement which gave occasion to the interruption was in fact erroneous — it was held no ground of error that the court answered, "Well, you have now stated it in your way; he has passed from it, let the argument go on." McLendon *v.* Frost, 57 Ga. 449.

[1] Jenkinson *v.* North Carolina Ore Dressing Co., 65 N. C. 563.

[2] Hoxie *v.* Home Ins. Co., 33 Conn. 471.

[3] State *v.* Lee, 66 Mo. 165; State *v.* Degonia, 69 Mo. 486; State *v.* Schorn, 12 Mo. App. 590; State *v.* Emory, 12 Mo. App. 593; *s. c.* affirmed, 79 Mo. 461; State *v.* Dickson, 78 Mo. 438; State *v.* Zumbunson, cited in 79 Mo. 463; State ex rel. *v.* Stark, 10 Mo. App. 591; Goldman *v.* Wolff, 6 Mo. App. 491; Klosterman *v.* Germania Life Ins. Co., 6 Mo. App. 582; St. Louis &c. R. Co. *v.* Myrtle, 51 Ind. 566, 576. Compare State *v.* Kring, 64 Mo. 591, 595.

[4] Kinnaman *v.* Kinnaman, 71 Ind. 417, 420.

§ 959. [ILLUSTRATION.] CHECKING APPEALS TO THE SYMPATHIES OF THE JURORS. — Where, in a case of arson, counsel for the prisoners, in argument, pressed upon the jury the consideration that the *consequence of their verdict*, if guilty, would be that the prisoners would be *hanged*, and the court checked the counsel and admonished the jury that they had nothing whatever to do with the conseqences of their verdict, but that their sole duty was to determine whether the prisoners were guilty or not guilty, — it was held that no error was committed. "This," said the court, "is quite common in cases of this character, and we cannot say that it is improper." The court did not regard it as a deprivation of the right of the jury to consider anything but the naked fact of the burning.[1]

§ **960. What will Cure the Prejudice.** — An objection by the opposing counsel, promptly interposed, followed by a rebuke from the bench and an admonition from the presiding judge to the jury to disregard the prejudicial statements, is generally, though not always, held sufficient to cure the prejudice.[2] The same result would, in most cases, follow a prompt and ample apology by the offending counsel; but it has been held in different jurisdictions that such a prejudice is not cured by the churlish form of apology which is involved in the expression that counsel will "take it back."[3] Other courts have conceived that the prejudice is sufficiently cured where the presiding judge waits until he comes to charge the jury, and then admonishes them to disregard such considerations as those which have been improperly pressed upon their minds by the counsel in the argument.[4] The rule that the effect of a prejudicial line of argument may be cured in this way has been applied in a flagrant case, where the argument was unprofessional and where the prejudice must have been serious.[5] Another court has gone so far as to suppose that the practice of curing the prejudice by an admonition in the charge of the judge is "perhaps the most proper way,"[6] — a con-

[1] State *v.* Dodson, 16 So. Car. 453, 461.

[2] State *v.* Braswell, 82 N. C. 693.

[3] Baker *v.* Madison, 62 Wis. 137, 148; Wolffe *v.* Minnis, 74 Ala. 386.

[4] Fry *v.* Bennett, 3 Bosw. (N. Y.) 200, 240, 243; *s. c.* affirmed, 28 N. Y. 324; State *v.* O'Neal, 7 Ired. (N. C.) L. 251; Melvin *v.* Easley, 1 Jones (N. C.), L. 386.

[5] The case referred to is stated in the next section.

[6] State *v.* O'Neal, 7 Ired. L. (N. C.) 251.

clusion from which the experience of most judges and practitioners will cause dissent. This conclusion has been denied in a case in Wisconsin, where this subject is ably reasoned. The court, speaking through Ryan, C. J., said: "Verdicts are too often found against evidence and without evidence, to warrant so great a reliance on the discrimination of juries; and without notes of the evidence, it will be often difficult for juries to discriminate against statements of facts within the evidence and outside of it. It is sufficient that the extra-professional statements of counsel may gravely prejudice the jury and affect the verdict." [1] On the other hand, the fact that the trial judge neglected to rebuke the impropriety will, in the view of many courts, be no ground of new trial, if the case was otherwise well tried, and it appears that, under the law and the evidence, no other result than a conviction was possible without a misbehavior of the jury.[2]

§ 961. [Illustration.] Correcting the Prejudicial Remarks by an Instruction. — The view that the prejudicial remarks may be sufficiently corrected by an admonition from the judge in his general instructions finds support in a celebrated case in New York, which was an action for libel against James Gordon Bennett, the proprietor of the New York *Herald*. Counsel for plaintiff, in his *concluding argument* to the jury, among other things, said: "The *Herald* by-and-by began to find that it could not live without doing something to attract public attention; and, about the days of Ellen Jewett, it came out as one of the most infamous sheets that ever existed since man was allowed by the Almighty to handle a pen." The counsel for the defendant thereupon objected, on the ground that no evidence had been given in relation to this matter. The court replied: "He is drawing upon his imagination." The plaintiff's counsel then said: "My learned friend does not discriminate as to what we are at liberty to take notice of. I should like to know if we are bound to prove everything we talk about? Then I should be in danger for saying that it is daylight now. I am speaking of the public history of the time, as I would of the Mexican war, or the reign of Victoria; and if it became necessary to talk about it, it would be perfectly ridiculous to prove the reign of James I. It is a thing received by all

[1] Brown *v.* Swineford, 44 Wis. 282, 292.

[2] State *v.* Zumbunson, 7 Mo. App. 526; *s. c.* affirmed, 86 Mo. 111.

mankind, and that portion which comes within the range of the fact I have a right to talk about. I suppose the gentleman knows that I have a right to talk about Bennett still publishing the *Herald*, without having proved it by evidence; or of other papers, such as the *Courier* or *Enquirer* or *Evening Post*. Now, Bennett comes up; I do not ask you to notice a single fact in relation to that paper, otherwise than as a part of the general history of the country; and so far as I know, the court will agree with me so far as this, that that which constitutes a part of the public history of the country is what we are at liberty to take notice of." The counsel for the defendant responded: "The learned counsel claims, as matter of law, that, he has a right to refer to the articles in the *Herald* as part of the history of the country. I desire the court to say that it is not so." The court responded: "I will say to the jury whatever is proper to be said at the end of the matter." Counsel for the defendant replied: "I except to the refusal of the court now to stop the counsel." It did not appear that the plaintiff's counsel subsequently made any remarks in which he should not have been permitted to indulge. The court, in charging the jury, used the following language: "Taking all these things into view, if you find for the plaintiff in this matter, you will assess these damages, taking constantly into view the application of this principle, and leaving out of view anything growing out of what has been said as to the character of his newspaper, about which there is no evidence before us any more than that the paper forms the libel, and divesting yourselves of all feeling of that kind, then say, in the exercise of a sound discretion, what damages ought to be assessed." It was held that the above ruling presented no reason for granting a new trial.[1]

§ 962. Question, How Saved for Review. — There is a confusion, not very creditable to the courts, upon the question how the error of allowing a prejudicial line of argument is to be saved for review in an appellate tribunal. A class of decisions is met with to the effect that the error may be —

(1.) *Shown by Affidavits submitted to the Court on Motion for New Trial.*[2] — But the sound view is that, this being a matter

[1] Fry *v.* Bennett, 3 Bosw. (N. Y.) 200, 241, 242; *s. c.* affirmed, 28 N. Y. 324.

[2] Hall *v.* Wolff, 61 Iowa, 559, 561; Dowdell *v.* Wilcox, 64 Iowa, 721, 724; Turner *v.* State, 68 Tenn. (4 Lea) 206. In Iowa, where, as already seen, the judge is allowed by the rules of procedure, to quit the bench during the argument and proceed with other business of the term in another room, it becomes necessary to adopt the

occurring in open court, in the presence of the presiding judge, his attention should be called to it by a seasonable *objection*, which, if overruled, should be followed by an *exception*, which exception should be noted and incorporated in the general bill of exceptions,[1] — from which the conclusion follows that such an irregularity cannot be presented for appellate review by affidavits.[2] Where the practice of the particular jurisdiction allows the question to be raised on motion for new trial by affidavits, and these affidavits are conflicting, the appellate court will resolve the doubt in favor of the ruling of the trial court.[3] It seems that the *affidavits of jurors*, in oppostion to a motion for a new trial upon this ground, in which the jurors attempt to show that the improper remarks had no influence upon them in making up their verdict, are not to be considered; since, though the jurors might conscientiously believe this, few men are able to take exact cognizance of the operations of their own minds and of the influences which bear upon them, and they might be mistaken.[4]

rule that the misconduct may be shown in this way. In that State it seems to be the practice to bring such an objection to the attention of the trial court by affidavit on a motion for new trial, and to save it for review by incorporating the affidavit into the bill of exceptions — at least this is the inference which the writer draws from one case. Dowdell *v.* Wilcox, 64 Iowa, 721, 724. In Tennessee, where such misconduct was shown by affidavits of members of the bar who were counsel for the defendant, which affidavits were embodied in the bill of exceptions without any comments by the presiding judge, the statements contained in them were taken to be true by the appellate court, on the ground that the judge had made the affidavits a part of the bill of exceptions without questioning in any manner the correctness of their statements. Turner *v.* State, 68 Tenn. (4 Lea) 206.

[1] Turner *v.* State, 68 Tenn. (4 Lea) 206; Roeder *v.* Studt, 12 Mo. App. 566; Rudolph *v.* Landwerlen, 92 Ind. 34, 37.

[2] So held in the cases cited in the preceding note. It seems at one time to have been the practice in Missouri to raise this question by affidavits; for in some cases the courts have refused to reverse a judgment for this cause because the affidavits were conflicting. State *v.* Baber, 11 Mo. App. 586; State *v.* Johnson, 76 Mo. 121.

[3] State *v.* Baber, *supra;* State *v.* Johnson, *supra;* State *v.* Comstock, 20 Kan. 650. And if the portion of the remarks which appear clearly to have been made were not prejudicial, the conviction will not be reversed.

[4] Kinnaman *v.* Kinnaman, 71 Ind. 417, 419. Especially the affidavits of *six* jurors to this effect will not prevail, since they are not able to answer for the other six. *Ib.*

(2.) *By Objections, Exceptions and a Bill of Exceptions.* — The other and more correct view is that such an irregularity can only be saved for appellate review by an objection seasonably made, an exception properly taken if it is overruled, which exception is incorporated in a bill of exceptions, signed and sealed by the presiding judge.[1] Confusing ideas are met with even in this connection; for, while it is held in one jurisdiction that such an irregularity cannot be made available on appeal unless pointed out to the lower court and the ground of objection specifically stated, yet another decision of the same tribunal is to the effect that an exception taken at the time is not in all cases necessary; since the trial court may, in the exercise of its discretion, see fit to wait until its charge is given to the jury, to cure the prejudice; and that an exception to the refusal to grant a new trial upon this ground sufficiently saves the question for review, where the irregularity is shown to have been such as prevented a fair trial.[2] The correct rule of procedure in such cases is believed to be that laid down by the Supreme Court of Nebraska, speaking through Reese, J., in the following language: "The Supreme Court, in the exercise of its appellate jurisdiction in cases of this kind, is limited to the correction of the error of the District Court. Before a case can be reversed and a new trial ordered, it must appear that the court before whom the accused was tried erred, and that such error was prejudicial to the party on trial. The practice in this State is now settled in this respect, and before this court can review questions of this kind, the attention of the trial court must be challenged by a proper objection to the language and a ruling upon the objection. If the language is approved by the court, and the attorney is allowed to pursue the objectionable line of argument, an exception to the decision can

[1] Bradshaw *v.* State (Neb.), 22 N. W. Rep. 361; *s. c.* 17 Neb. 147 (distinguishing Cleveland Paper Co. *v.* Banks, 15 Neb. 20; *s. c.* 16 N. W. Rep. 833); McLain *v.* State, 24 N. W. Rep. 720, 724; Bullis *v.* Drake (Neb.), 29 N. W. Rep. 292; Mulcairns *v.* Janesville (Wis.), 29 N. W. Rep. 565; State *v.* Anderson, 10 Ore. 448, 457; State *v.* Abrams, 11 Ore. 169, 172; Commonwealth *v.* Scott, 123 Mass. 239; Earll *v.* People, 99 Ill. 123; Jackson *v.* State, 18 Tex. App. 586; Maclean *v.* Scripps, 52 Mich. 215, 222.

[2] Rudolph *v.* Landwerlen, 92 Ind. 34, 39.

be noted. By a bill of exceptions, showing the language used, the objection, ruling of the court and exception to the ruling can be presented to this court for decision. If the court sustains the objection, and thus condemns the language, and requires the attorney to desist and confine himself to the evidence in the case, no injury is suffered by the accused."[1] This ruling has been re-affirmed by the same court in a more recent case.[2] It is scarcely necessary to add that an exception of this nature, in order to be available on error or appeal, should specify *what was said;* otherwise the reviewing court cannot see whether any prejudice resulted from the matter complained of.[3]

§ 963. Stating to the Jury Prejudicial Facts Which are not in Evidence. —It is scarcely necessary to suggest that, in every judicial trial, a party must present his evidence either by the testimony of witnesses who are under oath, by the exhibition of documents which are competent under the rules of evidence, or by the exhibition of such material objects as are connected with the *res gestæ* and speak with reference to the issues on trial. He cannot be permitted to present his evidence in the form of the argument of his counsel to the jury, who is not sworn to speak the truth as a witness in the particular case. All courts, therefore, unite upon the conclusion that where counsel, in their argument to the jury, make statements of prejudicial matters which are not in evidence, it will afford ground for a new trial, unless the error is cured before the cause is finally submitted to the

[1] Bradshaw *v.* State, *supra.*

[2] McLain *v* State, (Neb.) 24 N. W. Rep. 720, 724.

[3] State *v.* Cavenness, 78 N. C. 484. An old case in Illinois is to the effect that the reading of an improper paper by counsel in argument cannot be assigned for error, —the remedy of the opposite party being to request the court to instruct the jury that nothing which has been so read is evidence before them. Kenyon *v.* Sutherland, 8 Ill. 99. This decision is not only entirely out of the line with the authorities, but cannot be defended upon principle. If the only remedy for abuse of the privilege of argument lies in a request to the court to instruct the jury to disregard the prejudicial statement, then disingenuous counsel will be at liberty to fill the minds of the jurors with prejudicial matters, and the other side will have no better remedy than the meagre chance of the effect being obliterated by an admonition from the bench.

jury, in the manner stated in the preceding paragraphs.[1] It is a necessary part of this rule that the matters thus improperly stated by counsel to the jury in argument should, in view of the issues on trial, the *status* of the parties, their attitude toward each other, and the like considerations, be, in their nature, of a tendency to *prejudice* the cause of the opposing party in the minds of the jurors. Where such statements, though of matters not in evidence and hence improperly made, are *immaterial* or at least *not prejudicial*, they will afford no ground for a new trial.[2]

[1] State *v.* Lee, 66 Mo. 165; State *v.* Kring, 64 Mo. 591 (modifying the remarks of the same court in Loyd *v.* Hannibal &c. R. R. Co., 53 Mo. 509, 514); *s. c.* in intermediate appellate court, 1 Mo. App. 438; Yoe *v.* People, 49 Ill. 410, 412; Hennies *v.* Vogel, 87 Ill. 242; *s. c.* 7 Cent. L. J. 18; State *v.* Smith, 75 N. C. 307; Mitchum *v.* State, 11 Ga. 615, 633; Tucker *v.* Henniker, 41 N. H. 317, 324; Hatch *v.* State, 8 Tex. App. 416, 423; Brown *v.* Swineford, 44 Wis. 282, 293; Berry *v.* State, 10 Ga. 511, 522; Thompson *v.* State, 43 Tex. 268, 274; Festner *v.* Omaha &c. R. R. Co., 17 Neb. 280; Cleveland Paper Co. *v.* Banks, 15 Neb. 22; Rolfe *v.* Rumford, 66 Me. 564; Union Central Life Ins. Co. *v.* Cheever, 36 Ohio St. 201, 208; *s. c.* 38 Am. Rep. 573; Walker *v.* State, 6 Blackf. (Ind.) 2; Hoxie *v.* Home Ins. Co., 33 Conn. 471; Bulloch *v.* Smith, 15 Ga. 395; Dickerson *v.* Burke, 25 Ga. 225; Gould *v.* Moore, 49 N. Y. Sup. Ct. (8 J. & S.) 387, 395; Keolges *v.* Guardian Life Ins. Co., 57 N. Y. 638; Crandall *v.* People, 2 Lans. (N. Y.) 212; Northington *v.* State, 78 Tenn. (14 Lea) 424; Flint *v.* Commonwealth, 81 Ky. 186; Sullivan *v.* State, 66 Ala. 48; McAdory *v.* State, 62 Ala. 154; Grosse *v.* State, 11 Tex. App. 364, 377; Brown *v.* State, 60 Ga. 210, 212; Bulliner *v.* People, 95 Ill. 396. Such conduct has been deemed, in a sense, a deprivation of the right of trial by jury. See Mitchum *v.* State, 11 Ga. 615, 633, where this view is enforced at length in glowing language by Nisbet, J. Also Tucker *v.* Henniker, 41 N. H. 317, 324, where the language of Nisbet, J., in the preceding case, is plagiarized, with some slight omissions and rhetorical improvements. Consult, on this subject, the following authorities: Hopt *v.* People, 7 Sup. Ct. Rep. 614; Bullard *v.* Boston &c. Co. (N. H.), 5 Atl. Rep. 16; People *v.* Carr (Mich.), 31 N. W. Rep. 591; Gallinger *v.* Lake Shore Traffic Co. (Wis.), 30 N. W. Rep. 790; Henry *v.* Sioux City & P. R. R. Co. (Iowa), *Id.* 630 and note; Manning *v.* Bresnahan (Mich.), *Id.* 189; Palmer *v.* Utah & N. R. R. Co. (Idaho), 13 Pac. Rep. 425; Moore *v.* State (Tex.), 2 S. W. Rep. 887; Hucks-hold *v.* St. Louis, I. M. & S. R. R. Co. (Mo.), *Id.* 794; Stone *v.* State (Tex.), *Id.* 585; Little Rock &c. R. R. Co. *v.* Cavenesse (Ark.) *Id.* 505 and note; Brennan *v.* City of St. Louis (Mo.), *Id.* 481; Willis *v.* Lowry (Tex.), 2 S. W. Rep. 449; State *v.* Forsythe (Mo.), 1 S. W. Rep. 834; *s. c.* 89 Mo. 667; State *v.* Robertson (S. C.), 1 S. E. Rep. 443.

[2] City of St. Louis *v.* Fruin, 9 Mo. App. 590; Union Savings Assn. *v.* Clayton, 6 Mo. App. 587; State *v.* Lewis, 6 Mo. App. 584; Davis *v.* State, 33 Ga. 98. The following remarks of

The words spoken must have been of such a character as may reasonably be supposed to have influenced the jury to the prejudice of the party complaining.[1] The rule has been held to have no just application to *erroneous statements* of counsel in argument, in respect of the testimony which has been heard on the trial,[2] the reason of the rule apparently being that it is admissible for counsel to state the evidence in the most favorable light for his own client, and that deductions or inferences in respect of what the evidence tends to prove are always a fair subject of comment to the jury. Where there is a conflict of testimony, the counsel will not be stopped by the court as misrepresenting the testimony, merely because he assumes that the facts testified to by his own witnesses were proved;[3] and the view of the courts is that it is so important that the just privilege of counsel in argument should not be unduly restrained, that it has been regarded as not sufficient ground for a new trial that counsel, in the closing address to the jury, rather *overstates* the facts which there is some evidence tending to prove.[4] It is scarcely necessary to add that the rule does not apply to statements made by an *attorney* while testifying as a witness.[5] An exception to the rule has also been admitted where counsel have inadvertently omitted to introduce in evidence a document essential to his client's cause, such as an exemplification of the plaintiff's act of incorporation. Here the question is governed by the rule that the order in which

Cassoday, J., in a recent bastardy case in Wisconsin, are quoted by the author with some reserve: "Of course, the remarks of counsel are to be restricted to matters in the case on trial. But this is not always confined to such evidence as is pertinent to the issue on trial. Other evidence frequently gets into a case by consent of parties or without objection. So there may be, and frequently is, some fact or circumstances occurring upon the trial which is properly open to the comment of counsel, and yet never becomes a part of the record in the appellate court by being incorporated into the bill of exceptions. Counsel necessarily have a broad latitude." Baker *v.* State (Wis.), 33 N. W. Rep. 52, 55.

[1] Festner *v.* Omaha &c. R. Co., 17 Neb. 280.

[2] People *v.* Barnhart, 59 Cal. 402; People *v.* Lee Ah Yute, 60 Cal. 95. Especially where, as in the latter case, the court orders the improper remarks to be stricken out.

[3] Hatcher *v.* State, 18 Ga. 460.

[4] McKnabb *v.* Thomas, 18 Ga. 495, 507.

[5] Baker *v.* Madison, 62 Wis. 137, 146.

the evidence is presented is within the discretion of the trial judge, and that the mere fact that evidence is presented out of its order is not ground of new trial unless prejudice appears.[1]

§ 964. Limits Within Which the Rulings of the Trial Court Will be Controlled. — Recurring to what has already been said, and especially to the view that the control of argument, like other matters relating to the conduct of trials, must necessarily be committed largely to the *discretion* of the trial court, the conclusion follows that it is only in cases where the court has refused to exercise its powers, or where its *discretion* has been *manifestly abused* by permitting prejudicial matters to be rehearsed to the jury in argument, that appellate courts will interfere.[2] They will, as already seen, defer to the conclusion of the trial court, whose presiding judge was in a much better position to know whether prejudice really accrued to the unsuccessful party than the appellate court is,[3] especially where the evidence as to the nature of the remarks is conflicting.[4] And, on a similar principle, they will not control the trial judge, who has heard the evidence and tried the cause, in his decision upon the question how far the remarks were warranted by the evidence, when it is not made clearly to appear that they were unwarranted.[5] What abuses of the right of argument will warrant the interference of appellate courts, when thus clearly shown, will now be stated.

[1] Bank of Charleston *v.* Emerich, 2 Sandf. (N. Y.) 718, Oakley, C. J., saying: "It is surely not worth while to send this cause back for another trial, merely to have this document, upon which no question arises, given in evidence." *Ante*, § 344, *et seq.*

[2] It is said that, the trial judge being necessarily familiar with all the facts and circumstances, as well as the shades of the evidence, must necessarily have a broad discretion in such matters, and that error is not to be presumed in such a case; but that if counsel abuse their privilege or the trial court its discretion, it should be made to appear affirmatively, by incorporating the essential facts and circumstances showing it in the record. Baker *v.* State (Wis.), 33 N. W. Rep. 52, 55; Santry *v.* State, 67 Wis. 67; *s. c.* 30 N. W. Rep. 226.

[3] See the remarks upon this point in Loyd *v.* Hannibal &c. R. Co., 53 Mo. 509, 514, and in Cavanah *v.* State, 56 Miss. 299, 309.

[4] State *v.* Comstock, 20 Kan. 650; State *v.* Baber, 11 Mo. App. 586; State *v.* Johnson, 76 Mo. 121.

[5] Cobb *v.* State, 27 Ga. 649.

§ 965. Observations on the Limits Allowed to Argument. — On this subject it was said by Fowler, J., in what has come to be regarded as a leading case: "The counsel represents and is a substitute for his client; whatever, therefore, the client may do in the management of his cause may be done by his counsel. The largest and most liberal freedom of speech is allowed, and the law protects him in it. The right of discussing the merits of the cause, both as to the law and the facts, is unabridged. The range of discussion is wide. He may be heard in argument upon every question of law. In his address to the jury it is his privilege to descant upon the facts proved or admitted in the pleadings; to arraign the conduct of the parties; to impugn, excuse, justify or condemn motives, so far as they are developed in evidence, assail the credibility of witnesses when it is impeached by direct evidence or by the inconsistency or incoherence of their testimony, their manner of testifying, their appearance upon the stand or by circumstances. His illustrations may be as various as the resources of his genius; his argumentation as full and profound as learning can make it; and he may, if he will, give play to his wit, or wings to his imagination. To this freedom of speech, however, there are some limitations. His manner must be decorous. All courts have power to protect themselves from contempt, and indecency in words or sentences is contempt. This is a matter of course in the courts of civilized communities, but not of form merely. No court can command from an enlightened public that respect necessary to an even administration of the law without maintaining in its business proceedings that courtesy, dignity and purity which characterize the intercourse of gentlemen in private life. So, too, what a counsel does or says in the argument of a cause must be pertinent to the matter on trial before the jury, and he takes the hazard of its not being so. Now, statements of facts not proved and comments thereon are outside of the cause. They stand legally irrelevant to the matter in question, and are therefore not pertinent. If not pertinent, they are not within the privilege of counsel."[1] - - - - In 1878 this question came for the first time before the Supreme Court of Wisconsin, and it was said by Chief Justice Ryan in delivering the opinion of the court, that it was to the honor of the bar that this was the case. The counsel who had transcended the bounds of professional propriety, by comment-

[1] Tucker *v.* Henniker, 41 N. H. 317, 323. This language was quoted with approval by the Court of Appeals of Texas in Hatch *v.* State, 8 Tex. App. 416, 423. See also Cavanah *v.* State, 56 Miss. 299, 309.

ing upon a supposed state of facts not in evidence, was eminent at the bar and of high character; and the observations of the court, while not implying personal censure, give for this reason greater emphasis to the rule which it laid down. The following view was delivered from the bench, in respect of the limits of professional propriety in arguing facts to juries: "The profession of the law is instituted for the administration of justice. The duties of the bench and bar differ in kind, not in purpose. The duty of both alike is to establish the truth and to apply the law to it. It is essential to the proper administration of justice, frail and uncertain at best, that all that can be said for each party, in the determination of fact and law, should be heard. Forensic strife is but the method, and a mighty one, to ascertain the truth and the law governing the truth. It is the duty of counsel to make the most of the case which his client is able to give him; but counsel is out of his duty and the right, and outside of the principal object of his profession, when he travels out of his client's case and assumes to supply its deficiencies. Therefore, it is that the nice sense of the profession regards with such distrust and aversion the testimony of a lawyer in favor of his client. It is the duty and right of counsel to indulge in all fair argument in favor of the right of his client; but he is outside of his duty and his right when he appeals to prejudice irrelevant to the case. Properly, prejudice has no more sanction at the bar than on the bench. But an advocate may make himself the *alter ego* of his client, and indulge in prejudice in his favor. He may even share his client's prejudices against his adversary, as far as they rest on the facts in his case. But he has neither duty nor right to appeal to the prejudice, just or unjust, against his adversary, and *dehors* the very case he is to try. The very fullest freedom of speech, within the duty of his profession, should be accorded to counsel; but it is license, not freedom of speech, to travel out of the record, basing his argument on facts not appearing, and appealing to prejudices irrelevant to the case and outside of the proof. It may sometimes be a very difficult and delicate duty to confine counsel to a legitimate course of argument. But, like other difficult and delicate duties, it must be performed by those upon whom the law imposes it. It is the duty of the circuit courts, in jury trials, to interfere in all proper cases, of their own motion. This is due to truth and justice. And if counsel persevere in arguing upon pertinent facts not before the jury, or appealing to prejudices foreign to the case in evidence, exception may be taken by the other side, which may be good

ground for a new trial, or for a reversal in this court."[1] - - - - In the case just quoted from Georgia, Judge Lumpkin delivering the opinion of the court, thus eloquently denounced the practice under consideration: "Is it, I ask, worthy of the noblest of professions thus to sport with the life, liberty and fortune of the citizen? A profession which is the great repository of the first talents of the country, and to whose standard the most gifted flock, as offering the highest inducement of reputation, wealth, influence, authority and power which the community can bestow? I would be the last man living to seek to abridge freedom of speech, and no one witnesses with more unfeigned pride and pleasure than myself the effusions of forensic eloquence daily exhibited in our courts of justice. For the display of intellectual power, our bar speeches are equaled by few, surpassed by none. Why then resort to such a subterfuge? Does not history, ancient and modern, nature, art, science and philosophy, the moral, political, financial, commercial and legal, — all open to counsel their rich and inexhaustible treasures for illustration? Why, under the fullest inspirations of excited genius, they may give vent to their glowing conceptions in thoughts that breathe and words that burn. Nay, more, giving reins to their imagination, they may permit the spirit of their heated enthusiasm to swing and sweep beyond the flaming bounds of space and time — *extra flammantia mœnia mundi.* But let nothing tempt them to pervert the testimony, or surreptitiously array before the jury facts which, whether true or not, have not been proven."[2] After all this eloquence the court refused to grant the prisoner a new trial. - - - - So, in a case in Texas the practice was thus denounced by Mr. Justice Moore: "Zeal in behalf of their clients or desire for success should never induce counsel in civil cases, much less those representing the State in criminal cases, to permit themselves to endeavor to obtain a verdict by arguments based upon any other than the facts in the case and the conclusions legitimately deducible from the law applicable to them."[3]

§ 966. Instances of Reversals Under the Last Preceding Rule. — In his opening speech to the jury, counsel for the plaintiff said "that in the former trial of the case the defendants had suborned their little son

[1] Brown *v.* Swineford, 44 Wis. 282, 293. This language was also quoted with approval by the Texas Court of Appeals in Hatch *v.* State, 8 Tex. App. 418, 424.

[2] Berry *v.* State, 10 Ga. 511, 522.

[3] Thompson *v.* State, 43 Tex. 268, 274.

to commit perjury, * * * and that the appellant had committed perjury in his affidavit for a change of venue." [1] - - - - In a criminal prosecution for forgery, the State's counsel, in addressing the jury, was allowed by the court, the defendant's counsel not objecting at the time, to use the following language: "The defendant was such a scoundrel that he was compelled to move his trial from Jones County to a county where he was not known." And again: "The bold, brazen-faced rascal had the impudence to write to me a note yesterday, begging me not to prosecute him, and threatening me that if I did he would get the legislature to impeach me." [2] - - - - On the trial of an action upon a policy of life insurance, the counsel for the plaintiff read to the jury and commented thereon, against the objection of the defendant, a pamphlet prepared by the secretary of the defendant company for use among its agents, which had been offered in evidence and, upon objection, withdrawn.[3] - - - - In a suit on a policy of insurance on a vessel, the plaintiff offered in evidence a protest which had been filed by the master of the vessel, after it had sustained injury at sea, with a consul of the United States. The protest was excluded by the court on the objection of the defendants. Nevertheless, in his closing argument to the jury, the plaintiff's counsel attempted to state some of its contents, and, on objection, was allowed by the court to proceed, on the ground that such protests usually set forth the particulars of such a casualty, and that, under the circumstances, the plaintiff was entitled to any fair inference from the general character of the paper and the refusal of the defendant to have it read.[4] - - - - On the trial of an indictment for larceny, the State's attorney, against the objection of the defendant's counsel, stated, in his closing argument to the jury, that "he heard, while out on the street in New Braunfels, a citizen remark that it was a great shame that the defendant should have taken the money of the old man Wucherer, near seventy-one years old, and all the money he had in the world." [5] - - - - The defendant, on his trial for murder, identified three letters by a witness, and then handed them to the judge to be marked and preserved until

[1] Hennies *v.* Vogel, 7 Cent. L. J. 18; *s. c.* 87 Ill. 242. It was said by Dickey, J., in giving the opinion of the court: "Were this true, it would in fact be good cause for reversing the judgment. But, on an examination of the record, the court find that the charge that such language had been used was not sustained."

[2] Smith *v.* State, 75 N. C. 306.

[3] Union Central Ins. Co. *v.* Cheever, 36 Ohio St. 201, 208; *s. c.* 38 Am. Rep. 573.

[4] Hoxie *v.* Home Ins. Co., 33 Conn. 471.

[5] Grosse *v.* State, 11 Tex. App. 364, 377.

they should be used, but afterwards offered in evidence only two of them. Nevertheless, the State's attorney, in his closing argument, alluded to the third letter, expressing curiosity as to what it contained.[1] - - - - The State's counsel, in his argument to the jury was permitted, against the objection of the accused, to detail at length the facts of a similar case, which had been tried in another part of the State.[2] - - - - Where, in a prosecution for selling intoxicating liquors to a person when in a state of intoxication, the prosecuting attorney, in addressing the jury, stated, among other remarks of doubtful propriety, that "he knew personally the saloon keeper in this case, and that he was guilty of this, and, he was sure, of other crimes," — and the court failed, upon request to instruct the jury to disregard these remarks, and counsel saved an exception.[3] - - - - In his argument in a case of *larceny*, the prosecuting attorney asserted that "he knew that the defendant was the man who took the money," and, notwithstanding a strong objection, the court failed to caution the jury to disregard this statement, — and an exception was saved. [4] - - - - In all the foregoing cases, with the qualifications stated in the notes, it was held that the remarks afforded ground for reversing the judgment and ordering a new trial.

§ 967. [Continued.] Doctrine as Restated by Supreme Court of Alabama. — The Supreme Court of Alabama, to avoid misunderstanding, have restated its views upon this question, thus: "There must be objection in the court below, the objection overruled, and an exception reserved. The statement must be *as of fact;* the fact stated must be unsupported by any evidence, must be pertinent to the issue, or its natural tendency must be to influence the finding of the jury; or the case is not brought within the influence of this rule. To come within the last clause above, namely, where the natural tendency is to influence the finding of the jury, the case must be clear and strong. We would not embarrass free discussion, or regard the many hasty or exaggerated statements counsel often make in the heat of debate, which cannot, and are not expected to become factors in the formation of their verdict. Such statements are usually valued at their true worth, and have no tendency to mislead. It is only when the statement is of

[1] Bullner *v.* People, 95 Ill. 394. The ruling here was that, although this conduct was irregular and should not have been allowed, yet, as no objection was made at the time and no exception taken, it would not be ground for reversing the judgment.

[2] Cross *v.* State, 68 Ala. 476.

[3] Brow *v.* State, 103 Ind. 133.

[4] People *v.* Dane, 59 Mich. 550.

a substantive, outside fact — stated as a fact — and which manifestly bears on a material inquiry before the jury, that the court can interfere and arrest discussion." [1]

§ 968. [CONTINUED.] DOCTRINE RESTATED IN TEXAS. — In a recent criminal case in Texas the court, speaking through Willson, J., say: "It has become quite common to except to the remarks of counsel for the State in their address to the jury. We find such exceptions in the majority of contested cases that come before us. If we had sustained all these exceptions, the effect would have been to have virtually closed the mouths of prosecuting attorneys. While argument should be restricted legitimately, it should not be so unreasonably limited as to render it ineffectual. The State has rights in this respect as well as defendants. And in view of the frequency of exceptions of this character, we will take occasion here to say that, before we will reverse a conviction because of remarks of prosecuting counsel, it must appear to us: (1) that the remarks were improper; and (2) that they were of a material character and such as, under the circumstances, were calculated to injuriously affect the defendant's rights." [2]

§ 969. Commenting on Evidence which has been Excluded. — An aggravated form of the abuse of the privilege of argument, which is included in the rule stated and illustrated in the two preceding paragraphs, is presented where counsel, in arguing to the jury, are guilty of the highly unprofessional conduct of stating or commenting upon evidence which has been offered and excluded. This attempt to appeal from the judge to the jury, as to what is admissible as evidence in the case, is not only, within the limits stated in the preceding paragraphs, ground for a new trial,[3] but the writer has no hesitation in saying that the presiding judge would be justified in treating and punishing it as contempt of court. Scarcely less unprofessional and per-

[1] Cross *v.* State, 68 Ala. 476, 484.

[2] Pierson *v.* State, 18 Tex. App. 524, 564; reaffirmed in House *v.* State, 19 Tex. App. 227.

[3] Hoxie *v.* Home Ins. Co., 33 Conn. 471; Gould *v.* Moore, 40 N. Y. Sup. Ct. (8 J. & S.) 387, 395 (with which compare Koelges *v.* Guardian Life Ins. Co., 57 N. Y. 638; Crandall *v.* People, 2 Lans. (N. Y.) 212; Flint *v.* Commonwealth, 81 Ky. 186; Sullivan *v.* State 66 Ala. 48; McAdory *v.* State, 62 Ala. 154; Stephens *v.* State, 20 Tex. App. 255, 271).

nicious is the practice of counsel of presuming to state in argument what they *would have proved* had they been permitted under the rules of evidence.[1]

§ 970. Commenting on the Defendant's Character, Evidence as to which has been excluded. — Where, in a criminal trial, the character of the defendant was not put in evidence, and the court had excluded evidence tending to show that he had been at one time arrested for a robbery, it was held an abuse of privilege for the State's counsel to comment upon his general character; and that, in view of these improprieties, the court, in order to prevent as far as possible any prejudice to the defendant by reason of them, should have given to the jury the following special instruction, requested by the defendant: "You are charged that the law presumes that the defendant has a good character, and you cannot presume against it because the defendant failed to introduce evidence of a good character, and every presumption in favor of his innocence is indulged by the law," — and the appellate court, being of opinion that the defendant had not had a perfectly fair trial, the judgment was reversed.[2]

§ 971. Comments, not Supported by Evidence, on the Character and Credibility of Witnesses. — It has been held error to make statements and comments respecting the character and credibility of witnesses for which the evidence affords no basis or justification. In so holding the Supreme Court of Georgia, speaking through Nisbet, J., said: "I know of no rule of law which authorizes the credibility of witnesses to be impeached or fortified thus. The manner of attacking or defending the character of the witness is fixed by law, and fixed among other things that he may not be subject to irregular and irresponsible assaults upon his veracity and fairness. He, as well as parties and counsel, has rights which it is the duty of the court to protect. It were cruel injustice to permit his character to be driven to and fro like the shuttlecock by the outside statements of counsel. Where shall the license stop? If allowed against the credibility of a witness, then with equal reason they are to be allowed as

[1] Festner *v.* Omaha &c. R. Co., 17 Neb. 280.

[2] Stephens *v.* State, 20 Tex. App. 255, 271.

touching the merits of the issue. If crimination is granted, recrimination cannot be refused. If statements on one side are permitted, counter-statements on the other cannot be denied. If allowed to men of the highest honor, they cannot be denied to those few to be found in all professions destitute of all honorable principle. The concession, carried out in its legitimate consequences, would convert the stern inflexible law and order of a court of justice into confusion, uncertainty and injustice. All these objections apply alike to criminal trials and civil actions — to the prosecuting officer and to counsel." [1]

§ 972. EXPRESSING BELIEF IN GUILT OR INNOCENCE. — "No lawyer," says Dr. Bishop, "ought to undertake to be a witness for his client, except when he testifies under oath, and subjects himself to cross-examination, and speaks of what he personally knows. Therefore, the practice, which seems to be tolerated in many courts, of counsel for defendants protesting in their address to the jury that they believe their clients to be innocent, should be frowned down and put down, and never be permitted to show itself more." [2] The Court of Appeals of Texas quote this language with approval, and hold that it applies equally to counsel for the prosecution. "They should not intrude *their* belief in the guilt of the accused, upon the jury." Where, however, such remarks were objected to, and the trial judge promptly told the jury that the remarks were beside the evidence, foreign to the issue in the case, and that they were to pay no attention to them, the appellate court thought it "not probable that the jury would determine a case upon the belief of counsel, and especially when instructed by the court to disregard such remarks," and they accordingly held them no ground for a new trial.[3]

§ 973. ALLUDING TO FORMER TRIALS OF THE SAME CASE. — A statute of Texas enacts that "the effect of a new trial is to place the case in the same position in which it was before the trial had taken place," and that "the former conviction shall be regarded as no conviction of guilt, nor shall it be alluded to in the argument.[4] A statute of Utah, regulat-

[1] Mitchum *v.* State, 11 Ga. 611, 635.

[2] Bish. Crim. Proc., § 311.

[3] Pierson *v.* State, 18 Tex. App. 524, 563.

[4] Pasc. Dig. Tex. Stat., art. 3139; Rev. Stat. Tex., Code Crim. Pro., art. 783. For a similar statute, see Pasc. Dig. Tex. Stat., art. 3216; Rev. Stat. Tex., Code. Crim. Pro., art. 876.

ing proceedings in criminal cases, declares that the granting of a new trial places the parties in the same position as if no trial had been had," and that "all the testimony must be produced anew, and the former verdict cannot be used or referred to either in evidence or in argument."[1] These statutes express a general principle of procedure, which obtains with equal force where there is no such statutory enactment. Allusions, by counsel in argument, to the result of a former trial in the same case, favorable to the party for whom he is contending,[2] whether made directly or by the artifice of handing up to the court the opinion of the appellate court reversing the former judgment, accompanied by observations on the same in the hearing of the jury,[3] especially if accompanied with severe denunciation of the action of the appellate tribunal,[4] will, generally, though not always,[5] afford ground for new trial. It is an equal irregularity to permit counsel, in arguing to the jury, to read minutes of the evidence taken at a former trial between the parties, which minutes have not been put in evidence at the present trial, and chiefly for the reason stated in the preceding paragraph,[6] that counsel are not to be permitted, in arguing to the jury, to state evidential matters which have not been regularly admitted in evidence in the case.[7] The statute of Utah, above quoted, does not extend so far as to require the granting of a new trial, merely because the counsel for the government, in his final argument to the jury, alluded to the fact that the case had been many times before the tribunals. It was said: "If allusion to previous trials, such as were here made, were to vitiate a subsequent trial, a new element of uncertainty would be introduced into the administration of justice in criminal cases."[8]

§ 974. Appealing to Local Prejudices. — Appealing to local prejudices, — as, in an action brought by a citizen of the county in which the trial was had, to which the venue had been changed, against a board of school directors in another county, saying to the jury: "Stand by your own citizen;" and also, against the objection of defendant's counsel and the admonition of the court, telling the jury that "the school di-

[1] Laws of Utah 1878, p. 126, § 317.

[2] Crahan *v.* Balmer's Exr., 7 Mo. App. 585.

[3] Chicago &c. R. Co. *v.* Bragonier, 13 Bradw. (Ill.) 467.

[4] Hatch *v.* State, 8 Tex. App. 416; Moore *v.* State, 21 Tex. App. 666; *post*, § 976.

[5] Chicago &c. R. Co. *v.* Bragonier, *supra*.

[6] *Ante*, § 963.

[7] Martin *v.* Orndorff, 22 Iowa, 504. Compare Morrison *v.* Myers, 11 Iowa, 538; Samuels *v.* Griffith, 13 Iowa, 103.

[8] Hopt *v.* Utah, 120 U. S. 431, 442, opinion by Field, J.

rectors, people and citizens of Fulton county are trying to disgrace and oppress a citizen of Marshall county," [1] — affords ground of new trial.

§ 975. Appealing to Religious Prejudices. — Thus, in an action for damages for an assault and battery, for the plaintiff's counsel to say, in his closing argument: "It is in evidence that this defendant is a Catholic priest, and all of his witnesses are members of his church, and it is a strange coincidence that they track the evidence of defendant with that minuteness and precision in the use of words and language that cannot be accounted for except as shown by the evidence. They heard the defendant, from the pulpit, detail his version of the case, and they can come here and swear to his version of the case, and the defendant can absolve them from the sin. If it is one of the doctrines of the Catholic church that one of the members may swear falsely as a witness, and the priest can forgive him his sin for such false swearing, so as to absolve him from all moral guilt, it is the privilege and duty of the jury to take this fact, in determining the credibility of such witnesses." And, after protest, saying: "The defendant is here, and if it is not the doctrine of the Catholic church, let him stand up and deny it, and that shall be the end of it." It was held that a new trial must be had.[2]

§ 976. A Catalogue of Prejudicial Statements. — The following abuses of the right of argument have been held, under various circumstances, ground for reversing judgments and awarding new trials. For counsel, in arguing for the State in a criminal trial, when his language is excepted to, to retort, facing the jury, in the following strain: "Yes, take your bill; and as often as this case is taken to the Court of Appeals and there reversed on some foolishness or technicality, I will, as often as I can get the case before twelve honest men, convict him again and again." To repeat the language excepted to and to add: "Take bill and repeat them," and then to proceed to harangue the jury thus: "I mean to deal with these fellows [meaning men who had been indicted for complicity in land frauds], and commence with this one [meaning the defendant Hatch]; that when they know themselves to be guilty, and when they, as has this defendant, been once convicted by twelve honest men, and by a dodge and technicality have had the case reversed, and now represented by an able counsel watching for an error, I will teach them,— I will teach them to throw themselves on the mercy

[1] School-town of Rochester *v.* Shaw, 100 Ind. 268.

[2] Rudolph *v.* Landwerlen, 92 Ind. 34, 39.

of the jury and the court, and not make defenses to cost the State thousands. I demand of the jury, in the event you find the defendant guilty, that he be punished by the maximum of years allowed by law. He is defending and procuring the reversal of this case that, in the progress of time, witnesses may be scattered, and that, too, when he knows that he is guilty as hell itself. A taste should be put in his mouth in the shape of ten years' punishment, and then the next land thief who is tried will plead guilty and throw himself on the mercy of the court and jury." [1] - - - - The following passage in the concluding argument of the State's attorney reversed a conviction under an indictment for an assault with intent to commit rape: "Gentlemen of the jury, a good jury of your county convicted the defendant of the offense with which he is now charged, upon a former and a previous indictment, and his attorney appealed it to the Court of Appeals upon a trifling technicality in drawing the indictment; and that court reversed the case, and, by taking advantage of this trifling technicality, without merit, he has caused your county great expense, which comes out of the pocket of every good taxpayer, yourselves among the rest; and now, in view of these facts, I ask you to give him such a term in the penitentiary that will make up for this great expense he has caused upon a mere technicality." In the course of its opinion, the court said: "In many decisions this court has urged upon counsel, whose duty it is to prosecute the pleas of the State, to refrain from injecting into the trial of cases of this kind, any matter calculated to inflame the minds or excite the prejudices of the jury. If we could add anything to what has been said, or could use any language calculated to reach the minds and consciences of those to whom such admonitions are addressed, we would avail ourselves of the present occasion to do so. As we cannot, we can only reverse and remand the case, in the hope that the accused may secure a fair and impartial trial, according to law, and according to those methods, alike ancient and honorable, which still obtain in all enlightened courts. It is so ordered." [2] - - - - For the State's counsel, in a criminal trial, to read, against the protest of the accused, the proceedings which have taken place on an application for a change of venue which has been granted." [3] - - - - For the court to permit the State's counsel, against the objection of the defendant and without hinderance or rebuke, to use the following language in the closing argument to the jury: "And that is the character

[1] Hatch *v.* State, 8 Tex. App. 416.

[2] Humphrey *v.* State, 21 Tex. App. 483.

[3] State *v.* Phillips, 24 Mo. 475, 666, 668, opinion by Hunt, J.

of the man, and that is the character of the place they were going into — actually taking their lives in their hands — and there is no man on this jury who would have more bravely faced what those two men faced. I just ask you, however lion-hearted you may be, to put yourselves in their places — walking in there into a saloon in that part of the city, in the dead of night, face to face with two of the most terrible desperadoes of the city, to arrest them for highway robbery."[1] The defendant on trial was one of the two persons thus called "terrible desperadoes." - - - - For the State's counsel to indulge in gross denunciation, diatribe and abuse against the defendant on trial; as, in a prosecution against a negro for larceny, to say in his closing argument, turning toward defendant: "You black thief! You are a thief — as black as hell itself." Then, turning to the jury, to say: "Gentlemen, if you do not convict this man you had better throw open the jail doors, tear down our court-houses and burn up our law books; because if you acquit such men, and that is to be the law in Waller county, people will flock to Waller county from north and south Texas to become thieves. All good men in Waller county know that this man ought to be convicted, and it is your duty to do so. I feel an interest in this case and want to see this man convicted;"— the court declining to take other notice of this language, upon objection, than to say to counsel for the defendant: "I will give you a bill of exception."[2] - - - - For the defendant's counsel in a civil case to state, in his argument to the jury, the presiding judge not being present, that plaintiff was only a cat's paw to lend the cloak of respectability to the case, meaning that he was a cat's paw for one of his own witnesses.[3] - - - - For the State's attorney, in a criminal trial, to allude to the failure of the defendant to introduce evidence to sustain his character, no attempt to impeach his character as a witness having been made.[4] - - - - For the State's attorney, in a criminal trial, to comment to the jury upon the failure of the defendant to avail himself of the privilege guaranteed to him by the statute of calling his wife as a witness in his own behalf.[5] - - - - For the counsel for a party in a civil action to comment upon the fact that a witness of the opposing party had claimed exemption from answering a question on the ground of privilege,

[1] State *v.* Foley, 12 Mo. App. 431; following State *v.* Lee, 66 Mo. 165.

[2] Crawford *v.* State, 15 Tex. App. 501.

[3] Hall *v.* Wolff, 61 Iowa, 559, 561.

[4] Fletcher *v.* State, 49 Ind. 124, 134; State *v.* Upham, 38 Me. 261. Compare Walker *v.* State, 6 Blackf. (Ind.) 1; State *v.* McAllister, 24 Me. 139; Ackley *v.* People, 9 Barb. (N. Y.) 509.

[5] Knowles *v.* People, 15 Mich. 409, 413.

which claim had been allowed by the court as well founded.[1] - - - - For the prosecuting counsel in a criminal trial, to say: "They have suffered, and Conn is put to trial, and you are told that he is only a hired man. They hope thus to clear this man, and then he is to swear his confederate clear. I tell you this is the trick." For such counsel to continue, after a request made by defendant's counsel to the court to stop him from using such remarks, which the court refused to do, to say to the jury: "Good men in this county, and best citizens of Gonzalez county, desire the conviction of this man and his partner;" the court overruling this objection to this language with the remark: "He speaks at his peril. I will sign your bill of exceptions."[2] - - - - For the counsel for the plaintiff in a civil trial to eulogize in extravagant language the character of his client, calling him a "large-hearted, great-souled, confiding, trusting man," of which facts there was no evidence, and then, upon objection, saying: "O, well, I will take it back."[3] - - - - For the counsel for the plaintiff, in an action for maliciously suing out an attachment, in his closing argument, to discuss the wealth of the defendants (plaintiffs in the attachment suit), and to insist that the wealthier they were the greater the amount of damages which should be assessed against them.[4] - - - - For the counsel for the plaintiff, in an action against an officer in a railway company, for a tort which might be the subject of exemplary damages, to comment to the jury in the concluding argument, upon the defendant's connection with the railway company, upon the wealth and power of the company, and upon the defendant's ability, from these circumstances, to pay any judgment which might be rendered against him, although no evidence has been given of his pecuniary ability.[5] - - - - For counsel, in the closing address in a civil case, to read to the jury prejudicial matter not contained in the record, the evidence or the instructions given,[6] and to refer to or comment upon the in-

[1] Carne *v.* Litchfield, 2 Mich. 340.

[2] Conn *v.* State, 11 Tex. App. 391, 399.

[3] Wolffe *v.* Minnis, 74 Ala. 386. Compare Sullivan *v.* State, 66 Ala. 48; Cross *v.* State, 68 Ala. 476.

[4] Willis *v.* McNeill, 57 Tex. 465, 474.

[5] Brown *v.* Swineford, 44 Wis. 282, 291. It seems that in an action for a tort for which exemplary damages may be given, evidence of the wealth of the defendant is admissible, as speaking upon his ability to pay such damages. Burchard *v.* Booth, 4 Wis. 67; Barnes *v.* Martin, 15 Wis. 240; Buckley *v.* Knapp, 48 Mo. 162; Trimble *v.* Foster, 87 Mo. 49.

[6] The courts of procedure in the State where this ruling was made requires the court to instruct the jury in writing *before* counsel make their argument.

structions offered by the opposite party and refused.[1] - - - - For the State's counsel to allude to the fact that the judge did not direct an acquittal, by saying: "If the judge did believe that the defendant had made out a fair claim to the property, his Honor would have directed an acquittal without their leaving the box; but as he did not so say, the judge must not have believed that a fair claim of property had been shown by the defendant."[2] - - - - Where the counsel for the State, in a criminal trial has, under the provisions of a statute, admitted that an absent witness for the defendant would, if present, testify to a given state of facts, which admission is made in order to avoid a continuance,— for him, in his concluding argument, to say that the statement contained in the admission "was not the statement of sworn witnesses," but a statement "deftly prepared by counsel for defendant; that it was all a tissue of lies; that it contained nothing but lies, except a few immaterial things; that the persons named had never seen it, and would not have so sworn if they had been present;" but that "the State had proven her case by living witnesses, who had flesh and bone and blood, and had proven this statement to be lies, and nothing but lies."[3] - - - - In a criminal case the district attorney in his opening

[1] State ex rel. *v* Claudius, 1 Mo. App. 552.

[2] State *v.* Cavenness, 78 N. C. 484, 490. Compare State *v.* Johnson, 1 Ired. L. (N. C.) 354; Powell *v.* Railroad Co., 68 N. C. 395; State *v.* Dick, 2 Winst. (N. C.) 45.

[3] State *v.* Barham, 82 Mo. 67, 70. See also State *v.* Roark, 23 Kan. 147; State *v.* Hickman, 75 Mo. 416. It should be borne in mind that the Missouri statute, under which the admission was made in order to avoid the continuance, places the statement of facts set forth in the affidavit for a continuance on precisely the same footing, to all intents and purposes, as though the absent witnesses had been personally present and had so testified. It is only upon this ground that the validity of such a statute, depriving, as it does, the defendant of compulsory process for the attendance of his witnesses, can be upheld. State *v.* Underwood, 75 Mo. 234; State *v.* Jennings, 81 Mo. 185. It should be added that the decision of the Missouri court was placed on the ground that the prosecuting counsel was permitted to argue to the jury, against his own admission, that the witnesses would not so testify if present. So much of his argument as was to the effect that, although they would so testify, their testimony would be false, was within the line of legitimate argument; since it is permissible for the State's counsel so to argue in the case of any witness, nor would the court grant a new trial because he may have done so in strong and extravagant language. On the other hand, in an early case in Kansas, where the record showed that comments had been made upon an affidavit made by the opposite party to procure a continuance, but it did not appear what comments were made or under what circumstances,

speech said to the jury: "Gentlemen of the jury, the witnesses for the defense have sworn lies, and have come here for that purpose. I will show it by the testimony. They know that they have sworn lies, and if it was not so, they would not allow me to say it, but would make mince meat out of me when I charge them with having done so." The Court of Appeals, speaking through Hurt, J., said: "We deem it proper,— yea, an imperative duty on our part, — to sternly and emphatically condemn such conduct. Such bullying and defiant conduct was highly calculated to provoke the most serious results, and that, too, in the very temple of justice; a place in which the highest order and decorum should be preserved. The district attorney was not content to brand the witnesses as perjured liars, but calls the jury to witness that he proves the charge. How? Because they will not resent the terrible insult by at least an aggravated assault and battery — thus subjecting themselves to fine and imprisonment. Such conduct should not be tolerated for a moment, and if the court had knowingly permitted the same, we would feel it our duty to reverse the judgment because of this matter. However, the court's attention was not called to this matter at the time, and when this was done, the court reproved the attorney by stating that such remarks were highly improper. We think from the circumstances and nature of the remarks that the court should have gone further, by instructing the jury that the credibility of the witnesses could not be tested in any such manner; but as this matter will not arise upon another trial, we deem it unnecessary to determine whether or not it is reversible error." [1] - - - - In all the foregoing cases, subject to the qualifications stated, it was held that the limits of the privilege of advocacy had been exceeded, and new trials were ordered.

§ 977. Referring to Recent Crimes, Lax Administration of Law, etc. — In his closing argument in a prosecution for larceny, the prosecuting attorney referred to the riots at Cincinnati (then recent) and

the reviewing court declined to regard it as ground for a new trial. For aught that appeared, the counsel for the party making the affidavit might have first commented upon it; nor did anything appear in the record to show that such comments were prejudicial to the party complaining. If they were so, it would have been the duty of the trial court to restrain counsel within proper limits; and, as the record did not disclose the contrary, it was held that the proper discharge of this duty would be presumed. Perkins *v.* Ermel, 2 Kan. 325, 331.

[1] Ricks *v.* State, 19 Tex. App. 308, 319.

alleged, as a cause for the prevalence of mob violence, the lax administration of criminal justice in that city. The appellant objected to this line of argument, but the court overruled the objection. It was held that this was not error. "The remarks alluded to above, had reference to an *historical fact* concerning which the jury were supposed to be familiar, both in respect to its occurrence and the causes to which it was attributed." As there was no allusion made to the defendant in that connection, or to his being in any manner concerned in the riots, the court could not say that the privilege of fair debate had been transcended.[1] - - - - So, it has been held, in Missouri, that remarks of the prosecuting attorney in his argument, in which he states, in substance, that there is no security for the lives or property of citizens, if juries fail to do their duty, while crime is so greatly on the increase, contained nothing which could be deemed prejudicial to the defendant. It was but a declaration of the duty of juries, everywhere recognized, and the statement of the fact that crime was on the increase could certainly have been no inducement to the jury to convict the defendant, if the evidence did not warrant his conviction.[2] On the other hand, it has been held that, for the State's counsel, in a criminal trial, to comment on the frequent occurrence of murder in the community and the formation of vigilance committees and mobs, arguing that the same are caused by the laxity of the administration of the laws, and stating to the jury that they should make an example of the defendant, the defendant's counsel objecting, and the court overruling the objection and remarking, in the presence of the jury, that such things were proper subjects of comment, has been held ground of new trial.[3] - - - - The State's counsel, on the trial of an indictment for larceny, used language to the effect that there was a regular band of thieves in the neighborhood where this crime was committed; that the defendant was one of them (naming a number of others whose names were known to the jury as persons who had been recently convicted of crimes), and that unless the jury should convict the defendant he (counsel) would not blame the people for taking the law into their own hands, the defendant's counsel remonstrating and the court declining to interfere. This was held ground of reversal.[4] In another case in the same State, on the trial of an indictment for a felonious homicide, the State's counsel, in his argument to the jury, remarked that "if the juries

[1] Heyl *v.* State, 109 Ind. 589, 594.
[2] State *v.* Mallon, 75 Mo. 355, 358.
[3] Ferguson *v.* State, 49 Ind. 33.
[4] Turner *v.* State, 68 Tenn. (4 Lea) 206.

do not punish crime, the people will rise up, and should rise up, and punish it." These remarks, the Supreme Court said, "were very reprehensible, and the court ought to have rebuked him in the presence of the jury," but under the circumstances of the case it was not deemed a sufficient ground for a new trial.[1] - - - - On the trial of an indictment for murder in Illinois, where the record showed that counsel, both for the defendants and the people, referred to the prevalence of crime and commented upon it, but not in a manner which was regarded by the Supreme Court as prejudicial to the defendants, this court, speaking through Scolfield, J., among other things, said: "The trial judge should always see that the line of argument is kept within reasonable bounds, and not allow the defendant to be convicted or prejudiced on account of real or imaginary crimes for which he is not upon trial. And, unless for a palpable abuse of discretion in this regard, manifestly tending to an improper conviction, there should be no reversal." [2]

§ 978. Indulgence Extended to Extravagant Declamation, Exaggeration, Erroneous Statements of the Evidence. — The courts extend considerable indulgence to extravagant declamation and exaggeration. They obviously will not reverse judgments because counsel in argument have stated erroneous conclusions as to what the evidence proves.[3] The privilege of argument extends to a statement of the testimony as the counsel understands it, and therefore an erroneous statement of it, if not conceived in a spirit of unfairness or fraud, will be no ground of awarding a new trial.[4]

§ 979. Illustrations. — So, where, in his argument on the trial of an indictment for resisting an officer, the prosecuting attorney said: "Malice may bud and bloom in a man's heart almost in a moment or in a short time," the court saw nothing in this which could have operated to the injury of the defendant.[5] - - - - So, an interruption by counsel, of the opposing party in his argument, charging him with "dodging the main issue," has been held to afford no ground for a new trial.[6] - - - - So, where, in an action for damages against a railway company, the

[1] Scott *v.* State, 71 Tenn. (7 Lea) 232.

[2] Bulliner *v.* People, 95 Ill. 394, 405.

[3] State *v.* Mallon, 75 Mo. 355.

[4] People *v.* Barnhardt, 59 Cal. 402.

[5] State *v.* Estes, 70 Mo. 428.

[6] Overcash *v.* Kitchie, 89 N. C. 384, 389.

counsel for the plaintiff, in discussing the question of punitive damages, said: "You can and you should, out of the abundance of this company, take enough to keep this woman and her children from want all the days of their lives;" and the court, upon objection, merely said: "Let it pass," — no ground was perceived for a new trial.[1] - - - - A statement by the prosecuting attorney that "the defendant has been guilty of one penitentiary offense, and would be guilty of a greater offense to cover the other up," — has been held not sufficient ground of reversing a conviction on appeal, where it did not appear in what connection the statement was made.[2] - - - - It is the duty of a prosecuting attorney, if he thinks the evidence establishes the guilt of the defendant, to demand his conviction; and where, in a trial for murder, the State's attorney *demanded a conviction*, "in the name of the State, in the name of the law, justice and right, in the name of society, in the name of the widow and children of the deceased," — the appellate court saw nothing wrong in this. "If the defendant committed the murder, he had acted against the peace and dignity of the State; he had outraged law, justice, right and society; he had clothed the wife in widow's weeds, and had made fatherless the children of the deceased; and each and all of these consequences of his crime demanded his conviction and punishment."[3]

§ 980. **And to the Use of Epithets.** — "Epithets and invective in which counsel sometimes indulge are frequently matters of taste, and cases sometimes occur in which severe animadversion is deserved and merited. But, after all, it is for the court, in the presence of which the trial is had, to determine whether counsel transcends the limits of professional duty and propriety, and that determination cannot, in any appellate tribunal, be assigned for error."[4] Thus, it has been held no ground of new trial that the prosecuting attorney called him a *murderer* in his argument to the jury, where the indictment was for murder and the whole effort of the State was to prove him to be such.[5] So, where it appeared in evidence that, after the prisoner had committed the assault charged in the indictment, he had gone to the

[1] East Tenn. &c. R. Co. *v.* Gurley, 76 Tenn. 46, 54.

[2] State *v.* McCool, 34 Kan. 613.

[3] Pierson *v.* State, 18 Tex. App. 524, 564.

[4] State *v.* Hamilton, 55 Mo. 520, 522.

[5] State *v.* Griffin, 87 Mo. 608, 615.

Indian Territory, the court refused to grant a new trial because the prosecuting attorney, in his argument to the jury, said that "the defendant had gone to the Indian Territory, where all rascals go."[1] It is said, in a late case in Texas, that "to make vituperation and abuse grounds for reversing the judgment, it must appear that the remarks indulged in were grossly unwarranted and improper; that they were of a material character, and calculated injuriously to affect the defendant's rights."[2] And, in general, comments on the argument delivered by opposing counsel ought not to be restrained, where they do not amount to comments upon matters not in evidence.[3]

§ 981. **Appeals to Sympathy — The Widow in Tears.** — So, it is said: "Great latitude is allowed in appealing to the sympathy of the jury, in the arguments of counsel. That, and the widow in tears, are a kind of stage performance which courts cannot very well, perhaps ought not to attempt to control." And, proceeding upon this view, no ground for a new trial was perceived in the conduct of counsel, in a civil action, in appealing to the sympathies of the jury in behalf of his client because she was a widow, and in denouncing the opposing parties as leeches and oppressors of poor women and widows — the widow,

[1] State *v.* Stark, 72 Mo. 37.

[2] McConnell *v.* State (Tex.), 3 S. W. Rep. 699, 702, citing Pierson *v.* State, 18 Tex. App. 524.

[3] In Chambers *v.* Greenwood, 68 N. C. 271, the action was upon a note payable to the plaintiff's intestate, which note the defendant alleged was embraced in a settlement of accounts between him and the plaintiff's intestate, in his lifetime, and which, as he alleged, had thus been settled, but was not delivered up because mislaid. The plaintiff had offered to prove what his intestate had *said* about the note, but this evidence was ruled out, on the objection of defendant's counsel. In his argument the defendant's counsel said to the jury that, if the plaintiff's intestate were alive, there would be no difficulty about it, and that he would be willing to leave it to him. In reply, the plaintiff's counsel said: "Well, if that is so, why do you object to my proving what he said?" Thereupon the defendant's counsel asked the court to stop the plaintiff's counsel, because he was commenting upon evidence which had been ruled out. This the court declined to do, saying: "He is not commenting on the testimony which was ruled out, but he is commenting on your argument." It was held that, in thus refusing to stop counsel, no ground was presented for a new trial.

at the same time, facing the jury and weeping, or pretending to weep.[1] Haranguing the jury on irrelevant matters not necessarily prejudicial, such as the fact that the defendant had a *mother* only fifteen miles away, that she had abandoned him, that she was not at the trial to share his troubles, — has been held no ground of new trial.[2] So, where, in response to an objection to testimony which the counsel was seeking to introduce, he said: "I am careful not to get error into the case. If my client was a rich man I should like to litigate this matter for the next twenty-five years, and I think it would give me a good support; but my client is poor, and we live in Minneapolis, and every time we come down here it costs him $100," — it was held there was no ground for a new trial.[3]

§ 982. Tricks of Advocacy, Sidebar Remarks, etc. — Nor are mere tricks of advocacy, devised to arrest the attention of the jury at certain points in the evidence, ground for a new trial.[4] Thus, where a witness was being examined in a criminal case, and the prosecuting attorney, at a point in the evidence, remarked to his associate, "Put that down," an objection to this language was held frivolous.[5] Nor will a judgment be reversed, even in a capital case, because of indiscreet side remarks by the prosecuting attorney, unless the court can see that a jury of ordinarily intelligent men would be misled or prejudiced by them.[6]

§ 983. Bad Logic and Bad Law. — Nor is it ground for a new trial, in a criminal case, that the prosecuting counsel has made an illogical argument, or has misstated the law in his address to the jury.[7] If the error is of logic — if illogical conclusions are drawn or illicit inferences are made — the courts cannot correct them by directing counsel to reason logically. If, however, counsel state the law incorrectly in their address to the

[1] Dowdell *v.* Wilcox, 64 Iowa, 721, 724.

[2] State *v.* Griffin, 87 Mo. 608.

[3] Baker *v.* Madison, 62 Wis. 137, 147.

[4] Haderlein *v.* St. Louis R. Co., 3 Mo. App. 601.

[5] State *v.* Hopper, 71 Mo. 425, 433.

[6] State *v.* Guy, 69 Mo. 430.

[7] Morrison *v.* State, 76 Ind. 335.

jury, the adverse party can secure a correction. The correction is not to be obtained by objecting to the statements of counsel during the argument, but by asking the court to give the law to the jury in its instructions.[1]

§ 984. Other Statements Which Have Been Excused Rather than Justified. — The allusion by counsel in argument to the absence of the defendant from the trial of a civil case, has been held a question of taste and propriety rather than misconduct, even where the plaintiff's counsel had charged him with fabricating evidence and said: "He did not want to be here, and it is well that he is not here, after making such an exhibition of himself."[2] It is unquestionably a sound rule that *historical facts*, of which courts take judicial notice, may be alluded to in argument for the purposes of illustration, and this rule has been extended, on doubtful grounds, so far as to justify a State's counsel, in a criminal trial, in alluding to *other historical cases*, similar to the case at bar.[3] Nor, in a capital case, where coun-

[1] Proctor *v.* De Camp, 83 Ind. 559, opinion by Elliott, J. This rule would not be applicable in Missouri, where the charge of the judge is delivered *before* counsel make their argument. Under the system in that State an unfair statement of law by counsel to the jury ought to be corrected by the court when the objection is made.

[2] Carter *v.* Carter, 101 Ind. 450, 454.

[3] Thus, on the trial of a statutory felony, the State's attorney, in his closing argument, on the question of insanity, alluded to the facts of the Lawless case and the Guiteau case, and said that the case at bar did not show one-half or even the hundredth part of the eccentricities which those cases showed; that Guiteau's whole life was one of oddities and eccentricities; that experts were called from the whole nation, but nevertheless he was convicted by a jury, was allowed his appeal, and was finally hanged; that Tom Buford killed Judge Elliott and never went to the asylum. When the State's counsel commenced speaking of these matters, the defendant's counsel objected; but the court said these matters were merely in the nature of argument, and refused to stop him, and the defendant saved an exception. The Supreme Court overruled the exception, Freeman, J., in giving its opinion, saying: "While it was not pertinent to the issues in this case to cite the facts, or supposed facts, in the cases of Guiteau and Buford, still such reference, by way of illustration, we do not think sufficient ground of reversal of the verdict of a jury. The true basis of the argument is always the facts presented in the testimony, but we cannot see that such allusions as are here found could have materially affected the conclusions of

sel for the defendant has allowed improper evidence to go to the jury without objection, can a new trial be claimed on the ground that the prosecuting attorney commented on such evidence in his argument to the jury.[1] Although, as elsewhere seen,[2] counsel are not permitted in argument to refer to supposed facts not in evidence, yet it has been held not clearly error to permit counsel for the State, in a bastardy proceeding, to refer to the resemblance between the child (presumably in the court-room) and the respondent; since this, if a fact, was a fact which the jury could not well be prevented from noticing, and "some extravagance in cases involving sensational elements" cannot well be restrained.[3] So, in the absence of specific objection, or of a request for an instruction, the reading, by counsel for the defendant, of the complaint in the case, verified by affidavit, has been held no ground for a new trial, the reading having apparently been done for the purpose of showing what allegations were not denied and hence admitted.[4]

§ 985. [Illustrations.] Transgressions in Criminal Cases which have been Overlooked. — In a case of *larceny*, counsel, in closing for the defendant, by way of illustrating the value of certain testimony given on behalf of the State to sustain the reputation of a witness, said, in substance, that the witnesses did not profess to have any knowledge of the reputation of the witness whose testimony they were called to sustain, and that, from the same standpoint, he could personally sustain the reputation of the defendant. These observations were made the basis upon which the prosecutor said, in his argument, that he had personal knowledge of the fact that the defendant was reputed to be a *hotel thief*, and that he had been published and portrayed in the *Police Gazette* as such. The reviewing court censured this transgression of

the jury; besides, they are not within the principle established by our cases. They are not facts detailed by the attorney-general, not in proof in reference to the prisoner or his conduct or relations, but only matters of current history, used by way of enforcing an argument. This objection is not sufficient for reversal." Northington *v.* State, 78 Tenn. (14 Lea) 424, 428, 431.

[1] State *v.* Banks, 10 Mo. App. 111, 115.

[2] *Ante*, § 963.

[3] People *v.* White, 53 Mich. 537, 539; *ante*, § 856.

[4] Garfield *v.* Knight's Ferry Water Co., 14 Cal. 35.

the prosecuting attorney, but finding "a bare shadow" of excuse for it, and the verdict being well sustained by the evidence, concluded not to reverse the conviction.[1] - - - - On the trial of an indictment of a supervisor for unlawfully withholding a record from the proper custodian, the State's attorney, in his closing remarks to the jury, charged the defendant with *stealing an affidavit* made by him at a previous term of court for a continuance, and reiterated the same after objection by defendant and after being warned by the court that it was improper; and stated that the defense was all a sham, and that defendant had fled from justice and never surrendered himself until he found a witness was dead, and then hatched up his rotten defense. There was no evidence upon which to base such remarks, and they were reiterated after being informed by the court that they were improper. The reviewing court characterized these arguments as clearly improper and a manifest breach of both professional and official duty; yet, under the circumstances, the court did not regard them as of so gross a character as to warrant a reversal of the judgment.[2] - - - - On a trial for murder the prosecuting attorney, in addressing the jury, said: "The defendant in this case has stooped so low as to drag before you, on the trial of this cause, the infidelity of his dead wife, and publish her before the courthouse as a prostitute." The court could not deny that this remark was "unfair," but refused a new trial. [3] - - - - On a recent prosecution in Indiana for a murder by poison, one of the attorneys for the State, in his closing argument, delivered to the jury, notwithstanding repeated objections from the counsel of the accused, such paragraphs as the following: "Why, a man was hung at Ft. Wayne, in an adjoining county, on circumstantial evidence not a hundredth part as strong as the evidence in this case against Mrs. Epps." After an interruption and an admonition from the court to confine himself to the case, he replied: "I know what I am saying, and I do not want to be interrupted in my argument. It throws me off my line of argument." Commenting on certain evidence, he also delivered the following expressions, some of which were grossly unwarranted by the evidence: "This woman [pointing to the accused] took poison from Clinton Orndorff in Weaver's store and said: 'I know what it is; I know it's poison; I've handled it before; I have buried two husbands and children.'" The evidence to which this referred was merely that the accused had given

[1] Heyl *v.* State, 109 Ind. 590, 594.

[2] Baysinger *v.* People, 115 Ill. 420, 426.

[3] McConnell *v.* State (Tex.), 3 S. W. Rep. 699.

the witness five cents to buy some arsenic to poison rats, and, on receiving it she said she had handled it before. On being again interrupted by counsel for the accused and admonished by the court, the State's counsel kept on thus: "I don't mean that she [the accused] said it all in Weaver's store; I mean to say that she said in Weaver's store that she knew it was poison and had handled it before, and that it was a fact that she had buried two husbands and children; but I disclaim any intention to say that she testified to [these facts] all in the same connection in the store." Further on in his argument, he said: "Oh, gentlemen of the jury, if I could tell you what that good old man, Edward Mise [pointing to him], told me he knows about other dark things concerning this case, it would clear away much of the mystery about it, about which counsel for defendant talked so much." Because the verdict was right on the merits, the reviewing court overlooked these shameful abuses of the right of argument,[1] for which the counsel committing them ought to have been punished. - - - - Objection was made in one case to the statement of the district attorney, in his argument to the jury, that the plea of insanity in criminal cases is generally a "sham" and a "device" resorted to by defendants who have no defense, — illustrating his remarks by a reference to the Guiteau case. It was claimed that this was unwarranted and of a prejudicial character; but the court nevertheless affirmed the conviction and sentence of death.[2]

§ 986. Prejudice not Cured by Similar Misconduct in the Opposing Counsel. — Similar misconduct on the part of the opposing counsel does not justify such a course, although it may justify the counsel in endeavoring to remove the prejudice which may have been produced by the misconduct of the opposite counsel.[3]

§ 987. Illegitimate Argument first Introduced by Opposing Counsel. — We have had occasion to examine a rule of evidence under which a party who opens up, by his own witnesses, an improper line of inquiry, cannot complain that the other party was allowed to introduce evidence rebutting the same facts, or to follow up the same inquiry.[4] Some courts admit a correspond-

[1] Epps *v.* State, 102 Ind. 540, 550.
[2] Polin *v.* State, 14 Neb. 540, 548.
[3] Mitchum *v.* State, 11 Ga. 615, 629; Tucker *v.* Henniker, 41 N. H. 317, 322.
[4] *Ante*, §§ 423, 699, 706.

ing rule in respect of forensic argument; so that, where the counsel of the accused in a criminal trial enters upon a line of argument outside the record, the accused cannot complain that the State's attorney was allowed too free scope in *replying to the same*.[1] At least, where counsel on one side transcend their privilege by alluding to improper matter, the counsel on the other side may, without prejudicing their case, follow them, and indulge in *proper comments* upon the same matter.[2]

§ 988. Illustration. — This is well illustrated by a case of murder, where counsel for the accused, among other irrelevant matters, appealed to the jury to look into the defendant's face, "for evidence of courage and consequent incapacity to commit such a crime." "The prosecuting attorney," said the court, "in a masterly manner, took up the gauntlet thus thrown down, and ably, eloquently, and with telling force, presented the State's side of the collateral issues thus forced upon the prosecution. We are not prepared to say that his remarks were not entirely legitimate, independent of the provocation and invitation thus given by the defense. If the defendant wishes to invoke the rule of confinement to the record, they themselves must keep within the record. When they voluntarily go outside, they at least invite, if they do not render it necessary, that the prosecution should follow. Appellant's counsel characterized the deed as a most dastardly and cowardly murder, and requested the jury to look into defendant's face for evidence of courage and incapacity to commit such a crime. Answering this argument, the reply was: 'Whoever saw that face [pointing at defendant] that could ever forget it? No, gentlemen, no. As the pistol flashed, there was a circle of light in his front, and through it gleamed the eyes of the assassin sitting there [pointing at defendant] in this court room.' This reply was called for, and was legitimate. As stated above, if the remarks excepted to were not legitimate primarily, they were most clearly so, and entirely within the bounds, as answers to the above argument of defendant's counsel."[3]

§ 989. Matters Which have been Fair Subjects of Comment. — The subornation of evidence by the opposing party, or his failure to produce important evidence within his reach, is

[1] Pierson *v.* State, 21 Tex. App. 15, 59.

[2] Hoffman *v.* State, 65 Wis. 46; *s. c.* 26 N. W. Rep. 110; Baker *v.* State (Wis.), 33 N. W. Rep. 52, 55.

[3] Pierson *v.* State, 21 Tex. App. 15, 60.

always a fair subject of comment in argument to the jury,[1] — as where the opposing party fails to call an important witness whom he might have called,[2] or to read the depositions of witnesses which he has taken to be used in the case,[3] or to introduce important papers in his possession.[4] So, the apparent *interest* of the witness is always the subject of fair comment in argument,[5] and in most jurisdictions may properly form the subject of cautionary instructions to the jury. *Contractual relations*, sustained by a witness to a party may, as already seen, be shown in evidence, on cross-examination, for the purpose of affecting the credibility of the witness in the opinion of the jury.[6] Upon the like principle, the fact of such relationship is the subject of *fair comment* in argument. "Even though introduced by the party thus commenting, it is legitimate to call attention to the bias, in order to give more force to what the employé may swear against his master, — just as a brother swearing against a party in that relation to him might just as well be considered as entitled to great credit, and when for him, to less. Not that either could be impeached by the party calling him, but the fact of relationship or obligation or service may be properly evoked by counsel, with a view to strengthen or weaken the force of what is testified — the natural heightening or softening the colors of the story, without impeaching the integrity of the witness."[7] So, *if the accused takes the stand* as a witness in his own behalf his testimony is the subject of fair comment by the State's attorney, the same as the testimony of any other witness;[8] though if he

[1] See Knowles *v.* People, 15 Mich. 412; Anderson *v.* Russell, 34 Mich. 110; *ante*, §§ 453, 794, 795.

[2] Gavigan *v.* Scott, 51 Mich. 373; State *v.* Jones, 77 N. C. 520; Gray *v.* Burk, 19 Tex. 228; Peebles *v.* Horton, 54 N. C. 374.

[3] Learned *v.* Hall, 133 Mass. 417.

[4] Chambers *v.* Greenwood, 68 N. C. 274; Tobin *v.* Shaw, 45 Me. 331; Logan *v.* Monroe, 20 Me. 259. See also Devries *v.* Phillips, 63 N. C. 53.

[5] Morehouse *v.* Heath, 99 Ind. 569, 518

[6] *Ante*, § 450.

[7] Central R. Co. *v.* Mitchell, 63 Ga. 173, 180.

[8] Held *v.* State, 20 Neb. 493, 500. Compare Comstock *v.* State, 14 Neb. 205, where the accused having elected to take the witness stand and failed to controvert the testimony of the State's witnesses, it was reasoned that this was tantamount to an admission that such testimony was true. See *ante*, § 646.

does not take the stand, the circumstance cannot be alluded to.[1] Where the prisoner had taken the stand as a witness, and, being pressed with a particular question, had *declined to answer it on the ground of privilege*, and the prosecuting attorney had alluded to the fact in argument,—it was observed that it would have been more proper to have abstained from so doing, but that the remark afforded no sufficient ground for disturbing the verdict.[2] As the argument of the opposing counsel is a fair subject of comment, so may be his mode of framing the questions which he puts to his own witnesses; and accordingly it is not error to permit counsel to make comments on the cross-interrogatories proposed by the adverse party to a witness who testifies by deposition, and to argue therefrom that the evidence of that party, as given at the trial, was incorrect. "If," said Bigelow, J., "a witness should be examined on the stand, the mode in which questions were framed and put would certainly be open to observation. The same rule is applicable where the interrogatories are in writing."[3] Matters which form a part of the record are generally regarded as subjects of fair comment. Thus, it has been held that a written motion for a continuance, being a part of the record, may be commented upon by the opposite counsel in their argument, without the formality of having it offered in evidence.[4] So it is legitimate for counsel, in argument, in a criminal trial, to allude to what has transpired in the case from the time it was called, through its entire progress; and the conduct of the accused or his counsel in connection with his trial is a proper subject of argument. Such matters, it is reasoned, are necessarily within the *discretion* of the trial court, which discretion will not be controlled except in cases of flagrant abuse; it must appear that the accused has received some positive injury, or been denied some material right.[5] So, it has been held that the privilege of argument is not abused in a criminal case, by the statement by the prosecuting counsel that "the defendant stood

[1] *Post*, §§ 1001, 1002.

[2] People *v.* Wilson, 55 Mich. 506, 515.

[3] Smiley *v.* Burpee, 5 Allen (Mass.), 568.

[4] Cross *v.* Garrett, 35 Iowa, 486.

[5] Inman *v.* State, 72 Ga. 269, 274.

mute, and said nothing when accused of this crime by the prosecuting witness in the presence of the officers of the law,"— this being a fact shown by evidence.[1] In a criminal trial, counsel for the defendant objected to the solicitor-general stating, in his concluding argument to the jury, that counsel for the defendant had "*dilly-dallied*" *with this case;* that they had moved for a *continuance* at the last term of the court upon the absence of a witness [naming him], and, at the present term upon the same ground; that the court had sent for the witness and had brought him into court, and yet counsel for the defendant had not introduced him. It was held that these facts were subjects of fair comment.[2] In a case of murder, the prisoner had testified to *admissions* which his *wife* had made to him respecting her character for chastity. The wife was offered as a witness to contradict this, and, in arguing the question of her competency, the State's attorney narrated the statements made by the husband which he proposed to disprove by her, charging that they were "false" and stated that he "denied them." It was said that this was not outside the legitimate scope of argument.[3]

§ 990. Reading Documentary Evidence to the Jury. —It is scarcely necessary to say that counsel, in arguing to the jury, are entitled to read to them any instrument which has been offered and admitted, for the purpose of refreshing their minds in respect to the same and of directing their attention to the view entertained by counsel as to its bearings. Nor is it necessary that the portion of the document which the counsel proposes to read, was read to them when offered and admitted as evidence. Accordingly, where a paper is put in evidence by a party for a peculiar purpose, and not read to the jury, but read to them in part only, it is generally the right of the opposing party to have the *whole* of it considered as evidence, and to read to them such portions of it as he may desire.[4]

[1] Leonard *v.* State, 20 Tex. App. 442.

[2] Inman *v.* State, 72 Ga. 269.

[3] Polin *v.* State, 14 Neb. 540, 548.

[4] Hassler *v.* Schumacher, 10 Wis. 419; United States *v.* Crandell, 4 Cranch C. C. (U. S.) 683. See *ante,* §§ 412, 701, 835.

§ 991. Reading from the Notes of the Official Stenographer. — It is not an irregularity for the State's counsel, in a criminal trial, in reviewing the evidence in his argument to the jury, to read from the notes of a stenographic reporter of the court; since, his right to state the evidence being clear, it can make no difference whether he states it from recollection, or reads it from the reporter's abstract, provided he states it correctly. "In most cases," said the court, "it is quite probable that a more exact statement of what the testimony was, will be given from the stenographer's report than from memory; but of the correctness of the statement, and what the testimony actually was, the jury will ultimately determine. In either case, it devolves on the court to see to it that the jury are not imposed upon by any misstatement of the evidence given in the case." [1]

§ 992. Use of Papers, Maps, Diagrams, etc., which are not in Evidence. — It seems to be a sound conclusion that it is the right of a party, in arguing to a jury, to use a map or plan which is not strictly evidence in the case, for the purpose of illustrating his argument and explaining to the jury the position which he assumes — just as the teacher makes use of the figures on a blackboard for the purposes of illustration.[2] On the contrary, it has been held that trial courts should not permit counsel, in arguing a case to the jury, to induce the jurors to take down with pencil and paper the *counsel's calculation* of amounts, nor should the jurors be permitted to take such memoranda to the jury-room, to be used in making up their verdict. "It may be,"

[1] State *v.* McCool, 34 Kan. 613, 616.

[2] Thus, in a controversy between two coterminous owners as to a boundary, a plan of two lots, the location of the division line of which was the subject of the controversy, was made by the plaintiff's attorney, he not being a surveyor, and the plan not having been made prior to the survey of the lands. The plaintiff testified, without contradiction, that the plan was all right and located the land correctly, as near as he could see. It was held proper for the court to allow the plaintiff to use this plan for the purpose of explaining to the jury what his claim was in relation to the location of the lots, and where, according to his claim, the division line was, the charge of the court having limited his use of it strictly to his purpose. Hale *v.* Rich, 48 Vt. 217, 224. See also Wood *v.* Willard, 36 Vt. 82; *ante*, § 870

say the court, "that a juror, if he desire it, may make, on his own motion, memoranda of evidence, or even of the points of argument of counsel, but it should only be done on the motion of juror, and not by counsel." [1] But there seems to be no good sense in placing jurors under such restrictions. If they are fit for the discharge of their duties at all, they are competent to discharge them in a sensible and proper manner, just as the judge would discharge the same duties if he were sitting as the trier of the facts. But the line of propriety is clearly crossed when counsel, in argument, against the objection of the opposite party, hand to the jury a paper, in order that they may determine the question of a disputed signature by a *comparison of handwriting*.[2] This mode of proving handwriting by a comparison made by the jurors is not competent under the rules of evidence,[3] and therefore such an act is an act of the same quality as the act of getting before the jury, in argument, any other inadmissible, evidentiary matters.[4]

§ 993. Referring to the Failure of the Opposite Party in a Civil Case to Testify. — The omission of the opposite party in a civil case to testify in his own behalf, for the purpose of explaining matters which, from their nature, lie within his own knowledge, unless a sufficient explanation is otherwise afforded by his evidence, is a fair subject of comment.[5] The contrary conclusion has been reached in North Carolina, but upon reasoning which does not commend itself to favorable consideration.[6] In one case that court say: "The fact that a party does or does not offer himself as a witness, standing alone, does not allow the jury to presume anything for or against him, and can only be the subject of comment as to its propriety or necessity, in any given case, according to the circumstances, as the introduction of any other witnesses may be commented upon." [7] In another

[1] Indianapolis &c. R. Co. *v.* Miller, 71 Ill. 464, 472.

[2] Shorb *v.* Kinzie, 100 Ind. 429.

[3] Berryhill *v.* Kirchner, 96 Pa. St. 489; Benedict *v.* Flanigan, 18 S. C. 506; *s. c.* 44 Am. Rep. 583.

[4] *Ante*, § 963.

[5] Lynch *v.* Peabody, 137 Mass. 92.

[6] Devries *v.* Phillips, 63 N. C. 53; Chambers *v.* Greenwood, 68 N. C. 274, 288; Gragg *v.* Wagner, 77 N. C. 246.

[7] Devries *v.* Phillips, 63 N. C. 53.

case the court reasoned that it is the *privilege*, and not the *duty*, of a party to a civil action to offer himself as a witness. "The fact," the court say, "is not the subject of comment at all — certainly not unless under very peculiar circumstances, which must necessarily be passed upon by the judge presiding at the trial, as a matter of sound discretion."[1] The sound rule is the reverse of that suggested in the language above quoted. In many cases the fact that a party does not offer himself as a witness, standing alone, will raise a fair inference that he is suppressing the truth, and this manifestly ought to be the subject of fair comment to the jury, — as much so as his failure to call any other credible witness within his reach, who knows the facts in controversy. Rules which hamper counsel in freely presenting their client's cause to the jury are not conducive to the proper administration of justice. Modern statutes rendering parties competent to testify, and providing for the examination of parties, having taken the last vestige out of the old common-law rule which shielded a party to a civil action from producing evidence against himself, there is no reason in the nature of things why the failure of a party to a civil action to take the stand as his own witness should not be the subject of fair comment to the jury, in like manner as his failure to produce any other witness who presumptively knows the material facts.[2]

§ **994. Reading Newspapers to the Jury.** — Whether the reading to the jury, during argument, of paragraphs from a newspaper, will be ground for a new trial must, of course, depend upon the nature of the matter read. If it is evidentiary in its nature, or whether evidentiary or not, of a tendency to excite prejudice against the losing party, it will be ground for a new trial. It was so held where, in a suit brought against a railway company for a personal injury to an employé, the plaintiff's counsel read to the jury a newspaper article intended to cast a stigma upon all railway companies on account of their recklessness in caring for the lives of their em-

[1] Gragg *v.* Wagner, 77 N. C. 246.

[2] *Post*, §§ 1001–1003.

ployés.[1] "It is not proper, however, to permit counsel to read newspaper comments upon the case on trial, nor upon facts connected with it, nor upon like matters. In short, extracts can only be used for the mere purposes of illustration, and never as statements of facts or expressions of opinion; nor can they be used under the cover of illustrations, when they contain statements of facts or expressions of opinion, concerning the particular case in hearing, or cases of like character."[2] But it is a rule in this connection that prejudice from such a course of conduct on the part of counsel will not be presumed, but must appear, in order to warrant a reviewing court in granting a new trial on this ground. Thus, where it appeared from the bill of exceptions that the counsel of the successful party read, as a part of his argument and for the purpose of illustrating it, a slip cut from a newspaper containing the form of a promissory note calling for $10, and then, by folding it in a peculiar manner, showed that it assumed the form of a note for $279; and the bill of exceptions showed that the counsel commented upon the note read from the slip, but did not state what his comments were, — the Supreme Court could not see any prejudicial error, but presumed that the comments were such as were proper for the counsel to make. "If," said Elliott, J., "the counsel had written the paper which he used for the purpose of illustration, it would scarcely be contended that it was improper for him to make use of it for the purpose of illustrating the manner in which a man not used to business might be imposed upon and induced to believe he was signing one instrument, when in fact he was actually signing one of an altogether different character."[3]

§ 995. Reading Books of Science to the Jury. — In the former chapter the circumstances under which *books of the law* may be read to the jury in argument were considered, from which

[1] Chicago &c. R. Co. *v.* Bragonier, 13 Bradw. (Ill.) 467.

[2] Baldwin *v.* Bricker, 86 Ind. 221, opinion by Elliott, J., citing Thomp. & M. on Juries, § 351 and authorities; Ins. Co. *v.* Cheever, 36 Ohio St. 201; *s. c.* 38 Am. Rep. 573.

[3] Baldwin *v.* Bricker, 86 Ind. 221, 223.

it will appear that the reading of books of the law stands on this peculiar footing: that whereas, juries are in criminal trials and in actions for libel, judges of the law as well as of the fact, it necessarily follows that counsel have the right to argue the law to them, so that they do not commit the indecency of arguing against the law as laid down by the court; in the making of which argument they must necessarily have the right to read to the jury extracts from books of the law. This, at least, is the limit of the right, as laid down by those courts which uphold to the fullest extent the doctrine that, in criminal trials and in actions for libel, juries are judges of the law as well as of the facts. But the reading of other books, and notably *books of science*, to the jury rests upon a different footing, which will now be considered. And first it must be observed,—

§ **996. That Such Books are not Evidence.** — The rule is that professional books, books of science — *e. g*, medical books — are not admissible in evidence, though experts may be asked their judgment and the grounds of it, which may be founded on books, as a part of their general knowledge.[1] The reason of the rule is, obviously, that if the authors were present they could not be examined without being sworn and exposed to a cross-examination. Their declarations or statements, whether merely verbal, or written, or printed and published in books, are not admissible."[2] While it is said that a *general history* may be read from, yet this is only to refresh the memory of the court as to something which it is supposed to know; that is of which it takes judicial notice.[3] Applying this rule it is held that quotations from medical books are not admissible as evidence, when offered independently, or when read by witnesses. So, in those jurisdictions where it is conceded that, under appropriate restrictions, *domestic law books* may be read to the jury, yet the reason assigned for allowing this is that the court,

[1] Melvin *v.* Easley, 1 Jones L. (N. C.) 386; Collier *v.* Simpson, 5 Carr. & P. 73; Stilling *v.* Thorp, 54 Wis. 528; Northington *v* State, 78 Tenn. (14 Lea) 424.

[2] Battle, J., in Melvin *v.* Easley, *supra;* Stilling *v.* Thorp, *supra.*

[3] Northington *v.* State, *supra.*

being the judge of the law, may correct the counsel as to the law so read, or as to the application of it. Nay, the court may prohibit counsel from reading to juries extracts from books of law which have no pertinency to the issues on trial. But the opinions of medical experts are in the nature of facts, and as such must, like all other facts of which judicial notice is not taken, be established by the testimony of living witnesses. They cannot be proved by writings which are in the nature of hearsay declarations, which come from persons who are not present testifying as witnesses, and who are not even shown to be competent to express scientific opinions.[1] In so ruling in a criminal case, Baron Alderson said to counsel: "I should not allow you to read a work on foreign law. Any person who was properly conversant with it might be examined; but then he adds his own personal knowledge and experience to the information he may have derived from books. We must have the evidence of individuals, not their written opinions. We should be inundated with books, if we were to hold otherwise."[2] The doctrine has been reaffirmed in many cases.[3]

§ 997. Instances Affirming and Disaffirming the foregoing Rule. — Thus, where it is a material question, upon a trial before a jury, whether a party has been treated by a medical practitioner in a proper and skillful manner, it is error to permit counsel, in arguing to the jury, to read an extract from a medical work, giving the opinion of the writer as to the proper mode of treatment to be followed in such a case.[4] - - - - On the contrary,

[1] People *v.* Wheeler, 60 Cal. 580, 584; *s. c.* 44 Am. Rep. 70 (denying Bowman *v.* Woods, 1 Greene (Iowa), 441, 445).

[2] Reg. *v.* Crouch, 1 Cox C. C. 94.

[3] Reg. *v.* Taylor, 13 Cox C. C. 77; State *v.* O'Brien, 7 R. I. 338; Ashworth *v.* Kittridge, 12 Cush. (Mass.) 193; Commonwealth *v.* Wilson, 1 Gray (Mass.) 338; Washburn *v.* Cuddihy, 8 Gray (Mass.), 431; Commonwealth *v* Brown, 121 Mass. 81. Compare Legg *v.* Drake, 1 Ohio St. 286; Wade *v.* De Witt, 20 Tex. 401; Ripon *v.* Bittel, 30 Wis. 619; State *v.* Sarton, 2 Strobh. L. (S. C.) 60; Collier *v.* Simpson, 5 Carr. & P. 73; Carter *v.* State, 2 Ind. 617; Attorney-General *v.* Plate Glass Co., 1 Anstr. 39; Luning *v.* State, 1 Chand. (Wis.) 178; Green *v.* Cornell, 1 City Hall Rec. (N. Y.) 14.

[4] Gale *v.* Rector, 5 Bradw. (Ill.) 481, 484.

where, in a criminal trial, the prosecuting attorney first proved by the testimony of a practicing physician that a certain medical work was a book "recognized by the medical profession as good authority on all subjects therein treated of," it was held competent to allow him to read extracts from it.[1] - - - - In a case of murder, where the homicide grew out of a difficulty between two "gentlemen" one of whom, after having vainly endeavored to obtain satisfaction according to the "code," proceeded to "post" the other as a coward, it was held not such an irregularity as required a new trial, that counsel for the State, in his opening argument, read extracts from a standard work on dueling and also from an essay on the same subject written by himself, which laid down the rules obtaining "among gentlemen" as to blows, insults and apologies, the "lie direct," the "*amende honorable*," etc., and which gave an account of the unhappy life of one who had killed his adversary in a duel. The court could not say that this was entirely impertinent to the case under consideration, or beyond the scope of the limits allowed to advocacy.[2]

§ 998. Whether such Books may be Read for Purposes of Argument or Illustration. — Upon this question there is a difference of opinion, involving what might be called a strict and liberal construction of a well-settled and obvious rule. On the one hand, it is held that, such books not being admissible as evidence, it is not permissible for counsel to read to the jury extracts from them by way of argument or illustration; since this would have the effect of enabling counsel to get before the jury a species of evidence which the law rejects as incompetent.[3] It has even been held that an expert should not be allowed, in giving his testimony, to read from a work on medical jurisprudence.[4] On

[1] Merkle *v.* State, 37 Ala. 139 (following Staudenmier *v.* Williamson, 29 Ala. 566; Acct. Bowman *v.* Woods, 1 Greene (Iowa), 445).

[2] Cavanah *v.* State, 56 Miss. 300, 308.

[3] Reg. *v.* Taylor, 13 Cox C. C. 77; Ashworth *v.* Kittridge, 12 Cush. (Mass.) 193; People *v.* Wheeler, 60 Cal. 581; *s. c.* 44 Am. Rep. 70.

[4] Commonwealth *v.* Sturtivant, 117 Mass. 139. Compare Yoe *v.* People, 49 Ill. 410, 412.

the other hand, it has been held that counsel may properly be allowed, by way of argument or illustration, to read a pertinent quotation or extract from a work of science or art, as well as a classical, historical or other like publication, because it would make no difference whether repeated by counsel from recollection or read from a book; though it would be an abuse of privilege for counsel to make the right to read such matter the means of getting improper matter before the jury.[1] But the following qualification has been made to this rule: "The matter read or stated should be pertinent to the subject of inquiry, and so far calculated to elucidate it as to aid the jury in a better understanding of the evidence produced at the trial."[2] So, in an English criminal case, it was held that counsel had the right to read to the jury the general observations of a learned judge, made in a case tried some years before, on the nature and effect of circumstantial evidence, if he adopted them as his own opinions and made them a part of his address to the jury.[3] It is also conceded that the trial court may, in the exercise of a sound *discretion*, determine how far the public time shall be taken up in this way.[4] Other courts have settled upon the broader rule that the extent to which counsel in criminal trials may read books to the jury is a matter confided to the *discretion* of the trial court, which discretion will not be reviewed unless in clear cases of abuse;[5] from which it follows quite clearly that where the trial court refuses to permit counsel to read from a book not introduced in evidence to the jury, this will be no ground of reversal except in very clear cases.[6]

§ 999. Instructing the Jury that Such Books are not Evidence. — Where this practice has been permitted, it is the clear duty of the court to instruct the jury that the extracts from the

[1] Legg *v.* Drake, 1 Ohio St. 287; reaffirmed in Union Central Life Ins. Co. *v.* Cheever, 36 Ohio St. 201, 209; *s. c.* 38 Am. Rep. 573.

[2] Union Central Life Ins. Co. *v.* Cheever, *supra*.

[3] Reg. *v.* Courvoisier, 9 Carr. & P. 362.

[4] Legg *v.* Drake, 1 Ohio St. 287.

[5] Dempsey *v.* State, 3 Tex. App. 429; Hines *v.* State, 3 Tex. App. 483.

[6] Wade *v.* De Witt, 20 Tex. 398.

books which have been read to them are not evidence, but simply the theories of medical men.[1] But whether such an instruction will cure the error and prejudice is quite another question. In Indiana, where a book purporting to be a medical work had been read by counsel to the jury, and the court afterwards instructed them that the extract was to be regarded not in anywise as evidence, it was held that no reversible error had been committed.[2] The Supreme Court of California, on the contrary, in an elaborate judgment on this subject, regard the Indiana case as not having been well decided.[3] The question comes back to the conflict of opinion which obtains on the question whether the prejudice which flows from the admission of incompetent evidence is cured by the action of the court in subsequently instructing the jury to disregard it.[4]

§ 1000. Illustrations. — Where the court allowed the counsel for the State to read to the jury, against the objection of the prisoner, the evidence of Charles H. Porter, who, as professor of chemistry, had given testimony in a criminal trial in another State, counsel reading from the published report of the trial of *People* v. *Hartung*,[5] it was held that the ruling was erroneous, and the court, speaking through Breese, C. J., said: "If the State's attorney, in such a case or in any case, read from medical books in his argument to the jury, the court should instruct them that such books are not evidence, but theories simply of medical men. To permit testimony given in another State to be used as evidence against a prisoner on trial in this State, was the height of injustice, as the prisoner had no opportunity to cross-examine the witness or to meet his testimony by other evidence."[6] In a civil action for damages for overflowing the plaintiff's land and injuring the plaintiff's machinery by backwater from the defendant's mill-dam, the plaintiff was allowed to read extracts from a book called "Evans' Millwright's Guide," in his closing argument to the jury, although the defendant objected. The court instructed the jury that extracts read from a scientific work were not even a *prima facie* authority, but, like the argument of counsel, or other thing adduced in illus-

[1] Yoe *v.* People, 49 Ill. 410, 412.

[2] Harvey *v.* State, 40 Ind. 516.

[3] People *v.* Wheeler, 60 Cal. 581; *s. c.* 44 Am. Rep. 70.

[4] Hopt *v.* People, 7 U. S. Sup. Ct. Rep. 614; 21 Am. Law Rev. 459.

[5] 4 Park. Cr. (N. Y.) 297.

[6] Yoe *v.* People, 49 Ill. 410, 412.

tration, might be satisfactory to the jury, or might not. It was held that in view of the admonition of the court, no ground for new trial was presented. Hovey, J., in giving the opinion of the Supreme Court, said: "Reason is neither more nor less than reason because it happens to be read from a book; and we think we would be adopting a very difficult rule to enforce if we should attempt to compel counsel to use their own arguments for every position they might assume." [1]

§ 1001. Referring to the Failure of the Prisoner to Testify in His Own Behalf. — Since the passage of statutes in most American jurisdictions enabling the accused person, in a criminal case, to testify in his own behalf, it has become an important question whether, in case the accused does not avail himself of this privilege, the State's attorney may be permitted to comment upon the fact in his argument to the jury. In some of the States the statutes which thus enable an accused person to testify contain the provision that his neglect or refusal to do so shall not raise any presumption of guilt, nor shall the circumstance be referred to by the State's attorney.[2] The courts, whether following the express language of statutes or attempting to carry out the analogies of the old law, generally hold that the failure of the accused person, in a criminal trial, to testify in his own behalf, cannot be referred to by the State's counsel in their argument to the jury, and that to permit a reference to it is error for which a conviction will be reversed; [3] though if he does take the witness

[1] Cory *v.* Silcox, 6 Ind. 39.

[2] Kansas Laws 1871, ch. 118, § 1; Missouri Rev. Stat., § 1919. The Maine statute recites that the fact that the defendant in a criminal prosecution does not testify in his own behalf shall not be evidence of his guilt. Maine Rev. Stat., ch. 134, § 19.

[3] State *v.* Brownfield, 15 Mo. App. 593; Crandall *v.* People, 2 Lans. (N. Y.) 309; Showalter *v.* State, 84 Ind. 563; State *v.* Mosley, 31 Kan. 355; State *v.* Graham, 17 N. W. Rep. 192; Long *v.* State, 56 Ind. 182; Commonwealth *v.* Scott, 123 Mass. 239; Knight *v.* State, 70 Ind. 375; Morrison *v.* State, 76 Ind. 335, 338; State *v.* Banks (Me.), 3 New Eng. Rep. 240; Commonwealth *v.* Harlow, 110 Mass. 411. *Contra*, Stover *v.* People, 56 N. Y. 315; Price *v.* Com., 77 Va. 393; State *v.* Martin, 74 Mo. 547; State *v.* Banks, 3 New Eng. Rep. 240; *s. c.* 78 Me. 490 (superseding the contrary rule in State *v.* Bartlett, 55 Me. 200, 220; State *v.* Lawrence, 57 Me. 574, and State *v.* Cleaves, 59 Me. 298). For further observations on the policy of statutes admitting prisoners to testify, see People *v.* Jones, 31 Cal. 573; People *v.*

stand, his testimony becomes the subject of *fair comment*, like that of any other witness.[1]

§ 1002. Instances under the foregoing Rule. — In Ohio and Kansas, it seems to be conceded that the incidental allusion by the prosecuting attorney (not in argument to the jury) to the failure of the accused to take the stand in his own behalf may not, under particular circumstances, require the granting of a new trial.[2] In Missouri, the statement of the prosecuting attorney, in his argument to the jury in a case of larceny, "that no attempt had been made by the defendant to explain his possession of the property," was not regarded by the reviewing court as referring to the fact that the defendant himself might have been examined as a witness if he had so chosen, and was therefore held not a ground for a new trial.[3] - - - - In one jurisdiction the rule is that, if any objectionable comments are made by the State's counsel, upon the failure of the accused to take the witness stand in his own behalf, his

Farrell, 31 Cal. 583. In a recent case in Maine, State *v.* Banks, *supra*, the history of the practice in that State on this subject is thus given in the opinion of the court delivered by Virgin, J.: "In 1864, for the first time, a person charged with commission of a criminal offense was made, 'at his own request, and not otherwise, a competent witness.' Stat. 1864, ch. 280. After this statute took effect, county attorneys, where the accused did not elect to testify, were allowed, in argument to comment on the fact to the jury. State *v.* Bartlett, 55 Me. 220; State *v.* Lawrence, 57 Me. 574; State *v.* Cleaves, 59 Me. 298. This practice continued for fifteen years, and while it operated favorably for innocent persons, it resulted disastrously to the guilty who would not add perjury to the crime charged. Thereupon the Legislature, believing that the constitutional provision which declares that 'the accused shall not be compelled to furnish or give evidence against himself' (Decl. Rights, § 5), like the rain descending upon the innocent and guilty alike, and looking to a more careful protection of this right, enacted that 'the fact that the defendant in a criminal prosecution does not testify in his own behalf shall not be evidence of his guilt.' Stat. 1879, ch. 92, § 1; Rev. Stat., ch. 134, § 19. We think the intent of the statute is that the jury, in determining their verdict, shall entirely exclude from their consideration the fact that the defendant did not elect to testify, substantially as if the law did not allow him to be a witness. Commonwealth *v.* Harlow, 110 Mass. 411; Commonwealth *v.* Scott, 123 Mass. 241." It has been supposed that the fact that a party does not testify is not a circumstance against him, unless there is sufficient evidence to justify a finding against him. Horton *v.* Parsons (N. Y. Sup Ct.), 24 Week. Dig. 234.

[1] *Ante*, §§ 646, 989.

[2] Calkins *v.* State, 18 Ohio St. 366; State *v.* Mosley, 31 Kan. 355.

[3] State *v.* Preston, 77 Mo. 294.

remedy is to object to them at the time, and to ask the judge to instruct the jury that they should not be considered by them to his prejudice; that, in such a case, the judge is not required to treat the whole trial as a nullity because of such remarks, and withdraw the case from the jury.[1] - - - - But another court goes to the length of holding that, where counsel for the State, in their argument, are guilty of the highly improper and unprofessional conduct of referring to the fact of the failure of the accused to take the witness stand in his own behalf, such reference being prohibited by statute, a conviction will be reversed, although the court may have interposed and rebuked the impropriety; since in such a case it cannot be known how far the remark may have prejudiced the rights of the accused.[2] Nor will an instruction admonishing the jury to pay no attention to the remark, cure the prejudice.[3]

§ 1003. COMMENTS BY THE AUTHOR ON THE FOREGOING RULE. — The foregoing rule is a striking illustration of the extent to which old ideas, however foolish, when constantly reiterated by grave and earnest men, will pass unchallenged as the very essence of wisdom,— a thing which is every day illustrated in the idiotic religious creeds which take hold of the beliefs of the most learned men. It is an attempt to invest accused persons with this privilege and at the same time to throw around them the shield of the ancient maxim *nemo seipsum accusare tenetur*, thus keeping alive the maxim after the state of things which called it into existence has wholly passed away. The maxim had its origin in times when it was the practice to put accused persons to the torture, for the purpose of compelling them to disclose the guilt of themselves and their accomplices, and its original meaning was that no one should be compelled, *by torture*, or by any other compulsory means, to accuse himself. If we adhere to the maxim in its original meaning, we proceed upon a foundation of common sense and of obvious justice. But there is no sound reason why a prisoner should not be interrogated, as is done in continental countries, in respect of the circumstances surrounding the alleged crime, his answers and his manner of sustaining the examination being fair subjects of consideration by the jury. Far less reason is there for the conclusion that he may avail himself of the privilege of becoming a witness in his own behalf, and yet the triers of the facts are so far to stultify their own understanding as not to draw any unfavor-

[1] Com. *v.* Worcester, 144 Mass. 58, 61.

[2] Angelo *v.* People, 96 Ill. 209.

[3] State *v.* Balch, 31 Kan. 465; *s. c.* 2 Pac. Rep. 609.

able inference against him if he declines the privilege. In every other situation the rule of reason has its sway. *Contra spoliatorem omnia præsumuntur;* and, as already seen, where a party in a civil trial fails to produce material witnesses, depositions or documents within his reach, the fact creates a presumption against him and becomes a subject of fair comment in argument to the jury.[1] But here the tenderness of the law toward the criminal classes is so great, that the ordinary methods by which men reason in arriving at truth are to be put aside. A hardened counterfeiter or thief sits in the prisoner's seat, and he above all others could if he would, and would if he could, explain the inculpatory circumstances shown in the evidence against him; but it is his privilege to say not one word; and, lest the jury should draw from his silence that inference which the experience of men draws in every like situation from the failure of him to explain who best can explain, the prosecuting attorney is not to allude to the circumstances in argument, but is to assist, by silence, in *concealing from the jury*, if possible, the fact that the law allows the prisoner to take the witness stand and explain, if he can. Such efforts are not only ineffective, but they are puerile. As the intelligence of the community constantly rises, juries will seldom be assembled to try criminal cases who do not know that the law extends to every accused person the privilege of being a witness for himself. They justly regard it as a privilege which was intended to be the shield of the innocent and not the shield of the guilty. They know that an innocent man, who can explain, will always attempt do so. They bring to the discharge of their duties the processes of reasoning upon which men proceed in the ordinary affairs of life. They cannot be trained, for the purposes of a single trial, to stultifying common sense, in order that guilt may be screened and crime go unpunished. Any attempt to reach such a result, by withholding from their minds a knowledge of the state of the law on the subject, must be as fantastic as the attempt of the old hen which has hatched a litter of ducks, to keep them from running into the water. There is especially less reason for this rule under modern holdings which limit the cross-examination of the accused to the matters touched upon in his direct examination, and which prohibit the putting of disparaging questions to him touching the circumstances of his past life.[2] The privilege of *withholding evidence* and *concealing the truth* is an abomination which must be rooted out of the law.

[1] *Ante*, §§ 453, 794, 795, 989.

[2] *Ante*, §§ 652, 653.

§ 1004. Commenting on Failure to call Prisoner's Wife as a Witness. — The privilege of the defendant in this regard should, by analogy, be extended also to him in respect of his wife, where the statute allows him to call her as a witness but prohibits the State from doing it. Accordingly, it has been held in a jurisdiction where there is a statute enabling a husband or wife to testify for each other, that it is an irregularity, for which a conviction will be reversed, that the State's attorney, in his argument to the jury, commented upon the fact that the wife of the accused was not called in the particular case; since, if either marital partner were obliged to call the other, the failure to do so would become evidence, and the sanctities of the marital relation would be thereby broken up, and the policy of the statute defeated.[1] But in Texas, where the most extreme views are generally taken in favor of the rights of defendants in criminal cases, it has been held not error to allow the prosecuting attorney, in his closing argument, to comment on the failure of the defendant's wife to appear and testify as a witness in his own behalf, the nature of the case being such as to make her an appropriate witness.[2]

§ 1005. Prisoner's Counsel may enlarge on the Prisoner's Right to be silent. — Moreover, it has been ruled that, "as there is danger that the jury, knowing that the law now permits a defendant to testify, may draw inferences against him from his omission so to do, his counsel may properly, in addressing the jury, insist and enlarge upon his constitutional and legal right in this respect," without the danger of the matter being made the subject of unfavorable comment by the State's counsel.[3]

§ 1006. ILLUSTRATION OF THE FOREGOING. — On the trial of a joint indictment against two persons for breaking and entering a dwelling house in the night time for burglary, neither of them testified. Their counsel in his closing argument alluded to this fact, and to the reasons

[1] Johnson *v.* State, 63 Miss. 313.

[2] Mercer *v.* State, 17 Tex. App. 463, 467. The Kansas statute (Kan. Laws 1871, ch. 118, § 1), prohibits the prosecuting attorney from referring to the failure of a wife to testify on behalf of her husband.

[3] Com. *v.* Scott, 123 Mass. 239

for it, and stated that the fact they did not testify should not raise any presumption against them, and made the following remarks: "What good would the testimony of these people be in proving their innocence? If guilty, would they confess it? If innocent, they are to be proved so by other lips than theirs. I have been endeavoring to discover the real facts in this case, and have never asked Scott or Dunlap or Mrs. Scott about it, and have never spoken to these men, nor heard their voices except as they were challenging the jury. They could add by their word nothing for me, either for or against them. I tell you, gentlemen, I never yet called a prisoner to the stand. I never have been through the farce, and I could not be here to ask that these men might have their shackles taken off and go upon the stand and declare their innocence to you. Their testimony would be utterly worthless. When Professor Webster was tried for the murder of Dr. Parkman, his two daughters went upon the stand, and delivered important testimony. The lawyers for the government asked no questions, but bowed them graciously from the stand, because they knew that, from the lips of those daughters, pleading for the life of their father, no testimony could come that would weigh with the jurors. And so, gentlemen, as I said before, I could not have these men unshackled to protest their innocence to you. If they went on the witness stand, what could they do but deny the testimony of Edson, that he met them on Lexington avenue and Fiftieth street, or Madison avenue at Red Leary's and Fort Hamilton, or that they came here." The prosecuting attorney, in his closing argument, was proceeding to discuss these reasons, and to argue that other reasons than those suggested were the real reasons for not calling the defendants and Mrs. Scott as witnesses, when the counsel for defendants interrupted, and asked the judge to rule that the fact that the defendants did not testify could not be commented on by the government. But the judge, having first stated the law, that the fact that the defendants did not testify did not create any presumption against them, ruled that, *inasmuch as the matter had been referred to by the defendants' counsel*, the prosecuting attorney had the right to comment on the reasons which the defendants' attorney gave for their not going upon the stand and testifying in their own behalf, and also to give the reasons which, the government contended, really existed for their not testifying, and permitted the prosecuting attorney to proceed in his comments. The defendants having been convicted, on exceptions it was held that this was error. Mr. Chief Justice Gray, in giving the opinion of the court, said: "As there is danger that the jury, knowing that the law now permits a

defendant to testify, may draw inferences against him from his omission so to do, his counsel may properly, in addressing the jury, insist and enlarge upon his constitutional and legal right in this respect. When counsel for the defendants in the present case went farther, and referred to his own opinion and practice upon the subject, and to what he supposed to have taken place in other cases, he might well have been checked by the court. But the absolute exemption secured to the defendants by the constitution and laws, from being compelled to testify, and from having their omission to do so used in any way to their detriment, could not be affected by superfluous and irregular suggestions of their counsel in the heat of argument. That exemption could only be waived by each defendant's own election to avail himself of the statute, and to go upon the stand as a witness. The course of the closing argument for the prosecution tended to persuade the jury that the omission of the defendants to testify implied an admission or a consciousness of the crime charged, and the presiding judge, in permitting such a course of argument, against the objection of the defendants, and in ruling that the prosecuting attorney had a right to comment on the reasons which the defendants' counsel gave for their not going upon the stand and testifying in their own behalf, and also to give the reasons which the government contended really existed for their not testifying, — committed an error which was manifestly prejudicial to the defendants, and which obliges this court to set aside the verdict and order a new trial." [1]

§ 1007. Commenting on the Difference between Original and Amended Pleadings. — Difficulty has been found in dealing with the question whether, where a pleading has been amended, the original pleading can be put in evidence as an admission of the party whose pleading it is.[2] It is too obvious for discussion

[1] Com. *v.* Scott, 123 Mass. 239.

[2] In Massachusetts discarded or abandoned pleadings cannot be thus referred to. They are treated as having been drawn by the counsel for the purpose of laying the merits before the court, and as being hardly the act of the party, and also as being in some sense in the nature of *privileged communications*. Baldwin *v.* Gregg, 13 Metc. (Mass.) 253; Walcott *v.* Kimball, 13 Allen (Mass.), 460; Phillips *v.* Smith, 110 Mass. 61 (under a statute). In Missouri it has been held that an abandoned pleading cannot be read in evidence as an admission against the party, on the trial of the *same case* in which the pleading was originally filed. Corley *v.* McKeag, 9 Mo. App. 38, 41; Owens Co. *v.* Pierce, 5 Mo. App. 576; Breckenkamp *v.* Rees, 3 Mo. App. 585. But these de-

that it cannot properly be used in final argument, for the purpose of reaching the same result, where it has not been put in evidence.[1]

§ 1008. **Suffering the Audience to Applaud the State's Counsel.** — In a case of murder, the following scene took place: Upon the conclusion of the argument of the counsel who had opened the case for the State, the audience, which was composed of some four hundred people, cheered and applauded the speaker. This was late at night, and further argument was postponed until the next morning. The court did not restrain the audience, or in any way express its disapprobation of the improper demonstration, nor was the jury cautioned against suffering this conduct of the audience to influence their minds in the consideration of the case. On the next morning, counsel for the defendant were permitted, in their addresses to the jury, to comment upon and condemn without restriction the occurrence of the night before. In reply to them, counsel for the State, in the concluding argument, characterized the demonstration as a "spontaneous outburst of approval, by the audience, of this cause, after they had heard it truthfully represented by the State." This remark was not reproved by the court, nor was the jury admonished to guard themselves against being influenced by the popular demonstration. As the conviction was reversed on other grounds, the reviewing court deemed it unnecessary to say whether or not they would have suffered the conviction to stand, if this irregularity had presented the only ground of reversal. But they took occasion to say that the trial court should have taken prompt and decided action on the occasion, and should have endeavored, by its condemnation of the proceeding, and its admonitions to the jury, to prevent any prejudice to the defendant by such reprehensible

cisions are *overruled* in the later case of Anderson *v.* McPike, 86 Mo. 293, 301. It may always be read on the trial of *another case*. Murphy *v.* St. Louis Type Foundry, 29 Mo. App. 541; Dowzelot *v.* Rawlings, 58 Mo. 75; Turner *v.* Baker, 64 Mo. 228, 245. Compare Priest *v.* Way, 87 Mo. 16, 27, 32; Taussig *v.* Shields, 26 Mo. App. 318, 326, 327.

[1] Taft *v.* Fiske, 140 Mass. 250; *s. c.* 54 Am. Rep. 459; Walcott *v.* Kimball, 13 Allen (Mass.), 460; Phillips *v.* Smith, 110 Mass. 61.

conduct; and that, in this effort, the counsel for the State should have united.[1]

§ 1009. Civil Responsibility for Words Spoken in Forensic Debate. — The limits of this chapter do not permit an extended discussion on this most interesting topic. The general rule, upon which modern cases unite, is that words spoken in debate, or written in the regular course of a judicial proceeding, or before a *quasi*-judicial tribunal, by a party or his counsel, which are pertinent to the subject-matter of the inquiry, are absolutely privileged, and wholly without reference to the motives which may have prompted them.[2] An idea formerly lingered in the books that, in order to make the words privileged they must have been pertinent to the issues, and not spoken *ex malitiâ*;[3] but the modern doctrine is that, if the words are material to the issues, the question of malice or motive is an immaterial inquiry.[4] The rule, carried to this extent, is deemed absolutely necessary to uphold that freedom of forensic debate which is so essential to the due administration of justice. Where, however, a party or his counsel wanders from the issues, whether in writing or in speaking, maliciously, to asperse and villify another, the case is not within the privilege.[5]

[1] Cartwright *v.* State, 16 Tex. App. 473, 489; *s. c.* 49 Am. Rep. 826.

[2] 1 Hawk. P. C., ch. 28, § 8; Cooley's Const. Lim. 443; Hodgson *v.* Scarlett, 1 Barn. & Ald. 232, 239; *s. c.* 1 Holt N. P. 621; Mackey *v.* Ford, 5 Hurl. & N. 792; Cutler *v.* Dixon, 4 Coke, 14*b*; *s. c.* Dyer, 285; Weston *v.* Dobiniet, Cro. Jac. 432; Astley *v.* Younge, 2 Burr. 807, per Lord Mansfield, C. J.; Brooke *v.* Montague, Cro. Jac. 90; McMillan *v.* Birch, 1 Binn. (Pa.) 178; Newfield *v* Copperman, 15 Abb. Pr. (N. Y.) (N. S.) 360; Marsh *v.* Ellsworth, 36 How. Pr. (N. Y.) 532; *s. c.* 1 Sweeny (N. Y.), 152; 50 N. Y. 309; Garr *v.* Selden, 4 N. Y. 91; Ring *v.* Wheeler, 7 Cow. (N. Y.) 725; Hastings *v.* Lusk, 22 Wend. (N. Y.) 410; Gilbert *v.* People, 1 Denio (N. Y.), 41; Hoar *v.* Wood, 3 Metc. (Mass.) 193; Mower *v.* Watson, 11 Vt. 536; Jennings *v.* Paine, 4 Wis. 358.

[3] Hodgson *v.* Scarlett, 1 Barn. & Ald. 232; *s. c.* 1 Holt N. P. 621.

[4] Marsh *v.* Ellsworth, 50 N. Y. 309; Gilbert *v.* People, 1 Denio (N. Y.), 41; Hastings *v.* Lusk, 22 Wend. (N. Y.) 410; Ring *v.* Wheeler, 7 Cow. (N. Y.) 725.

[5] Gilbert *v.* People, 1 Denio (N. Y.), 41. Compare Padmore *v.* Lawrence, 11 Ad. & E. 380; Bromage *v.* Prosser, 4 Barn. & C. 247; Remington *v.* Congdon, 2 Pick. (Mass.) 210.

§ 1010. Who entitled to be Heard. — Parties are entitled to appear *in propria personâ*, and conduct their own causes, if they are foolish enough to do so;[1] but a person who is not an enrolled attorney or counselor has no right to appear as such for a party.[2] The *wife* of a party has no right to appear and conduct his cause at *nisi prius*.[3] A party conducting his own cause may rightfully address the jury as his own advocate, without waiving his right to give evidence as a *witness* in his own behalf.[4] But a party not enrolled as a counselor of the court cannot claim the right to conduct his cause in part by himself and in part by counsel: if he examines his own witnesses, counsel will not be heard in his behalf on points of law.[5] According to a review of the authorities by Mr. Chief Justice Gray,[6] they seem to indicate that *counsel for a deceased party* may be heard as *amicus curiæ* before the full court, "where the exceptions sought to be established have been allowed and entered in his client's lifetime, because the delay in disposing of them would be the act of the court;[7] or if the exceptions had been taken by the party in his lifetime, though not allowed or entered until after his death, because they would be his own exceptions, seasonably alleged and tendered by himself, and the subsequent allowance and entry of them might be treated as mere forms to put them in order for hearing;[8] or if the ruling below had been in his favor, and the questions of law reserved on the motion of the other party;[9] or if the questions of law had been reserved by the judge himself at the trial or hearing, and brought before the full court by his report, or by motion pursuant to leave so to reserve."[10] But an *amicus*

[1] Hightower *v.* Hawthorn, 1 Hempst. (U. S.) 42; Henck *v.* Todhunter, 7 Har. & J. (Md.) 275.

[2] *Ante*, § 209.

[3] Cobbett *v.* Hudson, 15 Ad. & El. (N. S.) 988; *s. c.* 14 Jur. 982.

[4] Cobbett *v.* Hudson, 1 El. & Bl. 11; *s. c.* 17 Jur. 488; 22 L. J. (Q. B.) 11.

[5] Mosoati *v.* Lawson, 1 Mood. & Rob. 454.

[6] Martin *v.* Tapley, 119 Mass. 116, 119.

[7] Citing Martin *v.* Tapley, 116 Mass. 275; Bridges *v.* Smyth, 8 Bing. 29; *s. c.* 1 Moore & S. 93; Miles *v.* Williams, 8 Q. B. 147.

[8] Kelley *v.* Riley, 106 Mass. 339.

[9] Currier *v.* Lowell, 16 Pick. (Mass.) 170.

[10] Springfield *v.* Worcester, 2 Cush. (Mass.) 52, 62; Freeman *v.* Rosher, 13 Ad. & El. (N. S.) 780.

curiæ cannot take a case up, by a bill of exceptions or otherwise, although he may have been counsel for the deceased party, and his authority may have been revoked by the death of his client. "An *amicus curiæ*," said Gray, C. J., "is heard only by the leave and for the assistance of the court, and upon a case already before it. He has no control over the suit, and no right to institute any proceeding therein, or to bring the case from one court to another, or from a single judge to the full court, by exception, appeal or writ of error."[1] Where competent counsel are retained in a cause and are present in court, prepared to argue it, the court commits no error in declining to hear counsel not retained in such cause, or in any other pending cause in which a similar question would arise, but who merely expect to have a *similar cause thereafter*.[2] There is no rule of law which prohibits an *attorney of record*, who is a *witness* in a cause, from summing up the case before the court or jury. It seems that there was, however, a rule in California which prohibited it from being done without permission of the court; but where the court gave such permission, no question was presented for review.[3] In Missouri it is held that it is not ground of new trial that an attorney, who had *assisted the prosecuting attorney* by taking the testimony, was allowed to make the opening argument to the jury with a fifteen minutes speech. The court said: "It is wholly immaterial whether the permission was made matter of record or not, nor does it make any difference whether he was employed in the case, or gratuitously assisted the prosecuting attorney. An attorney employed in the case may even make the statement of the case to the jury. The fifth subdivision of section 1908[4] cannot be construed so as to require the prosecuting attorney, instead of other counsel engaged in the cause, to make the opening statement."[5] The employment of *special counsel* by

[1] Martin *v.* Tapley, *supra;* citing Yearb., 4 H. VI. 16, pl. 16; Isley's Case, 1 Leon. 187; Knight *v.* Low, 15 Ind. 374; Minor's Abr., *Amicus Curiæ.*

[2] Nauer *v.* Thomas, 13 Allen (Mass.), 572.

[3] Branson *v.* Carruthers, 49 Cal. 375.

[4] Rev. Stat. Mo. (ed. 1879.)

[5] State *v.* Rob, 90 Mo. 31, 36; following State *v.* Stark, 72 Mo. 38.

private prosecutors, to assist the district attorney, is not inhibited by the laws of Texas. The State's attorney should, however, retain the direction of the prosecution, and not resign the same to assistant counsel.[1]

[1] Burkhart *v.* State, 18 Tex. App. 599. The court say: "This practice has been known to all the legislatures that have assembled in the State, and if it be an illegal and improper practice, as contended by counsel for defendant, it is indeed strange that it has been so long and so universally tolerated by the law-making power and sanctioned by the courts. It seems that, in some States, this practice is not allowed; but in most of the States it is sanctioned. It is, however, the duty of the district or county attorney to reserve to himself the direction of the case. This he should never surrender to assistant counsel. Whart. Pl. & Pr., § 555, and cases there cited; 1 Bish. Cr. Pr., § 281. The court did not err in overruling the defendant's objection to permitting the district attorney to avail himself of assistant counsel in the prosecution, both in the conduct and arguing of the case."

TITLE V.

PROVINCE OF COURT AND JURY: QUESTIONS OF LAW AND OF FACT.

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CHAPTER XXXI.

GENERAL RULES.

ARTICLE I. — QUESTIONS OF LAW FOR THE COURT.
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ARTICLE I. — QUESTIONS OF LAW FOR THE COURT.

SECTION
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§ **1015. The Ends of Judicial Administration.** — All effort in judicial administration expends itself in two directions: 1. In ascertaining the ultimate or constitutive facts upon which the rights of the parties depend. 2. In applying the law to such facts. In cases at law the jury ascertain the facts, and the judge applies the conclusion of law to them. The conclusion of law applied to the ascertained facts becomes the *judgment* of the court, not its *order* or *command*, the fiction being that the court pronounces the law, and that it moves forward, by its inherent

vigor, to the result. This fiction is expressed in the concluding words of every judgment at law, — *Consideratum est per curiam: it is considered by the court*, that the plaintiff recover of the defendant, or that the defendant go hence, etc.

§ **1016. Facts Ascertained, Judge pronounces Conclusion.** — In either case, therefore, where the facts are ascertained beforehand, the judge pronounces the conclusion of the law thereupon. Logically the facts would be ascertained first, and then the conclusion of the law would be pronounced by the judge. This is the case where special verdicts are found, and also where the controversy is submitted upon an agreed state of facts. But where a jury return a general verdict, this embodies a mixed conclusion of law and fact. In such cases the judge pronounces the law to the jury upon all the hypotheses of fact which the evidence substantially tends to prove, — leaving them to determine what hypothesis has been proved, and to apply to it the law thus stated. It must strike the thoughtful mind at once, that the office of deciding difficult questions of fact and applying conclusions of law announced from the bench to the facts so decided, is a difficult one, especially for a body of untrained persons acting in a situation entirely new and strange to them; and so, it is confidently stated, it results in actual practice.

§ **1017. Judge must declare the Law, and not leave it to Jury.** — The judge decides questions of law; the jury, questions of fact.[1] It is obviously the right of every suitor to have the opinion of the judge upon questions of law, material to the proper determination of his case. The jury are not qualified to determine such questions, and they are calculated to confuse, embarrass and mislead them. The general rule, therefore, is that it is error for the judge to submit questions of law to the determination of the jury.[2]

[1] Co. Litt. 155, 156; Fost. Cr. L. 255, 256.

[2] Hickey *v.* Ryan, 15 Mo. 63, 67; Fugate *v.* Carter, 6 Mo. 267, 273; United States *v.* Carlton, 1 Gall. (U. S.) 400; Thomas *v.* Thomas, 15 B. Mon. (Ky.) 178; Ragan *v.* Gaither, 11 Gill & J. (Md.) 472.

§ 1018. But Error not Reviewed unless Excepted to. — But it is no ground for a new trial that the judge left to the jury, as a question of fact, that which he himself should have decided as a question of law, unless the error was objected to at the time.[1]

§ 1019. Nor Unless Prejudicial. — Thus, it has been held that an instruction, leaving it to the jury to determine the question whether the instrument sued on is a promissory note, or not, is bad; but where the instruction was immaterial and technical, it was cured by the statute of jeofails.[2] And sometimes, where the judge has submitted to the jury a question which involves a conclusion of law, he may cure the error by an additional explanation. Thus, in an action against a railway company for killing hogs, which had strayed upon its track, the judge was asked to instruct the jury that, in order to find for the plaintiff, they must find that the hogs strayed upon the track at a point where the defendant was bound by law to fence its track. It was said that the judge could not properly have given this instruction to the jury, without, at the same time, telling them at what points of its track a railroad company is bound by law to have its track fenced. With such a correction, there would be no question of law left for the jury to decide.[3]

§ **1020. Nor where Jury decide Question of Law rightly.**— If the judge submits a question of law to the jury and they decide it rightly, there is no ground of exception; since it would be absurd to reverse a judgment in order that the judge might decide what the jury rightly decided.[4]

§ **1021. Judge decides all Questions on an Agreed Case.**— On an agreed case, stated to the court in writing for its decision, the court necessarily draws all inferences, both of law and of fact, from the facts agreed upon, which may be necessary to its judgment. Thus, it has been held that, whether the relation of *landlord and tenant* existed between the parties, and whether the

[1] Strickland *v.* Strickland, 8 C. B. 724.

[2] Lee *v.* Dunlap, 55 Mo. 454.

[3] Hudson *v.* St. Louis &c. R. Co., 53 Mo. 525, 539.

[4] Bernstein *v.* Humes, 78 Ala. 134, 141; Jones *v.* Pullen, 66 Ala. 306; Gleun *v.* Charlotte &c. R. Co., 63 N. C. 510; State *v.* Craton, 6 Ired. L. (N. C.) 164; Thornburgh *v.* Maston, 93 N. C. 258, 264; Woodbury *v.* Taylor, 3 Jones L. (N. C.) 504.

tenancy of the defendant was such as to make a *notice to quit*, or a *demand of possession* requisite to entitle a plaintiff in ejectment to maintain his action, was a question to be determined by the court, upon the consideration of an agreed state of facts.[1]

§ 1022. But Question Reserved should present a Pure Question of Law.— But, as appellate judges cannot, in jury cases, draw the conclusions of fact from the evidence, a *question reserved* for the decision of an *appellate court* must be a pure question of law. It cannot be a mixed question of law and fact, for that would necessarily draw to the court that which properly belongs to the jury.[2] If a point of law is to be reserved, it must be done by stating on the record the facts on which it arises, otherwise the point thus reserved is a mere abstraction.[3] And these facts must be either admitted on the record or found by the jury; since the court cannot withdraw the decision of the facts from the jury, by reserving as a point, whether, under all the evidence in the case, the plaintiff is entitled to recover. Without this, judgment cannot be entered *non obstante veredicto*.[4] There is only one exception to this rule, and that is said to be a seeming one merely, — where the question is whether *any evidence* has been given of some fact essential to the plaintiff's case or the defendant's defense.[5]

§ 1023. Judge Passes upon the Admissibility of Evidence.— Within limits already stated[6] the judge passes upon the admissibility of evidence, although his decision involves questions of fact, which may even reach to the decision of the main issue.[7]

[1] Howard *v.* Carpenter 22 Md. 10, 23.

[2] Com. *v.* McDowell, 86 Pa. St. 377, 379.

[3] Irwin *v.* Wickersham, 25 Pa. St. 316.

[4] Wilson *v.* Steamboat Tuscarora, 25 Pa. St. 317; Winchester *v.* Bennett, 54 Pa. St. 510; Wilde *v.* Trainer, 59 Pa. St. 439; Campbell *v.* O'Niell, 64 Pa. St. 290.

[5] Wilde *v.* Trainer, *supra;* Campbell *v.* O'Niell, *supra*.

[6] *Ante*, § 318, *et seq*.

[7] See the observations of Lowry, C. J., as to this function of the Judge in De France *v.* De France, 34 Pa. St. 385, 390–92.

§ **1024. Decides as to the Competency of Witnesses.** — The question whether a witness is competent to testify concerning the matters in issue is, in all cases, a question of law for the court.[1] And this is so, although the inquiry involves questions which are purely questions of fact.[2] Thus, the question whether a person who is offered as a witness is *insane;*[3] or whether one whose admissions were offered in evidence was a *partner* of the defendant;[4] or whether an offered witness was incompetent by reason of having a certain amount of negro blood in his veins;[5] or whether he was *interested* in the event of the suit;[6] — these and all other like questions are decided by the judge, and are not referred to the jury. This being so, it is error for the judge, after permitting the testimony of a witness to go to the jury, to instruct them to disregard it, if they should find that the witness was interested.[7] So, where the competency of a witness is attacked on the ground of insanity, if the court has decided in favor of his sanity, the evidence adduced to the court cannot be submitted to the jury to affect his credibility.[8] Nor will a court of error revise the decision of the trial judge on the competency of a witness, on the ground that his decision might have been influenced by evidence which he ought not to have considered. The appellate court will not presume that the judge was influenced by such evidence.[9] It has been held, however, that the question whether a witness, sane at the time he testifies, was insane at the time of the transaction concerning which he testifies, is a question for the jury, since it goes to his credibility, and not to his competency, and the opposing party may adduce such testimony with his other evidence.[10] In fact, the jury are often required, in

[1] Chouteau *v.* Searcy, 8 Mo. 733; Reynolds *v.* Lounsbury, 6 Hill (N. Y.), 534; Nave's Admr. *v.* Williams, 22 Ind. 368; Cook *v.* Mix, 11 Conn. 432; *ante*, § 323.

[2] *Ante*, § 318.

[3] Holcomb *v.* Holcomb, 28 Conn. 177; Regina *v.* Hill, 2 Den. C. C. 259; *s. c.* 5 Cox C. C. 470; 20 L. J. Rep. (N. S.) M. C. 222; 5 Eng. L. & Eq. 547; Campbell *v.* State, 23 Ala. 44.

[4] Harris *v.* Wilson, 7 Wend. 75.

[5] Nave's Admr. *v.* Williams, 22 Ind. 368.

[6] Cook *v.* Mix, 11 Conn. 432.

[7] Chouteau *v.* Searcy, 8 Mo. 733.

[8] Campbell *v.* State, 23 Ala. 45, 75.

[9] *Ibid.*

[10] Holcomb *v.* Holcomb, 28 Conn. 177.

estimating the credibility of a witness, to pass on the same evidence which was heard by the judge on the question of his competency.[1]

§ 1025. Whether he may submit the Question to the Jury.— It is said that there are cases where the question involves *complicated facts*, which may be submitted to the jury. Thus, where it became a question whether the statements of a witness, who had been an attorney of one of the parties, was to be excluded on the ground that they were privileged communications, it was held that it was not improper to leave to the jury the question whether, at the time the statements in question were made, the *relation of attorney and client* subsisted between the witness and the party; though, in the particular case, too large a range of exclusion was left to them.[2] It is not, however, to be inferred from this, that there are any cases in which the judge is *bound* to take the opinion of a jury as to the competency of a witness. The doctrine is that he *may* do it; and, where the point depends upon the decision of an intricate question of fact, this is sometimes done.[3] In Pennsylvania, it was held that, where one, offered as a witness, is objected to on the ground of *interest*, and parol evidence is given to the court to sustain the objection, if the interest is in the least degree doubtful, the judge may permit the witness to testify, and refer the question of his interest to the jury.[4] On grounds already stated,[5] we may venture to question the soundness of these views. Experience proves that juries are scarcely capable of deciding properly those questions which the law has clearly committed to them. It will still more embarrass them to compel them to shoulder a part of the burden which properly belongs to the judge.

§ 1026. Not bound to hear Objections to Competency and Sufficiency at the same Time. — "It is undoubtedly true,"

[1] Shipton *v.* Thornton, 9 Ad. & El. 314, per Lord Denman, C. J.

[2] Hartford Fire Ins. Co. *v.* Reynolds, 36 Mich. 502.

[3] 1 Phil. on Ev. (8th ed. by Amos & Phillips), p. 2, note; 1 Greenl. on Ev. §§ 49, 425; Spencer *v.* Trafford, 42 Md. 1.

[4] Hart *v.* Heilner, 3 Rawle (Pa.), 407; Gordon *v.* Bowers, 16 Pa. St. 226; Haynes *v.* Hunsicker, 26 Pa. St. 58.

[5] *Ante*, § 318, *et seq.*

says Marshall, C. J., "that questions respecting the admissibility of evidence are entirely distinct from those which respect its sufficiency or effect. They arise in different stages of the trial, and cannot with strict propriety be propounded at the same time." When, therefore, the counsel for the defendant prayed the opinion and direction of the court to the jury, that the evidence offered by the plaintiff was not admissible, competent and sufficient to be left to the jury as proof of the plaintiff's title to recover, it was held that the judge might properly have refused to give them; for the blending of an objection to the admissibility of evidence, in the same application which questions its sufficiency, is not only unusual, but it confounds propositions distinct in themselves, and is calculated to embarrass the court and the question to be decided.[1]

§ **1027. Construes the Pleadings.** — The construction of the pleadings is, of course, always a question for the court.[2] It is the province of the court to determine, from the pleadings, what allegations are admitted, and what denied.[3] It is, therefore, the duty of the court to *state the issues* to the jury, without referring them to the pleadings to ascertain what the issues are.[4] For like reasons, the judge should not tell the jury that all the allegations in the petition, not specifically denied in the answer, are to be taken as true; for this refers them to the pleadings, to determine what the allegations are which are not denied. He should inform them specifically what the issues are.[5] It is error to leave the jury to construe and determine the effect of the pleadings.[6]

§ **1028. Decides whether there is a Variance between the Pleadings and Proof.** — Whether there is a variance between the pleadings and proof, is likewise a question of law for the ex-

[1] Columbian Ins. Co. *v.* Lawrence, 2 Pet. (U. S.) 25, 44.

[2] Breckenkamp *v.* Rees, 3 Mo. App. 585.

[3] Potter *v.* Wooster, 10 Iowa, 334; McKinney *v.* Hartman, 4 Iowa, 154.

[4] Dassler *v.* Wisley, 32 Mo. 498.

[5] Missouri Coal & Oil Co. *v* Hannibal &c. R. Co., 35 Mo. 84.

[6] Hall *v.* Renfro, 3 Met. (Ky.) 51.

clusive determination of the court.[1] Thus, in an action for *slander*, it is for the court, and not for the jury, to determine whether there is such an *identity* between the *words* laid in the declaration and those which have been proved, as will support the action. The jury ascertain what words were spoken, and, if there is a variance between them and those contained in the declaration, they will look to the opinion of the court, in order to be informed whether it is of such a nature as will defeat the action.[2]

§ **1029. Decides Facts shown by the Records of the Court.** — These are ascertained by the judge upon an inspection of the records of the court, and are not submitted to the jury for their decision. The apparent reason is that the court must, in the nature of things, be more familiar with its records and more competent to judge of their meaning than the jury can be. A familiar illustration of this statement is shown in the rule that a plea of *nul tiel record* is always tried by the court, and not by the jury.[3] Thus, in charging the jury, *dates fixed by the records* of the court may be stated to them as facts.[4] So, where the law authorizes a *tender* to be made by *paying money into court*, the court will inform itself whether the money has been paid in, and need not submit the question to the jury.[5] So, upon the hearing of a motion to enter an *order nunc pro tunc*, the court is to decide whether the order was in fact made, though not entered of record at the time claimed, and is not to submit the question to a jury.[6]

§ **1030. Essential Facts Admitted or Undisputed.** — Obviously, whenever the facts are all admitted in writing, it is unnecessary for the jury to pass upon them.[7] "Where the facts are undisputed or clear, the court should apply the law and de-

[1] Birch *v.* Benton, 26 Mo. 153, 161; Berry *v.* Dryden, 7 Mo. 324.

[2] *Ibid.*

[3] Ridley *v.* Buchanan, 2 Swan (Tenn.), 555.

[4] Andrews *v.* Graves, 1 Dillon C. C. (U. S.) 108.

[5] Newton *v.* Allis, 16 Wis. 197.

[6] Lewis *v.* Armstrong, 64 Ga. 645.

[7] Howard *v.* Carpenter, 22 Md. 10, 23.

termine the case."[1] Thus, the facts being conceded, whether a given act is within the scope of a servant's employment has been held a question of law for the court.[2]

§ **1031. What is Meant by a Mixed Question of Law and Fact.** — The courts frequently speak of mixed questions of law and fact, and, in order to avoid confusion, it is necessary to understand precisely what they mean when they use this expression. It is often said that, in the case of a mixed question of law and fact, the jury are to find the facts, and the court is to pronounce the law upon the facts as they may be so found.[3] This is done in two ways: either by a special verdict, in which case, the jury first find the facts, and afterwards the judge, in rendering judgment, pronounces the law upon them; or, in the form of hypothetical instructions given by the judge to the jury, — he telling them that, if they find from the evidence a given state of facts, the law is for the plaintiff, or for the defendant, as the case may be. The latter practice is now most in vogue in American State jurisdictions.[4] Accordingly, where the evidence is conflicting, the court, in instructing the jury, declares the law upon the alternate hypotheses of fact presented by the opposing testimony.[5] Therefore, it is not to be understood that, in the submission to a jury of a mixed question of law and fact, the jury, in any civil case, is to determine what the law is, except as it receives it from the court. Many issues are necessarily so made up as to involve matters of law as well as of fact, and the whole matter is then properly submitted to the jury as a mixed question of law and fact; but, in disposing of the issue, the jury is bound to act upon the law as given to it by the court, and to apply it to the facts, as found, under the guidance of the court.[6]

[1] Powell *v.* Powell, 23 Mo. App. 365, 373, opinion by Philips, P. J.

[2] Snyder *v.* Hannibal &c. R. Co., 60, Mo. 413.

[3] Fourth National Bank *v.* Heuschen, 52 Mo. 207, 209.

[4] Fourth National Bank *v.* Heuschen, *supra*.

[5] Marshall *v.* Schricker, 63 Mo. 308.

[6] St. Louis National Stock Yards *v.* Wiggins Ferry Co., 102 Ill. 514.

ARTICLE II.— QUESTIONS OF FACT FOR THE JURY.

SECTION

1035. What Evidence was in fact Given.
1036. Knowledge of a Witness.
1037. Weight, Probative Effect, Sufficiency of Evidence.
1038. Credibility of Witnesses.
1039. Inferences of Fact from other Facts in Evidence.
1040. Particular Questions or Points of Fact.
1041. Effect of Contradictory Admissions previously made.
1042. Whether a Witness an Accomplice.
1043. Sufficiency of Corroborating Testimony.
1044. Sufficiency of Impeaching Testimony.
1045. Inference from Failure to Produce Evidence.
1046. Deductions from the Appearance of Witnesses.

§ 1035. What Evidence was in Fact Given. — Where counsel cannot agree as to the evidence, or misstate it in argument to the jury, it is the province of the jury, and not the court, to determine what evidence was actually given.[1] Where there is no official stenographer present to take down the exact words used by a witness, and the judge has made no minutes of his testimony, if counsel disagree as to what the witness has said on a material matter, the court must submit the question to the jury, even in the face of a motion for a nonsuit on the ground of variance. "What the witness says in his testimony on the trial of a cause, when the exacts words have not been taken down as uttered, is a question for the jury; and emphatically so, the sense in which they are used."[2]

§ 1036. Knowledge of a Witness. — Where a witness swears positively to a certain fact, it is not for the court to reject his deposition on the ground that, from the terms in which the witness states the fact, the witness had no knowledge of it. Whether or not the witness has knowledge of the fact, is an inference for the jury and not for the court.[3] Where a witness, in testifying

[1] Strauss *v.* Kansas City &c. R. Co., 86 Mo. 421, 432; State *v.* Zumbunson, 86 Mo. 111; affirming *s. c.* 7 Mo. App. 526.

[2] Porter *v.* Platt, 57 Vt. 533, 536.

[3] Dickinson *v.* Lovell, 35 N. H. 9, 17.

to the best of his knowledge and belief, refers to matters which, in a previous answer, were so stated as to indicate personal knowledge, it is for the jury rather than for the court, to determine whether he is speaking from personal knowledge.[1]

§ 1037. Weight, Probative Effect, Sufficiency of Evidence. — In all cases, after the judge has determined the preliminary question in favor of the admissibility of the evidence, the weight and probative effect of it become a question for the jury.[2] This rule is most commonly expressed by the bare statement that, where the evidence is conflicting, the *weight* of it is to be determined by the jury.[3] Another expression of the same legal conception is that, where there is evidence tending to prove a proposition of fact, whether it is *sufficient* to establish the fact is a question for the jury.[4] To illustrate: the circumstance that the evidence is *all on one side* does not, it has been held, authorize the court to direct the jury that it proves a fact in controversy; its *sufficiency* is for them.[5] The jury have the power to *refuse their credit* to parol testimony, and no action of the court, it has been held, should control the exercise of their admitted right to weigh its credibility.[6] A consequence of this rule is, that a judgment will not be reversed on error or appeal because the evidence is *conflicting*.[7] This rule is subject to the power of the judge to *limit the effect* of the evidence *by instructions*, where it is admitted for a particular and limited purpose, as hereafter pointed out.[8]

§ 1038. Credibility of Witnesses. — The weight of evidence always involves the consideration of the credit to be given to the opposing witnesses; and it is accordingly a rule that this is a

[1] Toulman *v.* Swain, 47 Mich. 82.

[2] Welstead *v.* Levy, 1 Mood. & Rob. 138, per Park, J.

[3] Cape Girardeau &c. Co. *v.* Bruihl, 51 Mo. 144; Moore *v.* Pieper, 51 Mo. 157; Covey *v.* Hannibal &c. R. Co., 86 Mo. 635; Brown *v.* Missouri Pacific R. Co., 13 Mo. App. 462.

[4] Hudson *v.* Weir, 29 Ala. 294.

[5] Charleston Ins. Co. *v.* Corner, 2 Gill (Md.), 411.

[6] *Ibid.*

[7] State *v.* Kinney, 81 Mo. 101.

[8] *Ante*, §§ 351, 723; *post*, § 2416.

question within the exclusive province of the jury.[1] The rule is the same in *criminal* as in *civil cases*, and judgments in criminal cases will not be reversed on error or appeal merely because the evidence is conflicting.[2] The court cannot, on a motion for a nonsuit or a peremptory direction, invade the province of the jury, by attempting to pass upon the credibility of witnesses, to reconcile conflicting statements, or to determine what weight is to be given to the evidence of the respective witnesses.[3] If their testimony presents a conflict or discrepancies, it is the province of the jury to reconcile them if possible, and if not, they may give credence to the witnesses who, in their opinion, are best entitled to it.[4] Thus, the relative value of contradictory statements made by one when drunk and when sober, presents a question for the jury.[5] In equitable actions of ejectment in Pennsylvania, all controverted questions of fact are for the jury.[6]

§ 1039. Inferences of Fact from other Facts in Evidence. — What inferences are to be drawn from the facts in evidence is, within reasonable limits, a question for the jury.[7] This is well illustrated by what will be hereafter stated touching the question of *negligence*, which is often an inference of fact from other facts in evidence.[8] A limitation of this rule is that, in certain cases, the fact being established, the law conclusively draws the inference, or annexes the conclusion. The inference or conclusion which the law thus pronounces from the established fact is often called a *presumption of law*. Of these, familiar instances are the presumption of *malice*, which the law draws from the

[1] Moore *v.* Pieper, 51 Mo. 157; Hill *v.* Sutton, 8 Mo. App. 353; Hitchler *v.* Voelker, 8 Mo. App. 492; Greenwood *v.* Harris, 8 Mo. App. 603; Mechanics' Savings Institution *v.* Potthoff, 9 Mo. App. 574; Meyers *v.* Union Trust Co., 82 Mo. 237; Rosecrans *v.* Wabash &c. R. Co., 83 Mo. 678; Condy *v.* Iron Mountain &c. R. Co., 85 Mo. 79, 85; Tallon *v.* Grand Portage Mining Co., 55 Mich. 147; Curry *v.* Curry, 114 Pa. St. 367.

[2] State *v.* Kinney, 81 Mo. 101; Seal *v.* State, 28 Tex. 491.

[3] Condy *v.* Iron Mountain &c. R. Co., 85 Mo. 79, 85.

[4] Seal *v.* State, 28 Tex. 491.

[5] Finch *v.* State, 81 Ala. 41, 47, 50.

[6] Curry *v.* Curry, 114 Pa. St. 367.

[7] Howard *v.* Carpenter, 22 Ind. 10, 23; Ross *v.* Citizens Ins. Co., 7 Mo. App. 575.

[8] *Post*, § 1663, *et seq.*

making of an assault with a *deadly weapon;* [1] the presumption of guilt from the recent unexplained *possession of stolen goods;* [2] the presumption of malice from making a *false accusation* against a person, imputing the commission of an indictable offense.[3] Accordingly, as already seen,[4] it is a general rule, subject to exceptions, that the *conclusions or opinions of witnesses* are not admissible in evidence; [5] otherwise the witnesses would usurp either the function of the court of declaring the law, or that of the jury of deciding the facts. It has been said that "in general, whenever an inference is to be drawn by a jury, from the proof of certain facts, it is the duty of the court to state to the jury, in a case calling for it, not only what facts were not sufficient legally to authorize the presumption, but what facts, if proved, will justify it." [6]

§ **1040. Particular Questions or Points of Fact.** — It is necessarily a part of the foregoing rule that, where a particular question or point of fact is disputed, whether it reaches to the merits of the whole controversy or not, it must, in general, be decided by the judge. Thus, where a witness was interrogated respecting a *conversation*, which the witness believed to have taken place in the presence of a party, and gave certain reasons, grounded on *distances* and *tone of voice*, for believing that the party did not hear the conversation, — it was held that the court erred in deciding that the party did not hear the conversation, and in excluding the testimony as to what the conversation was. "It was not for the witness nor the court, but for the jury, to determine from all the circumstances," whether the party heard what occurred in his presence.[7] So, where a remark, made by the defendant to the plaintiff, was material evidence, if made *before* the delivery of a deed, but the evidence was conflicting as to whether it was made *before* or *after*, it was held that all the

[1] 1 Greenl. Ev., § 18.
[2] 1 Greenl. Ev., § 34.
[3] 1 Greenl. Ev., § 18; 2 *Id.*, § 418.
[4] *Ante*, §§ 377, 378.
[5] People *v.* Wilson, 3 Park. Cr. (N. Y.) 200, 206.
[6] Wheeler *v.* Schroeder, 4 R. I. 383, 392 (citing Lecraw *v.* Boston, 17 How. (U. S.) 426, 436).
[7] Wilson *v.* Irish, 62 Iowa, 260, 264.

evidence concerning the remark should have gone to the jury, and that it was for them to determine whether it was made before or after the delivery.[1]

§ 1041. Effect of Contradictory Admissions previously Made. — So, whether or not certain admissions, previously made by the prosecuting witness in a criminal trial, contradictory to his testimony, will have the effect to impair his credit as a witness, is necessarily a question for the jury.[2]

§ 1042. Whether a Witness an Accomplice. — Whether a witness is an *accomplice* in the commission of a crime for which the defendant is on trial, within the meaning of the rule that his testimony must be corroborated in order to furnish ground for a conviction, is a question for the jury, and not for the court.[3]

§ 1043. Sufficiency of Corroborating Testimony. — It is equally a question for the jury whether such a witness has been corroborated. Thus, where, independently of the evidence of an *accomplice*, there is evidence tending to connect the defendant with the commission of the offense, the question of its *sufficiency* is for the jury.[4]

§ 1044. Sufficiency of Impeaching Testimony. — In like manner, as hereafter explained, the sufficiency of impeaching testimony — whether a witness has been successfully impeached — is always a question for the jury.[5]

§ 1045. Inference from Failure to Produce Evidence. — As already seen,[6] the failure or refusal to produce evidence which is within the power of the party, affords ground for an infer-

[1] *Ibid.*

[2] State *v.* Johnagen, 53 Iowa, 250.

[3] State *v.* Lawlor, 28 Minn. 217.

[4] People *v.* Kunz (Cal.), 14 Pac. Rep. 836. Respecting the sufficiency of accomplice testimony, see People *v.* Elliott (N. Y.), 12 N. E. Rep. 602, and note. As to who is an accomplice within the rule, see Smith *v.* State (Tex.), 5 S. W. Rep. 219, and note.

[5] *Post*, § 2426.

[6] *Ante*, §§ 453, 794, 795, 989.

ence unfavorable to him; and where he has purposely destroyed instruments of evidence, the law warrants the making of whatever deductions against him the case fairly admits of, in conformity with the maxim *contra spoliatorem omnia præsumuntur*. Without stopping to consider the extent of this presumption, it will be here said that, in cases tried before juries, it is for them to say what inference is to be drawn from the failure of a party to produce evidence which is accessible to him.[1] Upon this question it has been held proper, under circumstances, for the judge to decline to rule that it was incumbent on the plaintiff to produce certain evidence, and that the absence of such evidence was to be weighed as discrediting the testimony of a particular witness; and on the other hand, to instruct that, where a party knows that evidence is likely to be introduced at a trial inconsistent with his own claim, and if his claim is well founded, it is in his power to produce other evidence which will control that brought against him, his failure to produce such other evidence should be considered as a circumstance against him, — leaving it to them to say whether this principle applies to the conduct of either party.[2]

§ **1046. Deductions from the Appearance of Witnesses.** — It has been held that a jury may properly be permitted to find, from the appearance of a young man, without other evidence, that he is not twenty-one years of age.[3] On like grounds, where it was a question, whether a railway company, having the duty of making a proper inspection of cars coming upon its road from other lines, employed a competent person to perform this duty, it might be judged of by the jury from the appearance of the person so employed when testifying as a witness in the case, in addition to evidence that the car which was the source of the injury was defective, and in connection with the general testimony of the inspector.[4] On the contrary, it has been ruled in the same court,

[1] Eldridge *v.* Hawley, 115 Mass. 410.

[2] Sturtevant *v.* Wallack, 141 Mass. 119.

[3] Com. *v.* Emmons, 98 Mass. 6.

[4] Keith *v.* New Haven &c. R. Co., 140 Mass. 175.

that the fact that the jury, in most cases where a *view* takes place, acquire a certain amount of information which they may properly treat as evidence, presents no suitable obstacle to the granting of a new trial, on the ground that the verdict is against the weight of the evidence.[1]

[1] Tully *v.* Fitchburg R. Co., 134 Mass. 499, 503. For a controversy on this question, see *ante*, § 889, *et seq.*; especially §§ 900, 901.

CHAPTER XXXII.

EXISTENCE AND INTERPRETATION OF LAWS, ORDINANCES, RULES AND CUSTOMS.

SECTION

1050. Judge interprets Written Laws.
1051. Illustration of an Application of this Rule.
1052. Meaning of Words in Statutes.
1053. [Continued.] Whether a Pretended Act of the Legislature was duly Passed.
1054. Foreign Laws.
1055. Existence of Municipal Ordinances.
1056. Interpretation of Municipal Ordinances.
1057. Validity of Rules, By-Laws, Regulations, etc., of Corporations.
1058. Existence of Particular Usages or Customs.
1059. Mining Laws and Customs not enacted by the Legislature.
1060. Constitution and By-Laws of a Private Society.
1061. The Law of the Particular Case.

1050. Judge Interprets Written Laws. — The interpretation of statutes, constitutional ordinances, municipal ordinances and by-laws, and all other written laws, is for the court, and not for the jury.[1] It has been held that *juries* are not *judges of the law* in criminal cases, in the sense which entitles them to interpret the meaning of words employed in criminal statutes, and that it is error for the court in its charge to submit the meaning of such words to them;[2] but this subject will be considered hereafter.[3]

§ 1051. ILLUSTRATION OF AN APPLICATION OF THIS RULE. — Thus, it is a question of law, who is "a mill owner, within the meaning of the law relating to mills and mill-dams" in Wisconsin, and this is to be ex-

[1] Barnes *v.* Mayor of Mobile, 19 Ala. 707; Fairbanks *v.* Woodhouse, 6 Cal. 433; Peoria *v.* Calhoun, 29 Ill. 317; Maltus *v.* Shields, 2 Met. (Ky.) 553; Carleton *v.* People, 10 Mich. 250; Supervisors *v.* Heenan, 2 Minn. 330; Denver &c. R. Co. *v.* Olsen, 4 Colo. 293; Large *v.* Orvis, 20 Wis. 696.

[2] Carpenter *v.* People, 8 Barb. (N. Y.) 603, 610.

[3] *Post*, § 2132, *et seq.*

plained to the jury, and not left to them to discuss and settle for themselves. Therefore, an instruction that, in order to maintain a defense in an action under a statute called the Mill-Dam Act, for flowing the plaintiff's land and obstructing the wheel of her mill, on the ground of a prior right as a lower mill-owner on the same stream, the defendant "must have shown himself to be a mill-owner within the meaning of the law relating to mills and mill-dams," was properly refused.[1]

1052. Meaning of Words in Statutes. — It is error for the court to submit to the jury the meaning of a material word in a statute. Thus, in an indictment for unlawfully selling stray animals, it became a question whether the sale was attended by three adult bidders besides the members of the family of the defendant, who had taken up the estray, which was made by the statute,[2] a prerequisite to the validity of the sale. The court declined a requested instruction as to the meaning of the word "*family*" in the statute, but told the jury that they could put their own construction on it, it being a matter of proof. It was held that this was error, the court saying: "What is intended in the statute by the words 'the family of the taker up,' is, when applied to a particular state of facts, a mixed question of law and fact. So far as the fact is governed by law, it belongs to the judge to declare the law; and so far as the fact was one of proof, it was a matter to be ascertained from the evidence, and one not to be left to the personal knowledge of the jury."[3]

§ **1053. [Continued.] Whether a Pretended Act of the Legislature was duly Passed.** — Whether what purports to be an act of the legislature of a State was duly passed, with the concurrence of the requisite majority of the members of both houses, as is required by the constitution of the State, so as to become a valid law, is a question of law for the

[1] Large *v.* Orvis, 20 Wis. 696.

[2] Rev. Stat. Tex., art. 4583.

[3] Goode *v.* State, 16 Tex. App. 411; citing Green *v.* Hill, 2 Tex. 465. The court *defined* the word "*family*" to mean, "the collective body of persons in one house under one head or management." See as to the meaning of the word: Tyson *v.* Reynolds, 52 Ia. 431; Arnold *v.* Waltz, 53 Ia. 706; *s. c.* 36 Am. Rep. 248, and note; Wilson *v.* Cochran, 31 Tex. 677; Howard *v.* Marshall, 48 Tex. 471, 478; Raco *v.* Green, 50 Tex. 483.

court, and not a question of fact for the jury.[1] In a subsequent case, one of the questions which was regarded as settled in the case just cited was thus stated: "Whether a seeming act of the legislature is or is not a law, is a judicial question, to be determined by the court, and not a question of fact to be tried by a jury;" and this doctrine was reaffirmed.[2] This is in conformity with what was said in an early case in the same court: "Whenever a question arises in a court of law, of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question; always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule."[3] In the case first cited it was said: "There can be no estoppel in the way of ascertaining the existence of a law. That which purports to be a law of a State, is a law, or it is not a law, according as the truth of the fact may be, and not according to the shifting circumstances of parties. It would be an intolerable state of things if a document purporting to be an act of the legislature could thus be a law in one case and for one party, and not a law in another case and for another party; a law to-day, and not a law to-morrow; a law in one place, and not a law in another in the same State. And whether it be a law, or not a law, is a judicial question, to be settled and determined by the courts and judges." Further on in the same opinion it is said: "Of course, any particular State may, by its constitution and laws, prescribe what shall be conclusive evidence of the existence or non-existence of a statute; but the question of such existence or non-existence, being a judicial one in its nature, the mode of ascertaining and using that evidence must rest in the sound discretion of the court on which the duty in any particular case is imposed."[4] In determining this question, it

[1] South Ottawa *v.* Perkins, 94 U. S. 260.

[2] Post *v.* Supervisors, 105 U. S. 667.

[3] Gardner *v.* Collector, 6 Wall. (U. S.) 499, 511.

[4] South Ottawa *v.* Perkins, 94 U S. 260, 267, 269, opinon by Bradley, J.

is competent for the judges, upon whom the duty of deciding it is imposed, to resort to the written *records of the legislature*, so far as they disclose the steps which took place in the passage of the statute in question.[1]

§ 1054. Foreign Laws. —Unless there are statutes enabling courts to take judicial notice of foreign laws, or to ascertain their existence from foreign law books,[2] the existence of a foreign law is proved as a fact, just as any other fact is proved. Yet when the existence of the law is thus established, it is for the court to determine its meaning, just as it is to determine the meaning of a domestic law.[3] In New Hampshire it is said that evidence of the existence of a foreign law is to be addressed to the court, and not to the jury.[4] And this is the view of Mr. Justice Story,[5] adopted by Prof. Greenleaf,[6] and by the Supreme Court of Maryland.[7] But in Missouri and North Carolina it has been held that the existence of a foreign law is a question of fact for the jury;[8] and it is so held in Massachusetts, with the addition that it is for the jury to determine as a fact, what construction has been put upon the particular foreign law by the courts of

[1] Gardner *v.* Collector, 6 Wall. (U. S.) 499, 510; Purdy *v.* People, 4 Hill (N. Y.), 384; DeBow *v.* People, 1 Denio (N. Y.), 9; Spangler *v.* Jacob, 14 Ill. 297; Young *v.* Thomson, 14 Ill. 380; Speer *v.* Plank Road Co., 22 Pa. St. 376; Matter of Welman, 20 Vt. 653; Supervisors *v.* Heenan, 2 Minn. 330; Fowler *v.* Pierce, 2 Cal. 165; Post *v.* Supervisors, 105 U. S. 668; People *v.* Campbell, 8 Ill. 466; Prescott *v.* Trustees, 19 Ill. 324; Happel *v.* Brethauer, 70 Ill. 166; Watkins *v.* Holman, 16 Pet. (U. S.) 25, 55, 56; Bryan *v.* Forsyth, 19 How. (U. S.) 334; Gregg *v.* Forsyth, 24 How. (U. S.) 179; Ryan *v.* Lynch, 68 Ill. 160; Miller *v.* Goodwin, 70 Ill. 659.

[2] As in Connecticut. Lockwood *v.* Crawford, 18 Conn. 361.

[3] Cecil Bank *v.* Barry, 20 Md. 287, 295; Consequa *v.* Willings, 1 Pet. C. C. (U. S.) 225; Charlotte *v.* Chouteau, 33 Mo. 194; *s. c.* 25 Mo. 465; Livingston *v.* Maryland Ins. Co., 6 Cranch (U. S.), 280; Bowditch *v.* Soltyk, 99 Mass. 136; Kline *v.* Baker, 99 Mass. 253; Cobb *v.* Griffith &c. Co., 87 Mo. 90, 94; Hooper *v.* Moore, 5 Jones L. (N. C.) 130.

[4] Ferguson *v.* Clifford, 37 N. H. 86.

[5] Story on Confl. Laws, § 638.

[6] 1 Greenl. Ev., § 486.

[7] Wilson *v.* Carson, 12 Md. 54, 75; Bank *v.* Barry, 20 Md. 287, 295; De Sobry *v.* De Laistre, 2 Harr. & J. (Md.) 192.

[8] Charlotte *v.* Chouteau, 33 Mo. 194; Moore *v.* Gwynn, 5 Ired. L. (N. C.) 187; Cobb *v.* Griffith &c. Co., 87 Mo. 90, 94; Hooper *v.* Moore, 5 Jones L. (N. C.) 130.

the particular country.[1] Outside of the rule, it is the duty of the court to instruct the jury as to its meaning, and it is error to refer the whole question to them without such instructions.[2] Statutes of sister States of the American Union are foreign laws within the meaning of this rule; and where the statute of a sister State is given in evidence, it is the duty of the court to expound it to the jury, and it is proper to refuse instructions which commit its exposition of it to them.[3]

§ 1055. Existence of Municipal Ordinances. — A *city ordinance*, it has been held, is to be *proved* by evidence addressed to the court, and not to the jury.[4]

§ 1056. Interpretation of Municipal Ordinances. — The interpretation of a municipal ordinance stands on the same footing as that of a statute; it must be made by the court, and an instruction which submits its meaning or legal effect, or its applicability under given circumstances, to the jury, is erroneous.[5] As hereafter seen,[6] the *reasonableness* of municipal ordinances is a question for the decision of the court. But it has been ruled, on doubtful grounds, that, whether the cutting down of the sidewalk adjacent to the plaintiff's lot to the level of the street, 15 feet below, was a *construction* of the highway within the meaning of the constitutional provision, was a question of fact for the decision of the jury; and that the court erred in instructing them that the plaintiff was entitled to recover, if his property was injured, without regard to the circumstances or character of the alteration.[7]

§ 1057. Validity of Rules, By-laws, Regulations, etc., of Corporations. — Whether a certain rule of a railway corporation

[1] Holman *v.* King, 7 Met. (Mass.) 384. See Mostyn *v.* Fabrigas, Cowp. 164; Miller *v.* Heinrick, 4 Camp. 155; Haven *v.* Foster, 9 Pick. (Mass.) 130.

[2] Hooper *v.* Moore, 5 Jones L. (N. C.) 130.

[3] Cobb *v.* Griffith &c. Co., 87 Mo. 90, 94.

[4] Roulo *v.* Valcour, 58 N. H. 347; Hall *v.* Costello, 48 N. H. 176, 179.

[5] Pennsylvania Co. *v.* Frana, 13 Bradw. (Ill.) 91.

[6] *Post*, § 1057; § 1568, *et seq.*

[7] Montgomery *v.* Townsend (Ala.), 2 South. Rep. 155.

be *reasonable* and therefore valid is a question of law for the court, — the general rule being that the reasonableness of the by-laws, rules and regulations of corporations, whether private or municipal, is to be decided as a question of law, and that such a by-law, rule or regulation, if unreasonable, is to be held void as matter of law; [1] and it is improper to submit the question of the reasonableness of such a by-law, ordinance or regulation to the decision of a jury.[2] But whether a given rule of a railroad corporation is *adequate* for the safe management of its trains, is a question of fact for the jury.[3]

§ 1058. Existence of Particular Usages or Customs. — Where a usage is set up to vary the terms of a contract, there are generally two questions for the jury: 1. Whether the usage or custom has been proved. 2. Whether the parties contracted with reference to it.[4] The existence of a local custom or usage which is not of a character so *general* as to be matter of common knowledge, and therefore the subject of *judicial notice*, is a question of *fact for a jury*;[5] but whether a given custom be *valid* or

[1] Merz *v.* Mo. Pa. R. Co., 14 Mo. App. 459; City of St. Louis *v.* Weber, 44 Mo. 547; City of St. Louis *v.* St. Louis R. Co., 14 Mo. App. 221; *post*, §§ 1096, 1097, 1138, 1139,

[2] Neier *v.* Mo. Pa. R. Co., 12 Mo. App. 26.

[3] Chicago &c. R. Co. *v.* McLallen, 84 Ill. 109.

[4] Burroughs *v.* Langley, 10 Md. 248; Powell *v.* Bradlee, 9 Gill & J. (Md.) 220, 247, 277; Foley *v.* Mason, 6 Md. 37; Dorsey *v.* Eagle, 7 Gill & J. (Md.) 321.

[5] Steamboat Sultana *v.* Chapman, 5 Wis. 454, 466; Chesapeake Bank *v.* Swain, 29 Md. 483; Kuhtman *v.* Brown, 4 Rich. L. (S. C.) 479, 481; Parker *v.* Ibbetson, 4 C. B. (N. S.) 346; Steamboat *v.* Hopkins, 30 Miss. 703; Burroughs *v.* Langley, 10 Md. 248; Brig Cadmus *v.* Matthews, 2 Paine C. C. 229; Grave *v.* Brien, 1 Md. 438; Chicago Packing &c. Co. *v.* Tilton, 87 Ill. 547. In an action against a railroad company for damages on the ground of negligence, it was held not incumbent on the plaintiff, in opening his case, to show that, by the laws of railroad companies, the defendants were guilty of want of ordinary care. "If he saw fit to trust that question to the good sense of the jury, he might. It is not one of those mere scientific subjects whose laws, like that of botany, geology, or medicine or surgery, are matters of settled principle or accurate knowledge. If the defendants desired the benefit of the rules of engineering for their exculpation, they might show the custom, and, if not unreasonable, of which the jury must judge, it would avail them." Quimby *v.* Vermont Central R. Co., 23 Vt. 387, 394.

invalid, is always a question of law *for the court*, and should not be left to a jury.[1] The *extent* of the custom — whether it is or is not universally recognized in a particular locality, is also a question of fact for a jury.[2] The inference of fact as to whether a party had authority to act in a particular way from another, is a question of fact for the jury, where it depends upon a *course of dealing* between the parties, — as whether a person has been accustomed to draw on a banker, although he had no cash credit in the hands of the banker.[3]

§ 1059. Mining Laws and Customs not enacted by the Legislature. — At an early day in California the persons engaged in mining the precious metals established certain laws or rules, in order to prevent conflicts among themselves and to settle disputed questions of right. It has been held, in a case depending upon these rules, that they are to be proved as facts, and that the question of their existence is to be submitted to the jury; but that it is for the court, upon their being so proved, to instruct the jury as to their proper meaning and application.[4]

§ 1060. Constitution and By-Laws of a Private Society. — So, the by-laws of a corporation or other voluntary association or private society, when proved, are to be interpreted by the court, the same as a public law, and it is error to submit the interpretation of them to the jury.[5] This is illustrated by a

[1] Chicago Packing &c. Co. *v.* Tilton, 87 Ill. 547.

[2] *Ibid.*

[3] Cumming *v.* Shand, 5 Hurl. & N. 95.

[4] Coleman *v.* Clements, 23 Cal. 245, 248. This, it will remembered, is in conformity with the rule which relates to foreign laws.

[5] In an action by the administrators of a deceased member of a *benevolent society* for the benefit alleged to be due from the society on account of his death, it was held that the court properly refused to submit to the jury the question whether certain proceedings, had against the decedent during his life time, were in accordance with the constitution and by-laws of the society. The court said: "Whether any, and if any, what proceedings took place, were proper inquiries for the jury; but whether they were in accordance with the constitution and by-laws of the society or tribe, was a question of law for the court, and not one of fact for the jury." Osceola Tribe *v.* Rost, 15 Md. 295. The court cite: Emery *v.* Owings, 6 Gill (Md.), 191, 199; Clark *v.* Marriott, 9 Gill (Md.), 331, 337.

case where the *rules of a board of trade* were a part of the contract sued on, and authorized the plaintiff, who was a member of the board, and who, as a commission merchant, had bought produce for future delivery on account of the defendant, to offset and settle such trade by other trades made by the defendant, and to substitute some other person for the one from whom he purchased the property, — thus, in the slang of such institutions, "ringing out the deal." Acting under this rule, the plaintiff released the seller from his contracts, and, having many similar transactions in his business, proposed to himself to substitute, in place of the contract with the seller, the agreement of such other contractor as might be available for the purpose at the time of settlement, but designated no particular contractor or contract. It was held that it was a question of law for the court whether this was a *substitution* within the meaning of the rule; since it involved merely an interpretation of the rule, which was within the province of the court.[1]

§ 1061. The Law of the Particular Case. — Where, upon a given state of facts, the law has been pronounced by an appellate tribunal and the cause remanded for a new trial, the trial court will, if the same state of facts is again presented by the evidence, declare the law thereupon according to the opinion of the appellate court. Thus, it is was ruled in Missouri that, where the Supreme Court had declared a sale void, upon an appeal presenting a certain state of facts, and, on trial anew, the facts presented by the evidence were substantially the same, the trial court should have held the sale void as a question of law.[2]

[1] Higgins *v.* McCrea, 116 U. S. 671.

[2] Vail *v.* Jacob, 7 Mo. App. 571 (not reported in full).

CHAPTER XXXIII.

INTERPRETATION OF PRIVATE WRITINGS.

SECTION
1065. General Rule as to the Interpretation of Writings.
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1096. Validity of Written Instruments.
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1098. Inferences from Writings put in Evidence to show Extrinsic Facts.

1065. General Rule as to the Interpretation of Writings.— As a general rule, the interpretation or construction of written instruments, which are drawn in language so plain as not to require the aid of extrinsic evidence, is a question for the court, and it is error to submit such a question to the jury.[1] An instruction to the jury, as to the legal effect of a written instrument, is not subject to objection as being an instruction upon a question of fact.[2] The rule is said to be that written instruments should be construed and interpreted by the court *upon inspection only*, unless terms of art or other unusual language be employed, or unless words are employed not in their ordinary

[1] Parker *v.* Ibbetson, 4 C. B. (N. S.) 345; State *v.* Lefaivre, 53 Mo. 470; Edwards *v.* Smith, 63 Mo. 119; Blakeley *v.* Bennecke, 59 Mo. 193; Burress *v.* Blair, 61 Mo. 133; State *v.* Donnelly, 9 Mo. App. 520; Brecheisen *v.* Coffey, 15 Mo. App. 80; Michael *v.* St. Louis Mutual Fire Ins. Co., 17 Mo. App. 23; Fruin *v.* Crystal Ry. Co., 89 Mo. 397, 404; Falls Wire Man. Co. *v.* Broderick, 12 Mo. App. 378; Spalding *v.* Taylor, 1 Mo. App. 34; Goddard *v.* Foster, 17 Wall. (U. S.) 123; Lapeer Ins. Co. *v.* Doyle, 30 Mich. 159; Eyser *v.* Weissgerber, 2 Iowa, 463; Levy *v.* Gadsby, 3 Cranch (U. S.), 180; Streeter *v.* Streeter, 43 Ill. 155; Drew *v.* Towle, 30 N. H. 531; Shepherd *v.* White, 11 Tex. 346; Thomas *v.* Thomas, 15 B. Mon. 178; Smith *v.* Faulkner, 12 Gray, 251; Warren *v.* Jones, 51 Me. 146; Cocheco Bank *v.* Berry, 52 Me. 293; Williams *v.* Waters, 36 Ga. 454; Illinois Central R. Co. *v.* Cassell, 17 Ill. 389; Nash *v.* Drisco, 51 Me. 417; Perth Amboy Man. Co. *v.* Condit, 21 N. J. L. 659; Rogers *v.* Colt, 21 N. J. L. 704; Brown *v.* Hatton, 9 Ired. (N. C.) 319; Roth *v.* Miller, 15 Serg. & R. (Pa.) 100; Vincent *v.* Huff, 8 Serg. & R. (Pa.) 381; Moore *v.* Miller, 4 Serg. & R. (Pa.) 279; Wason *v.* Rowe, 16 Vt. 525; Collins *v.* Benbury, 5 Ired. (N. C.) 118; Bedford *v.* Flowers, 11 Humph. (Tenn.) 242; Gregory *v.* Underhill, 6 Lea (Tenn.), 207, 211; Louisville &c. R. Co. *v.* McKenna, 13 Lea (Tenn.), 280, 288; Holman *v.* Crane, 16 Ala. 570, 580; Welsh *v.* Dusar, 3 Binn. (Pa.) 329, 337; Fowle *v.* Bigelow, 10 Mass. 379 384; Woodman *v.* Chesley, 39 Me. 45; Harris *v.* Doe, 4 Blackf. (Ind.) 369; Leviston *v.* Junction R. Co., 7 Ind. 597; Emery *v.* Owings, 6 Gill (Md.), 260; Kidd *v.* Cromwell, 17 Ala. 648; Walker *v.* Bank of Washington, 3 How. (U. S.) 62; Higgins *v.* McCrea, 116 U. S. 671, 682; Eddy *v.* Chase, 140 Mass. 471; Friend *v.* Friend, 64 Md. 321; Warner *v.* Thompson, 35 Kan. 27; Russell *v.* Arthur, 17 S. C. 477; Union Bank *v.* Heyward, 15 S. C. 296; Mowry *v.* Stogner, 3 S. C. 251, 253; Burke *v.* Lee, 76 Va. 386; Dixon *v.* Duke, 85 Ind. 434; Butler *v.* State, 5 Gill & J. (Md.) 511, 519; Sellars *v.* Johnson, 65 N. C. 104; Luckhart *v.* Ogden, 30 Cal. 547, 556; Dunn *v.* Rothernell, 112 Pa. St. 272; Van Eman *v.* Stanchfield, 8 Minn. 518, 522; Grady *v.* Cassidy, 104 N. Y. 147.

[2] Lucas *v.* Snyder, 2 G. Greene (Iowa), 499; San Antonio *v.* Lewis, 9 Tex. 69, 71.

signification, and which hence require explanation by extrinsic evidence.[1] "The construction of all written instruments," said Baron Parke, "belongs to the court alone, whose duty it is to construe all such instruments as soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts by the jury; and it is the duty of the jury to take the construction from the court, either absolutely, if there be no words which are to be construed as words of art, or phrases used in commerce, and no surrounding circumstances to be ascertained; or conditionally, when those words or circumstances are necessarily referred to them. Unless this were so, there would be no certainty in the law; for a misconstruction by the court is the proper subject, by means of a bill of exceptions, of redress in a court of error; but a misconstruction by the jury cannot be set right at all, effectually."[2]

§ **1066. Reason of the Rule.** — "This," said the Supreme Court of Pennsylvania, "is a matter of very great importance. The security of property depends upon it; for there is no appeal from the decision of a jury. The injured party may indeed move for a new trial, but the court may grant or refuse, at its discretion. It is the right, therefore, of every suitor, to have the opinion of the court on such matters as, by the law of the land, the court is bound to decide; and one of these matters is the construction of written contracts. There may be cases in which extrinsic circumstances are so connected with a writing as to render it necessary to leave the whole to the jury."[3] "It is," said Le Grand, C. J., "exclusively the province of the court to interpret all written instruments, and to determine the materiality and force of each and all the facts contained in them. Were the jury permitted to do this, there would be no certain legal significance assignable to any paper; for it would depend upon the

[1] Van Eman *v.* Stanchfield, 8 Minn. 518, 522.

[2] Baron Parke in Neilson *v.* Harford, 8 Mees. & W. 823. See also Morell *v.* Frith, 3 Mees. & W. 406.

[3] Denison *v.* Wertz, 7 Serg. & R. (Pa.) 372, 376.

peculiar notions of each particular jury, under whose supervision it might be brought; and thus a recital in a case like the one before us might be deemed material by one jury, and by another, as wholly immaterial and unimportant."[1] "It is," said Mr. Justice Cooley, "for the court to interpret the written contracts of parties; for when they have assented to definite terms and stipulations, and incorporated them in formal documents, the meaning of these, it is supposed, can always be discovered on inspection; nothing which is within the purview of the contract is left in doubt, and there is of course nothing to submit to the jury."[2]

§ 1067. What Instruments the Rule embraces. — The obligation of the court to expound the meaning of written instruments to the jury, and not to submit such questions to them, embraces every species of writings: contracts,[3] records,[4] deeds,[5] wills,[6] and all others.[7] So, where a disputed question turns up-

[1] Cook's Lessee *v.* Carroll, 6 Md. 104, 111.

[2] McKenzie *v.* Sykes, 47 Mich. 294, 295. See also Thompson *v.* Richards, 14 Mich. 172.

[3] Cases, *ante*, § 1065; *post*, § 1068.

[4] Adams *v.* Betz, 1 Watts (Pa.), 425.

[5] McCutchen *v.* McCutchen, 9 Port. (Ala.) 650; Seaward *v.* Malotte, 15 Cal. 304; Bonney *v.* Morrill, 52 Me. 252; Venable *v.* McDonald, 4 Dana (Ky.), 336; Hodges *v.* Strong, 10 Vt. 247; Whittlesey *v.* Kellogg, 28 Mo. 404; Hurley *v.* Morgan, 1 Dev. & Batt. 425; Morse *v.* Weymouth, 28 Vt. 824; Addington *v.* Etheridge, 12 Gratt. (Va.) 436; Poage *v.* Bell, 3 Rand. 586; Smith *v.* Clayton, 29 N. J. L. 357; Brown *v.* Huger, 21 How. (U. S.) 305; American Bank *v.* Inloes, 7 Md. 380; Whiteford *v.* Munroe, 17 Md. 135; Dean *v.* Erskine, 18 N. H. 81; Stark *v.* Barrett, 15 Cal. 361; Montag *v.* Linn, 23 Ill. 551; Harris *v.* Doe, 4 Blackf. (Ind.) 369; Symmes *v.* Brown, 13 Ind. 318; Miller *v.* Shackleford, 4 Dana, 264; St. John *v.* Bumpstead, 17 Barb. (N. Y.) 100; Stevens *v.* Hollister, 18 Vt. 294; Cox *v.* Freedley, 33 Pa. St. 124; Price *v.* Mazange, 31 Ala. 701, 709.

[6] Magee *v.* McNeil, 41 Miss. 17; Downing *v.* Bain, 24 Ga. 372; Sartor *v.* Sartor, 39 Miss. 760; Willson *v.* Whitefield, 38 Ga. 269. So, whether or not a will has been executed with the proper formalities is, of course, a question of law. Roe *v.* Tyler, 45 Ill. 485; Riley *v.* Riley, 36 Ala. 496; Sullivan *v.* Honacker, 6 Fla. 372

[7] Kidd *v.* Cromwell, 17 Ala. 648; Earbee *v.* Craig, 1 Ala. 607; Carpentier *v.* Thirston, 24 Cal. 268; Richmond &c. Co. *v.* Farquar, 8 Blackf. (Ind.) 89; Leviston *v.* Junction R. Co., 7 Ind. 597; Pickerell *v.* Carson, 8 Iowa, 544; Caldwell *v.* Dickson, 26 Mo. 60; Holman *v.* Crane, 16 Ala. 570; Cahoon *v.* Ring, 1 Cliff. (C. C.) 592; Turner *v.* Yates, 16 How. 14; Moore *v.* Leseur, 18 Ala. 606; Long *v.* Rodgers, 19 Ala. 321.

on the construction of *two or more* written instruments which are to be construed together, it is the duty of the court to construe them and to declare their meaning to the jury, and to direct a verdict, if, in the state of the case, a due construction of the instruments determines the controversy.[1] *Instances* under the rule could be multiplied almost without number. Thus, the force and effect, as well as the interpretation and construction, of a writing, upon the question *whether* it is *a lease or not*, is for the determination of the court and not of the jury.[2] So, whether an agreement between parties amounts to an *extension of time* for the performance of a prior contract between them, and if so, what time, are questions of law for the court, and not questions of fact for the jury.[3] So, it was held error to submit to the jury the question whether the terms of a written contract excluded a general *custom of trade*, the existence of which had been proved before them.[4]

§ 1068. Error to submit such a Question to the Jury. — An instruction which submits to the jury the interpretation of a written contract, which is so plain in its terms that extrinsic evidence is not needed to explain its meaning, is erroneous;[5] if the jury construe it wrongly, the judgment will be reversed; but if they construe it rightly, the error will be immaterial.[6]

§ 1069. Characterization, Interpretation and Effect of Wills. — This doctrine applies to wills, and all questions touching the operation, construction and effect of *testamentary writings*, are for the court, with the single exception that where there is a latent ambiguity parol evidence may be heard.[7]

[1] Helmholz *v.* Everingham, 24 Wis. 266.

[2] Dunn *v.* Rothermel, 112 Pa. St. 272.

[3] Luckhart *v.* Ogden, 30 Cal. 548, 556.

[4] Parker *v.* Ibbetson, 4 C. B. (N. S.) 345.

[5] State *v.* Lefaivre, 53 Mo. 470; Spalding *v.* Taylor, 1 Mo. App. 34; Willard *v.* Sumner, 7 Mo. App. 577; Brooks *v.* Standard Fire Ins. Co., 11 Mo. App. 350; Miller *v.* Dunlap, 22 Mo. App. 97; other cases, *ante*, § 1065.

[6] Brooks *v.* Standard Fire Ins. Co., 11 Mo. App. 350; Martineau *v.* Steele, 14 Wis. 273; *ante*, § 1020.

[7] Burke *v.* Lee, 76 Va. 386.

Whether a will has been *executed* with all the *proper formalities*, is a question of law for the court, and is not to be submitted to the jury.[1] Whether a paper tendered in evidence is *testamentary in its character*, to take effect on the death of the maker, and whether, as such, it should be admitted for probate, is peculiarly a question for the court. But, on being so admitted, the questions as to the *testamentary capacity* and free volition of the testator is for the jury.[2] There is always a presumption, it is said, against an imperfect testamentary paper; and where it is doubtful whether it was intended to operate as a *deed* or as a *will*, it is for the *jury* to decide, on the facts touching its execution and delivery, the declarations of the maker and other circumstances, which way it was intended to operate.[3] Although the interpretation of wills is generally a question of law for the court, yet where the question depends upon the *form of attestation*, which may have been the result of ignorance on the part of the testator (the law requiring a different attestation in case of a disposition of real property from that required in case of a disposition of personal property), it has been held, in a contest touching personal property alleged to have been passed by the will, that the question whether the testator intended that the paper should *operate as to the personal property* unless it could take effect as to the real property, is a question of fact for the jury.[4]

§ **1070. Interpretation of Public Records.** — Whether a certain instrument, for the alteration of which a person has been

[1] Roe *v.* Taylor, 45 Ill. 485. There is a ruling in one jurisdiction to the effect that, whether a testamentary instrument was signed and attested as required by law are questions of fact for the jury. Watford *v.* Forester, 66 Ga. 738. If this means anything more than that the question whether the will was in fact executed by the person by whom it purported to be executed, it is an obvious judicial aberration.

[2] Watford *v.* Forester, 66 Ga. 738.

[3] Ferguson *v.* Ferguson, 27 Tex. 339, 344. Compare Herrington *v.* Bradford, Walker (Miss.), 520; Jones *v.* Kea, 4 Dev. (N. C.) 301; Lyles *v.* Lyles, 2 Nott & McC. (S. C.) 531; Wigle *v.* Wigle, 6 Watts (Pa.), 522; Wareham *v.* Sellers, 9 Gill & J. (Md.) 98; Witherspoon *v.* Witherspoon, 2 McCord (S. C.), 520; King's Proctor *v.* Daims, 3 Hagg. 218.

[4] Fatheree *v.* Lawrence, 33 Miss. 585, 628. See also Jones *v.* Kea, 4 Dev. (N. C.) 301.

indicted and put upon trial, is a public record, is a question of law for the court.[1] Thus, it is the province and duty of the court to settle, as a question of law, the meaning of the *specification of a patent;* and, if it cannot be ascertained satisfactorily from an inspection of the patent, it is to be declared void for ambiguity. Accordingly, where, in an action on the case for an infringement of letters-patent, it was objected, upon the face of the specification of the patent, which was for improvements in the mode of propelling vessels, that it was uncertain whether the patentee claimed a *wheel* constructed *spirally* or only spiral paddles attached to a wheel, and the court instructed the jury that the question whether the specification was ambiguous in the particular charged was one compounded of law and fact, and that, if the jury should find that a *spiral wheel* and a *spiral propeller* were the same thing in ordinary acceptation, then the specification was sufficiently certain in that respect, — it was held that the instruction was erroneous.[2]

§ **1071. Interpretation of Judicial Records.** — The meaning of a judicial record, including the question of its validity, is always a matter to be expounded by the court, — as whether an order granting *letters of administration* is valid or invalid.[3] As already stated,[4] this rule applies with peculiar force to the records of the particular court. So, it has been held that, where there is a question as to the meaning of an *order of sale* of personal property made by an Orphans' Court, it is not competent to introduce the order book and to show similar orders made by the court in the matter of other estates, — the construction of the particular order being for the court.[5] So, where in an action on a contract, the defendant pleads a *decree* of a chancery court, to show a release by the plaintiff of his cause of action, it is for the court to construe the decree and determine from its face, whether it was intended to operate as a release; and a

[1] State *v.* Anderson, 30 La. Ann. Pt. 1, 557.

[2] Emerson *v.* Hogg, 2 Blatchf. (U. S.) 1, 6. Compare Washburn *v.* Gould, 3 Story (U. S.), 122.

[3] Sims *v.* Boynton, 32 Ala. 352, 360.

[4] *Ante*, § 1029.

[5] Wyatt *v.* Steele, 26 Ala. 639, 649.

charge which submits this question to the jury is erroneous.[1] So, also, the *interpretation of an award* made by arbitrators is for the court; although it has been said that, in construing either the terms of the submission or the language of the award, reference may be had to all the surrounding facts of the case.[2]

§ 1072. Interpretation of Contracts by Correspondence. — Where the evidence adduced to prove the existence of a contract consists wholly of letters which have passed between the parties, it is the office of the court, upon an inspection of the letters, if they are capable of being understood without extrinsic evidence, to declare, as matter of law, whether they amount to a proposal and to an unconditional acceptance, so as to constitute a contract,[3] and, if so, to say what the contract is ;[4] and it is error to submit the question to the jury.[5] This must, on principle, be qualified with the statement that, where the question of contract or no contract is to be determined from the *acts* as well as the writings, in order that the court shall determine it, the act must be established by uncontroverted evidence, and must be of an unequivocal character. If they admit of different inferences as to the intent, the question is, on principle, one of fact for a jury.[6]

[1] Shook *v.* Blount, 67 Ala. 301.

[2] The award of arbitrators is conclusive upon the parties, only in respect of those matters which have been submitted to them for arbitration. If they assume to act on questions not submitted to them, or fail to follow the directions of the submission in a material point, their award in respect of those matters will not be binding, whether the questions be questions of law or questions of fact. Squires *v.* Anderson, 54 Mo. 193. Consult also Pratt *v.* Hackett, 6 Johns. (N. Y.) 13; Allen *v.* Galpin, 9 Barb. (N. Y.) 246. Whether the arbitrators had authority to act in reference to any particular subject-matter, or whether their award conforms to the direction and powers given them by the submission, must of course be determined by the court as a question of law, upon a consideration of the terms of the submission. Squires *v.* Anderson, *supra;* Kanouse *v.* Kanouse, 36 Ill. 439.

[3] Falls Wire Man. Co. *v.* Broderick, 12 Mo. App. 378, 385; Luckhart *v.* Ogden, 30 Cal. 547, 556; Macbeath *v.* Haldimand, 1 T. R. 172, 180.

[4] Van Valkenburg *v.* Rogers, 18 Mich. 180

[5] Lea *v.* Henry, 56 Ia. 662; Russell *v.* Arthur, 17 S. C. 477; Ranney *v.* Higby, 5 Wis. 62.

[6] *Post*, § 1083.

§ 1073. [Continued.] Observations on the above Rule. — In the leading case upon this rule, the question was whether the defendant had contracted as agent for the government or for himself, and it was objected that, whether he had made himself liable or not was a question which ought to have been left to the jury to decide. "But," said Lord Mansfield, "there was no evidence which was proper for their consideration; for the evidence, consisting altogether of written documents and letters which were not denied, the import of them was matter of law, and not of fact." Willes, J., said on the same point: "There was no other evidence but letters, which were before the jury, and the judge had a right to give his opinion upon them. The construction of deeds is a matter of law, but that of letters is proper for the consideration of the jury." Buller, J., said: "I do not agree with my brother Willes as to the construction of letters. If they are written in so dubious a manner as to be capable of different constructions, and can be explained by other transactions, the whole evidence must be left to the jury to decide upon, for they are to judge of the truth or falsehood of such collateral facts which may vary the sense of the letters themselves. But if they are not explained by any other circumstances, then, like deeds or other written agreements, the construction of them is a mere matter of law." [1] This case must therefore be taken as deciding that the *construction of letters*, not in themselves ambiguous so as to require the aid of extrinsic evidence in their explanation, is for the court and not for the jury.

§ 1074. [Continued.] An Exception to the Above Rule. — To this rule an exception was stated by the Supreme Court of Ohio, in a case where F. sued the Franklin Insurance Company upon a policy of insurance. The answer alleged that the loss occurred after the policy had become void because the premium note was not paid when due. The reply charged that the company sent the note after the default to T. for collection; that T. directed the defendant to continue the insurance and guaranteed the payment of the premium, to which the defendant assented. On the trial of this issue, the plaintiff gave in evidence T.'s letter to the defendant, reading, "Continue the policy in force and we will guarantee the payment of the note." The plaintiff also gave evidence showing the course of dealing and correspondence between T. and the defendant. This showed that the defendant made no reply to the letter, but wrote him several letters on other matters during the

[1] Macbeath *v.* Haldimand, 1 T. R. 172, 180, 181, 182.

interval prior to the loss. Upon this evidence the court, on motion of the defendant, took the issue from the jury. It was held that this was error. The letter of T. did not in terms or by necessary implication under all the circumstances, call for a reply if the defendant assented thereto. The court should have submitted, under suitable instruction, to the jury, the question: "Did the defendant assent to T.'s proposal?"[1]

§ 1075. Meaning of Ordinary Words and Phrases. — The meaning of ordinary words and phrases in written instruments is to be interpreted by the court, and not by the jury.[2] Thus, the question what is meant by the words of a written contract sued on, "when the walls shall be completed," being a question involving the construction of a contract, has been held a question of law for the court.[3] So, it has been held error for the judge to submit to the jury whether the words used in a *warranty* of facts upon which a policy of *insurance* was obtained asserted an existing fact or merely gave an opinion, — the warranty being wholly in writing.[4] So, it is said, that what is meant by the use of the words "*insupportable*" and "*outrageous*," in a statute relating to *divorces*, is a question of law; but that the existence and truth of the facts which amount to such outrages are for the jury.[5] So, in an action for *slander*, where there is no averment that any of the words used had a local or provincial meaning, the jury should be left to judge, from the speaking of the words and the attending circumstances, of the meaning intended to be conveyed by the use of them. Accordingly, it is error in such a trial, to allow witnesses to give their opinions as to the meaning of such words.[6]

§ 1076. Meaning of Words not used in their Ordinary Sense. — In the interpretation of written instruments the words employed are to be understood in their ordinary sense unless it appears doubtful whether they were intended to be understood

[1] Fry *v.* Franklin Ins. Co., 40 Oh. St. 108.

[2] Brady *v.* Cassidy, 104 N.Y. 147, 153.

[3] Worcester Medical Institution *v.* Harding, 11 Cush. (Mass.) 285, 289.

[4] Bennett *v.* Agricultural Insurance Co., 51 Conn. 504.

[5] Byrne *v.* Byrne, 3 Tex. 336.

[6] Justice *v.* Kirlin, 17 Ind. 588.

in that sense, in which case the court may receive extrinsic evidence for the purpose of aiding in the construction,[1] and may refer the question of the meaning of the words to the jury.[2] The rule has been stated thus: "Ordinarily, the construction of written instruments is for the court, and not for the jury; but where a writing contains *technical* (other than legal) *terms*, mercantile abbreviations or phrases, or obscure expressions, the meaning of such terms or expressions is to be ascertained by the jury."[3] It has been also said that ordinarily, "the meaning of words and the grammatical construction of the English language, so far as they are established by the rules and usages of the language, are *prima facie* matter of law, to be construed and passed upon by the court. But language may be ambiguous, and used in different senses; or general words in *particular trades* and branches of business — as among merchants, for instance — may be used in a new, peculiar or technical sense; and therefore, in a few instances, evidence may be received from those who are conversant with such branches of business and such technical or peculiar use of language, to explain and illustrate it."[4] It is also said that if the question arises from the obscurity of the writing itself, it is determined by the court alone; but questions of custom, usage, and the actual intention and meaning derived therefrom, are for the jury.[5] "This," said Mr. Justice Story, "is especially applicable to cases of *commercial correspondence*, where the real objects and intentions and agreements of the parties are often to be arrived at only by allusions to circumstances which are but imperfectly developed."[6] This principle has been frequently recognized and acted upon.[7]

[1] Hutchinson *v.* Bowker, 5 Mees. & W. 535; Weil *v.* Schwartz, 21 Mo. App. 372, 380.

[2] Bunce *v.* Beck, 43 Mo. 266, 280; Simpson *v.* Hargitson, 35 Leg. Obs. 172; Weil *v.* Schwartz, 21 Mo. App. 372, 381; Edwards *v.* Smith, 63 Mo. 119, 127; Fagin *v.* Connoly, 25 Mo. 94; McNichol *v.* Pacific Express Co., 12 Mo. App. 401, 407.

[3] McNichols *v.* Pac. Ex. Co., *supra*.

[4] Brown *v.* Brown, 8 Metc. (Mass.) 573, 576; Prather *v.* Ross, 17 Ind. 495, 499.

[5] 2 Phil. Ev. (Cow. & Hill's Notes), § 734.

[6] Brown *v.* McGran, 14 Pet. (U. S.) 479, 493.

[7] See for instance, Fagin *v.* Connoly, 25 Mo. 94, where this was the only question in the case.

§ 1077. INSTANCES UNDER THIS RULE.— Thus, the meaning of the expression, in a mercantile letter, "Please to give them credit in exchange when the bills are duly honored," was held by Gibbs, C. J., to be, "a question singularly fit for a jury, and one on which they were likely to arrive at a sounder conclusion than the court, because their knowledge of it arises from daily experience." And in this view the other three judges of the common pleas concurred.[1] - - - - So, where a letter remitting a bill contained a request, "which please to honor," and the reply was, "Your bill of *l.*100, to W. Johnson & Co., shall have attention,"— it was left to a jury to say whether the words "shall have attention" amounted to an acceptance of the bill.[2] - - - - So, where a factor was directed to sell a consignment of flour "after the receipt of the Atlantic's news," and there had been other correspondence relating to the sale of the flour, it was properly left to the judge, sitting as a jury, to determine, as a question of fact, whether the factor had sold the flour in conformity with the instructions.[3] - - - - So, where one merchant instructed another to purchase for him two cargoes of coal "afloat," and there was some dispute as to what was meant by the word "afloat," and testimony was given as to its meaning among merchants, it was held that the court properly submitted the question of its meaning to the jury.[4] - - - - So, where the question concerned the meaning of the abbreviation "C. O. D.," it was held proper to submit it to the jury.[5] - - - - It has been held that the words "*in liquidation*," written after the signature to a note executed in the name of a *partnership*, if proved to have been written when the note was made, and if according to mercantile usage they import a firm dissolved, furnish a circumstance from which the jury may infer that the payee of the note had notice of the dissolution of the firm.[6] - - - - So, it has been held, where the question related to the identity of certain wood which had been levied upon by an officer and which was described in his return as "sixty cords of *soft cord wood*, more or less," that the term "soft wood," not being one to which the law has attached a specific meaning, the court cannot expound it, but that it is properly left to the jury to say what was intended to be embraced in the language used.[7] - - - - So, it

[1] Lucas *v.* Groning, 7 Taunt. 164.

[2] Rees *v.* Warwick, 2 Barn. & Ald. 113. See also Story on Agency, § 75. See also Macbeath *v.* Haldemand, 1 T. R. 172; Morrell *v.* Frith, 3 Mees. & W. 402.

[3] Fagin *v.* Connoly, 25 Mo. 94.

[4] Law *v.* Cross, 1 Black (U. S.), 533, 538.

[5] McNichol *v.* Pac. Ex. Co., 12 Mo. App. 401.

[6] Burr *v.* Williams, 20 Ark. 172, 188.

[7] Darling *v.* Dodge, 36 Me. 370.

has been held that parol evidence is admissible to explain what the parties meant in a written instrument by the phrase "*waste ground*," when used in reference to railroad building.[1]

§ 1078. [FURTHER ILLUSTRATION.] PROMISE TO PAY IN "CASH NOTES." — Where a promissory note agreed to pay a stipulated amount of money "in cash notes due since the first day of January, 1845," it was held, in an action on the note, a question for the jury, to determine what the parties meant by the use of the words "cash notes." In giving the opinion of the court, Lipscombe, J., said: "The use of the words 'cash notes' creates the presumption that the parties intended to give some effect to them and to designate a payment different from, and more favorable to the party promising, than the payment of money. We believe, at all events, that it should have been left to the jury to decide what was meant by the use of the terms, and also to say, if they meant some other thing, and the value of such thing. I recollect reading, in an opinion of Judge Cowan, on the vexed question of latent and patent ambiguities, that he puts a case that once occurred before him, of a suit being brought on a promise in writing to pay so much money *in deal*. The judge said that he was totally at a loss as to what meaning should be attached to the word *deal*, but, by leaving it to the jury on proof, it was rendered perfectly intelligible. It was to be paid in work in the maker's trade — that is to say, in blacksmith's work, the maker being a smith. No rule of evidence would have been violated; it would not have been altering a written contract by parol; it would have been only showing what the parties really meant. We do not know how much injustice would be done by undertaking to say, that all such promises were absolute for the payment of so much money. The parties may have intended something else, and if so, such intention should not be defeated by an arbitrary rule of construction that would render it senseless and of no effect. It is likely that a man would often be willing to give a much higher price for property, payable in notes due to him, than he would be willing to pay in money. And if so contracted, neither the law, nor reason, would hold him liable to pay the amount in cash. The difference between payments in cash notes and cash can only be ascertained by a jury." [2]

§ 1079. View that Jury must declare Meaning of Word, and Court expound Contract. — There is a modified view, that in such

[1] Prather *v.* Ross, 17 Ind. 495, 499. [2] Ward *v.* Lattimer, 2 Tex. 245, 248.

a case, after the jury have declared the meaning of the doubtful or technical word, the court must proceed to interpret the instrument with reference to the meaning so declared, and must expound its effect to the jury.[1] This view has been thus formulated in an English case: "The construction of all written instruments belongs to the courts alone, whose duty it is to construe all such instruments as soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts by the jury.[2] Another court has thus stated the rule: "If words of doubtful meaning are employed, or such as have more than one meaning, the question whether their technical sense is different from their ordinary meaning, may be left to a jury; but, in the end, the court must determine the interpretation of the contract, with such light as the verdict may afford on the question submitted to the jury."[3] Accordingly, it has been held that, in an agreement reserving the privilege of using all the water of a spring, "the same as it has been formerly *conveyed*," for the use of a certain paper mill, the word "conveyed" refers to the manner of taking the water, and not to the conveyance of the right; and that the meaning of the word in such a case, was rightly decided by the court, and not submitted to the jury.[4] It is submitted, however, that this rule cannot be conveniently employed in those jurisdictions where special verdicts are not in use; though even there, its application is not necessarily *impracticable*, since the court might, by hypothetical instructions, direct the jury as to the various meanings of the instrument, according to the various meanings which they might give to the disputed word or phrase.

§ **1080. Technical Terms known only to Experts.** —There is a similar view that, where a contract embraces technical terms known only to experts in a particular art or science, it will be

[1] Hutchinson *v.* Bowker, 5 Mees. & W. 535; Edelman *v.* Yeakel, 27 Pa. St. 26.

[2] Neilson *v.* Harford, 8 Mees. & W. 806, 823. This language has been quoted in a recent case in Missouri as laying down the correct doctrine. Fruin *v.* Crystal Ry. Co., 89 Mo. 397, 404.

[3] Edwards *v.* Smith, 63 Mo. 119, 127, opinion by Napton, J.

[4] Edelman *v.* Yeakel, 27 Pa. St. 26.

proper to receive the evidence of persons skilled in such art or science, to *enable the court* to determine the meaning of the contract.[1] In such a case, it has been said that the testimony of experts is admissible in proper cases *to aid the court* in such interpretation,— as where the instrument contains technical terms which are peculiar to a certain art, trade or business and which are not subjects of common knowledge,— such as the words "*slow up*" in railway management.[2]

§ 1081. The Meaning which the Parties themselves have Placed upon their Contract. — It has been well observed: "The rights of parties to put an interpretation upon their own contracts, even to the extent of doing away, practically, with the ordinary and plain meaning of terms, cannot well be denied, so long as their interpretation does not result in a contract which, for some reason, is in itself unlawful; and the cases are numerous and consistent, which permit a resort to the proof of the circumstances or situation of the parties, when their contract was made, and of their transactions under it, when its terms are of doubtful or ambiguous meaning, for the purpose of arriving at the true intention, and, when this is done, the question must be left to the decision of the jury."[3]

§ 1082. [Continued.] Court to Instruct Jury as to Inferences. — On what the writer conceives to be an erroneous view, the Supreme Court of Rhode Island hold that it is the duty of the court, in a case calling for it, to instruct the jury what inferences may be legally drawn

[1] McAvoy *v.* Long, 13 Ill. 147, 150.

[2] Louisville &c. R. Co. *v.* McKenna, 13 Lea (Tenn.), 280, 288.

[3] Reissner *v.* Oxley, 80 Ind. 580, 584, opinion by Woods, J. The learned judge cited the following authorities "as more or less in point:" Bates *v.* Dehaven, 10 Ind. 319; Symmes *v.* Brown, 13 Ind. 318; Bell *v.* Golding, 27 Ind. 173; Conwell *v.* Pumphrey, 9 Ind. 135; Wilcoxen *v.* Bowles, 1 La. Ann. 230; Lowber *v.* Le Roy, 2 Sandf. (S. C.) 202; Williamson *v.* McClure, 37 Pa. St. 402; Prather *v.* Ross, 17 Ind. 495; Eaton *v.* Smith, 20 Pick. (Mass.) 150; Etting *v.* President, 11 Wheat. (U. S.) 59; School District *v.* Lynch, 33 Conn. 330; Watson *v.* Blaine, 12 Serg. & R. (Pa.) 131; Harper *v.* Kean, 11 Serg. & R. (Pa.) 280; Frederick *v.* Campbell, 14 Serg. & R. (Pa.) 293; See also 2 Pars. Contr. (6th ed.) 493.

from the words of a written contract, or from the words of receipts, coupled with the conduct of the parties in relation thereto. The court say: "The legal force and effect of the words in written business documents and of the conduct of the parties in exposition of them, are so purely matters of law, that a judge would, in our opinion, fail in his duty, if he neglected to give it in charge to the jury, so far as was necessary for the proper decision of the case before them." [1] This language must be taken with two qualifications: 1. The words in business documents may have a technical meaning among merchants, such as will call in parol explanation or evidence of usage in their interpretation, — in which case their meaning is for the jury.[2] 2. If the acts of the parties, done in respect of writings which have passed between them, are equivocal or susceptible of different interpretations, the judge manifestly cannot declare the meaning of such acts to the jury.

§ 1083. Rule Where Parol Evidence is required to explain Ambiguities. — Where the meaning and effect of written instruments depend, not merely on their construction and language, but on collateral facts *in pais* or extrinsic circumstances, the inferences of fact to be drawn from them should be left to the jury. "An admixture of parol with written evidence draws the whole to the jury." [3] This happens where a contract is so ambiguous as to require the aid of parol evidence to ascertain its meaning, in which case the question of its meaning is necessarily left to the jury,[4] and the court must not, in instructing them, assume to interpret it.[5] But it is said that the court may give such instructions upon the legal effect of the instrument as will meet the various phases presented by the extrinsic evidence.[6]

[1] Wheeler *v.* Schroeder, 4 R. I. 383, 392.

[2] *Ante*, § 1076.

[3] Holman *v.* Crane, 16 Ala. 570, 580; Sewall *v.* Henry, 9 Ala. 24; Overton *v.* Tracey, 14 Serg. & R. 311, 330; Watson *v.* Blaine, 12 Serg. & R. (Pa.) 131, 136; McKean *v.* Wagenblast, 2 Grant Cas. (Pa.) 462, 466; Turner *v.* Yates, 16 How. (U. S.) 14; First National Bank *v.* Dana, 79 N. Y. 108, 116; Gardner *v.* Clark, 17 Barb. (N. Y.) 538, 551; Etting *v.* Bank of United States, 11 Wheat. (U. S.) 59; Jennings *v.* Sherwood, 8 Conn. 122; Foster *v.* Berg, 104 Pa. St. 324; Vernor *v.* Henry, 3 Watts (Pa.), 385, 392.

[4] Bedard *v.* Bonville, 57 Wis. 270, 275; Ganson *v.* Madigan, 15 Wis. 144, 154, 155 (meaning of the word "team.")

[5] Philibert *v.* Burch, 4 Mo. App. 470.

[6] Taylor *v.* McNutt, 58 Tex. 71.

For perhaps stronger reasons, where a question arises as to the nature of a contract which subsists between parties, and its solution depends, not only upon the construction of *several written instruments*, but also upon oral evidence, it has been held proper to submit the whole question to a jury. So held, where the question was whether a contract between several parties was a *joint contract* and created a joint liability.[1]

§ 1084. [Illustration.] Where Parol Evidence is admitted to explain a Will. — It was said of a will, where such evidence had been introduced to aid its interpretation: "The ascertainment of intention from the will itself falls within the province of the court; and where the sense is incomplete, the deficiency cannot be supplied by extrinsic evidence; a latent ambiguity occurs, and the bequest is void. But a discrepance, or an accordance, between the whole or particular parts of the description, may be shown by evidence *dehors*, to create, or to destroy an ambiguity which is said to be latent, because it is concealed by the will, and disclosed but by extrinsic circumstances. A legatee is designated by *name* or by *description*, according to his condition or the relation he bears to persons or things; or by both. Where the designation is by a name common to two or more, and without reference to circumstances of description, the question of identity is one purely of fact. Where, however, a description or an addition is inapplicable, not only to the party named, but every one else, its falsity is insufficient to invalidate the designation by the name, the maxim being that *veritas nominis tollit errorem demonstrationis*, and Lord Bacon has some curious observations on this head to show that, next to the actual presence of the donee, a designation of him by name is the more worthy in certainty; whence a legal presumption of fact, in case of a discrepance, that the falsity is in the description and not in the name."[2] Applying this principle, where the will read, "I give and bequeath to my nephew, James Vernor Henry, son of my deceased sister, Elizabeth, his heirs or assigns," etc., and James Vernor Henry was not the nephew, but the grand nephew of the testator, and not the son, but the grandson of his sister named Elizabeth, but the testator had a nephew named Robert R. Henry, who made pretension to be the person named in the bequest, it was held a question of fact for the jury which was

[1] Bradford *v.* South Carolina R. Co., 7 Rich. L. (S. C.) 201, 214.

[2] Citing Bacon's Maxims, Reg XXV.

the person named.[1] The court applied the principle that, in the case of latent ambiguity in a will, explanatory declarations made by a testator at the time of its execution are admissible in evidence. So also are previous professions of the testator, indicating a design to give his property in a particular way.[2]

§ 1085. [CONTINUED.] HOW THE JURY INSTRUCTED IN SUCH A CASE.— From the points which were ruled upon in the case above cited, the following charge to the jury may be constructed, so far as the same applies to the general principles of law applicable in such a case: "The jury are instructed that, the description of the person named in the bequest failing to apply to the plaintiff in every particular but the Christian name, and there being a person claiming this legacy who was in being when the will was made, and known to the testator, who answers this description according to its very letter, a latent ambiguity or uncertainty as to the person intended by the testator to take the legacy is presented." "If the evidence be such as satisfies the jury that the person bearing the name mentioned in this clause of the will, and who is the plaintiff in this suit, was intended by the testator, the inconsistent description will not prevent his recovery. The evidence, by parol or word of mouth, which the plaintiff has been allowed to give for the purpose of dispelling or removing the uncertainty as to the person intended by the testator, need not be conclusive, or such as to remove the ambiguity beyond every doubt, nor is it necessary that it afford a high degree of probability that the plaintiff was the person intended by the testator; but it will be sufficient if it satisfies the minds of the jury that such was the fact." [3]

§ 1086. Contract partly in Writing and partly in Parol. — Where a contract is partly in writing and partly in parol, and the parol evidence is conflicting, or such as to leave the intention of the parties obscure, it is proper to submit to the jury the decision of the question what the contract was.[4]

§ 1087. Receipts for Money Paid. — A written receipt for the payment of money is an admission only, and, though

[1] Vernor *v.* Henry, 3 Watts (Pa.), 385, 392.

[2] Compare Harris *v.* Bishop of Lincoln, 2 P. Wms. 137; Thomas *v.* Thomas, 6 T. R. 671; Standen *v.* Standen, 2 Ves. Jun. 589; Dare *v.* Geary, cited Amb. 375.

[3] Vernor *v.* Henry, 3 Watts (Pa.), 385.

[4] Edwards *v.* Goldsmith, 16 Pa. St. 43, 48; *post*, § 1113.

evidence against the person who made it and those claiming under him, is not conclusive evidence, except as to a person who may have been induced by it to alter his condition.[1] It may therefore be contradicted or explained; and it will be for a jury or other trier of the facts to say, upon such contradictory or explanatory evidence, what the fact was.[2] But an instrument in writing which acknowledges the receipt of a sum of money, in full for damages sustained by the signer in consequence of an injury received from the person paying the money, is not a simple receipt which can be explained or varied by parol evidence, but is in the nature of a *release*, and is a contract which bars an action for the injury, unless shown to have been obtained by fraud. It cannot be explained by parol evidence, but its meaning and conclusive effect must be pronounced by the court.[3]

§ 1088. Meaning of Words Varied by Evidence of Usage.— Words used in a particular relation may have a different meaning from that which attaches to them in their ordinary use. Hence, it is that evidence of usage is sometimes admissible to show that ordinary words, when used with reference to a particular subject, have a peculiar meaning; and in such a case, whether the words have such peculiar meaning is, of course, a question for a jury. Thus, in one case it was held that, in an action on a lease of an estate which included a rabbit warren, evidence of usage was admissible to show that the words "thousand of rabbits" were understood to mean one hundred dozen, that is twelve hundred. The decision was based on the ground that the words "hundred," "thousand," and the like, were not understood, when applied to particular subjects, to mean that number of units; that the definition was not fixed by law, and was therefore open to such proof of usage.[4] Commenting upon this case, it was said by Chief Justice Shaw: "Though it is exceedingly difficult to draw the precise line of distinction, yet it is manifest

[1] Straton *v.* Rastall, 2 T. R. 366; Wyatt *v.* Hertford, 3 East, 147.

[2] Graves *v.* Key, 3 Barn. & Ad. 313, 318.

[3] Coon *v.* Knapp, 8 N. Y. 402. Compare Egleston *v.* Knickerbocker, 6 Barb. (N. Y.) 458; and White *v.* Parker, 8 Barb. (N. Y.) 48.

[4] Smith *v.* Wilson, 3 Barn. & Ad. 728.

that such evidence can be admitted only in a few cases like the above. Were it otherwise, written instruments, instead of importing certainty and verity, as being the sole repository of the will, intent and purposes of the parties, to be construed by the rules of law, might be made to speak a very different language, by the aid of parol evidence." [1] Accordingly, where a town had conveyed a beach, reserving the right to enter and take away "gravel and sand * * * for the making and repairing of their highways," it was held that evidence was admissible to prove what species of material had been used as gravel by the town for repairing its highways before the making of the deed, since this must be presumed to have been within the contemplation of the parties; but such evidence was not admissible to prove the meaning of the words "sand and gravel," as generally and usually understood at that town.[2]

§ 1089. Mercantile Contracts explained by the Usages of Trade. — This introduces another exception to the general rule above stated,[3] which is that, in the case of a mercantile contract, if "the instrument be not clear and unequivocal, evidence of the usage or course of trade which is to be carried into effect, is admissible to explain the meaning and remove the doubt." [4] It is also reasoned that parol evidence is admissible to show the existence of a custom of trade or business, within the purview of which the contract was made, provided such custom was of such universal practice as to justify the conclusion that it became, by implication, a part of the contract; and the existence and extent of such a custom is a question of fact for a jury,[5] except in the case of customs of such universality that the courts will notice their existence judicially.[6] "The principle applicable to such a

[1] Brown *v.* Brown, 8 Metc. (Mass.) 573, 577.

[2] Brown *v.* Brown, *supra*.

[3] *Ante*, § 1065.

[4] 2 Kent Com. 556; Salmon Falls Man. Co. *v.* Goddard, 14 How. (U. S.) 446, 454; Brown *v.* Brown, 8 Metc. (Mass.) 573, 576; Prather *v.* Ross, 17 Ind. 495, 499.

[5] Branch *v.* Palmer, 65 Ga. 210.

[6] In an action on a contract whereby a defendant undertook to impart to a competent person the information necessary to enable him to operate a sugar factory, it was held a question for the jury, under the evidence, whether such competent person should be an expert in the general

case is, that the evidence of usage, and the surrounding circumstances, in explanation and illustration, are for the consideration of the jury, — the province of the court being to instruct them, conditionally or hypothetically, what should be the proper construction or interpretation of the written instrument, as they may find the evidence either to support or not to sustain the purpose for which it has been offered." [1] "When a new and unusual word is used in a contract, or when a word is used in a technical or peculiar sense, as applicable to any trade or branch of business, or to any particular class of people, it is proper to receive evidence of usage, to explain and illustrate it, and that evidence is to be considered by the jury; and the province of the court will then be, to instruct the jury what will be the legal effect of the contract or instrument, as they shall find the meaning of the word, modified or explained by the usage." [2]

§ 1090. Instance of an Instruction Erroneous within this Rule.— An instruction was granted, to the effect that a certain entry is a sufficient memorandum in writing of a contract to bind the defendant, provided the jury find that it "either expressly, or according to the sense and signification of its language and figures, under the established custom and usage of merchants in the city of Baltimore, at the time," etc., "represented truly and fully the terms of and parties to the contract of sale." It was held that this instruction was erroneous under the above rule, because it authorized the jury to construe the entry or memorandum, without any absolute or conditional construction thereof by the court.[3]

§ 1091. The correct Reading of Written Instruments — Identity of Words — Legibility. — There is a conflict of authority on the question whether the deciphering of illegible writings is for

business of making sugar, and also whether a competent person, within the meaning of the contract, had been designated by the defendant to receive the information bargained for. Tansill *v.* Brinkman, 16 Mo. App. 557.

[1] Williams *v.* Woods, 16 Md. 220, 251; Eaton *v.* Smith, 20 Pick. (Mass.) 150, 156; Neilson *v.* Harford, 8 Mees. & W. 823.

[2] Eaton *v.* Smith, 20 Pick. (Mass.) 150, 156, opinion of the court by Shaw, C. J.

[3] Williams *v.* Woods, 16 Md. 220, 253.

the court or the jury. According to one view, the proper reading of an illegible writing is for the court, and not for the jury, — as for instance, whether a Christian name in an indictment should read David or Daniel.[1] So, whether the letters "*oix*" in a policy of insurance meant "*six*," which would make sense, or "*oix*" which would make nonsense, was erroneously submitted to the jury.[2] But we find the same court deciding in a subsequent case that, while the construction of written instruments is for the court, yet the *identity of a word* in such an instrument, — as, for instance, where it is so written that it may be read either *fifty* or *sixty*, — presents a question of fact for a jury.[3] Again, in one court we find it decided that it is for the court to decide what are the letters and figures used in an instrument which is offered in evidence and the meaning which is to be attached to them; and, if it be the instrument sued on, whether it *varies* from the one which is described in the declaration.[4] In another court, where there was an objection to the admission of a promissory note in evidence, upon the ground of an alleged variance between the date of the indorsement of the note and that of the copy of the note set out in the petition, and the court was unable to determine, because of the peculiar manner in which the figures were made, whether there was a variance or not, — it was held that it was within the *discretion* of the court to submit the question of the variance to the jury, under proper instructions.[5] Swinging back with the pendulum, we find that where, on the trial of an indictment for perjury, it became a question whether a word in a record which had been produced, which was written above an erasure, was the word "meeting" or the word "mutiny," Lord Ellenborough, C. J., ruled that it was not a question for the jury, but that it was a question within the peculiar province of the court.[6] But we apprehend that this last decision is unsound

[1] Com. *v.* Riggs, 14 Gray (Mass.), 377. See also Com. *v.* Davis, 11 Gray (Mass.), 4.

[2] Lapeer Ins. Co. *v.* Doyle, 30 Mich. 159.

[3] Paine *v.* Ringold, 43 Mich. 341.

[4] Riley *v.* Dickens, 19 Ill. 29.

[5] Partridge *v.* Patterson, 6 Ia. 514. See also Jefferson County *v.* Savory, 2 G. Greene (Ia.), 238; Converse *v.* Warren, 4 Ia. 158.

[6] Rex *v.* Hucks, 1 Stark. N. P. 521.

in principle; for the reading of a word in a writing is matter of fact, and not matter of law; and although it may properly be committed to the judge in civil cases, yet in a criminal case, where the essential question of *criminal intent* may depend upon it, and consequently where the whole question of guilt or innocence may turn upon it, it is manifestly an invasion of the province of the jury for the judge to withdraw its decision from them. It is scarcely necessary to add that, on the trial of an indictment for the *forgery* of a particular instrument, the question whether it was forged or not, being the essential question in the case, is exclusively for the determination of the jury; and hence that it is not necessary that this question should be determined prior to the admission of the instrument itself in evidence.[1]

§ **1092. Blanks in Written Instruments.** — The same contrariety of holding exists in respect of the meaning of written instruments, where blanks have been left unfilled through clerical misprision. According to one view, it frequently presents a case of what is called *patent ambiguity*, which is not explainable by parol, but in which case the court must declare the meaning if it can be done, and if not, to declare the instrument to be void for uncertainty. Many cases are found where essential words have been omitted from such instruments, and where their meaning has been declared as matter of law. Thus, where a paper, given to the plaintiff by the defendant, promised to pay the plaintiff one hundred and twenty-three ——— and 6-100, on demand, and interest, it was held that it was a promissory note, payable in money and for a certain sum, and that the statute of limitations did not apply.[2] It well might be; for there were prefixed on the upper left-hand margin, as is usual in the case of promissory notes, the figures $123.06, plainly showing the amount intended. So, where, in the bond of a sheriff as tax collector, the undertaking was to pay "to the treasurer of the district of Tennessee," and the sheriff was collector for a county within the collection district of West Tennessee, and the

[1] Mosier *v.* State, 14 Ind. 261.

[2] Coolbroth *v.* Purinton, 29 Me. 469.

law required the sheriffs within that district to pay the moneys collected to the treasurer of West Tennessee, it was held that the court would supply the word "West" before the word "Tennessee," so as to give effect to the instrument.[1] So, in an old case, where the obligation read, "I, Phillip Goole, do stand bound [without stating to whom] in the sum of sixteen pounds, and is to be paid to the said John Garnes the elder's executors," the court supplied, after the words "do stand bound" the words "to the executors of John Garnes," that being the manifest sense of the instrument.[2] So, where a note was made payable "six —— after date," it was queried, but it should not have been, whether the meaning of the parties was a question for the court or for the jury. It was a case where the judge sat as trier of the facts, and, the note having been given to an insurance company for a policy, and six months being the usual term of credit, it was ruled that, if there be nothing in the note to indicate a different time, the law would regard it as payable six months after date. The rule applied was that the ambiguity was patent, and hence not explainable by parol testimony; but that the actual intention of the parties might be inferred from the paper itself, in the light of the circumstances in which it was given.[3]

§ 1093. [CONTINUED.] CASES WHERE THE MEANING HAS BEEN SUBMITTED TO THE JURY. — In an early case in Mississippi the declaration in an action of *assumpsit* described the note sued on as payable twenty-four months after date; but the note itself, when offered in evidence, appeared to read "twenty-four ——— after date." It was held that the note was admissible in evidence without parol explanation, the *jury* being the judges of the fact of the time of payment intended to be stipulated by the parties to the instrument.[4] - - - - So, in an early case in New York the instrument sued on read: "Six months after date, I promise to pay to the order of Phillip Brotherton eight ———, for value received," etc., and, after it had been transferred, the words "hundred dollars" were inserted in the blank without obtaining the indorser's

[1] Kincannon *v.* Carroll, 9 Yerg. (Tenn.) 11.

[2] Langdon *v.* Goole, 3 Lev. 21.

[3] Nichols *v.* Frothingham, 45 Me. 220.

[4] Conner *v.* Routh, 7 How. (Miss.) 176.

assent, and parol evidence was given to show that it was intended that the amount of the note should be for eight hundred dollars, and that the words "hundred dollars" were omitted by mistake. It was held that the presiding judge properly left it to the jury to say whether it was the intention of the parties to give and receive a note for eight hundred dollars.[1]

§ **1094.** [**Continued.**] **Blanks in the Descriptive Calls of a Deed.** — The meaning of a clerical imperfection in the descriptive calls of a deed, as where a word is accidently omitted, may be submitted to a jury as a question of fact. It was so held where the word "white," with a blank following it, was the call for a certain corner, and evidence was given to show that a white oak tree stood nearly in the course indicated in the deed; in which case it was held proper to leave it to the jury to say whether the white oak tree was the corner intended.[2] This seems to be no more than an application of the rule that, where the description in a deed is indefinite and doubtful, and susceptible of more than one application, thus constituting what is known as a latent ambiguity,—the court, to remove such ambiguity, may resort to extrinsic evidence, and thus restrain, confine and apply the description to a single object. In such a case it is said that, "if the court cannot, by a fair and legitimate construction or use of either description, or by all united, locate with sufficient certainty the land conveyed in the several deeds, then the court will resort to extrinsic or parol testimony, and to the aid of a jury, to ascertain the true intent of the parties, and to locate the lands."[3]

§ **1095. Whether Instrument Sealed or Unsealed.** — Whether an instrument is sealed or not is a question of law for the court;[4] but whether the seal is that of a particular party, — as for instance a corporation, — must, in case of dispute, be sub-

[1] Boyd *v.* Brotherson, 10 Wend. (N. Y.) 93.

[2] Dobson *v.* Finley, 8 Jones L. (N. C.) 495, 499.

[3] Bell *v.* Woodward, 46 N. H. 315, 332.

[4] Schwarz *v.* Herrenkind, 26 Ill. 208.

mitted to the jury.[1] So, where the issue is presented whether an instrument has been *altered* or not, and if so, when and by whom, by the addition of a seal, this may well be submitted to a jury.[2]

§ **1096. Validity of Written Instruments.** — Enlarging the same view, where all the evidence concerning the *assignment* of a patent-right was in writing and uncontradicted, it was held the duty of the court to determine the validity of such an assignment, and error to submit the question to the jury.[3] But where the validity of the instrument depends upon an *extrinsic fact* which is doubtful or disputed,— as whether the obligee was so *intoxicated* at the time of making it, as to be entitled to *rescind* it after becoming sober, — this must, of course, be submitted to the jury.[4] So, it has been held that, whether a contract made on *Sunday* was a work of *necessity* or *charity*, within the meaning of a statute, is a question of fact for a jury.[5]

§ **1097. Whether a Contract is against Public Policy.** — But where the true meaning of a contract is thus ascertained, the question whether or not it is against public policy, is a question for the court, which it is error to submit to the jury.[6] The reason is that, otherwise there would be no settled rule by which the validity of contracts could be determined, and they would be determined, not according to settled principles of law, but according to the uncertain and fluctuating conceptions of juries as to the proper standard of morality and private and public rights.

§ **1098. Inferences from Writings put in Evidence to show Extrinsic Facts.** — Where a writing thus put in evidence is not a dispositive instrument, but is merely offered for the purpose

[1] Crossman *v.* Hilltown Turnpike Co., 3 Grant Cas. (Pa.) 225.

[2] Schwarz *v.* Herrenkind, *supra.*

[3] Snyder *v.* Kurtz, 61 Iowa, 593.

[4] Cummings *v.* Henery, 10 Ind. 109; Reynolds *v.* Dechaums, 24 Tex. 174; Hanna *v.* Phillips, 1 Grant Cas. (Pa.) 253.

[5] Hooper *v.* Edwards, 18 Ala. 280.

[6] Tallis *v.* Tallis, 1 El. & Bl. 391; *s. c.* 22 L. J. (Q. B.) 185; 18 Eng. L. Eq. 151; Pierce *v.* Randolph, 12 Tex. 290, 295, where the question is reasoned at considerable length by Hemphill, C. J.

showing an *extrinsic fact*, it will be for the jury to say what inference of fact is to be drawn from it.[1] The reason is that the question which arises in such a case is not the proper interpretation of a writing which disposes of the rights of the parties, but what effect the writing shall have as evidence of a collateral fact, — as for instance, where the question under inquiry is whether payment of an obligation has been made, and a writing (not a receipt) is introduced as evidence, tending to show that payment had been made.[2] "The most authentic documents," said Scott, J., "when offered for such a purpose, become no more than mere letters or a written correspondence, which, when offered in evidence to prove a fact, are always to be interpreted by the jury."[3] It is added that "when documents are offered for such a purpose, they, like written correspondence, may be interpreted by extrinsic evidence.[4] Accordingly, where the effect of a written instrument, collaterally introduced as evidence, depends not merely upon the construction and meaning of the instrument, but upon extrinsic evidence and circumstances, the inferences of fact to be drawn from it must be left to the jury.[5]

[1] Primm *v.* Haren, 27 Mo. 205, 211; Wilson *v.* Board of Education, 63 Mo. 137, 142; McNichol *v.* Pacific Ex. Co., 12 Mo. App. 401, 407; Reynolds *v.* Richards, 14 Pa. St. 205; McKean *v.* Wagenblast, 2 Grant Cas. (Pa.) 462, 466.

[2] Reynolds *v.* Richards, 14 Pa. St. 205.

[3] Primm *v.* Haren, 27 Mo. 205, 211.

[4] Primm *v.* Haren, *supra*.

[5] Barreda *v.* Silsbee, 21 How. (U. S.) 147, 168.

CHAPTER XXXIV.

VERBAL SPEECH: ORAL CONTRACTS.

SECTION

1105. Meaning of the Speakers a Question for the Jury.
1106. Meaning Ascertained, Court to declare the Legal Effect.
1107. [Continued.] Where there is Doubt as to the Meaning of the Language Used.
1108. Rule Restated as to Parol Contracts.
1109. Illustrations of the Foregoing.

§ 1105. Meaning of the Speakers a Question for the Jury.— Where there is a controversy as to what the parties to a conversation intended, the question is a question of fact for the jury.[1] The rule has been stated, with some variation, as follows: "The interpretation of written contracts is for the court; but where the matter rests in words, and the intention of the parties is to be ascertained from what they have said and done, it is a question for the jury."[2] "When the words are written, the general rule is that the court shall interpret them; but when they are merely spoken, the sense and meaning intended are for the jury."[3] "The rule is undoubted that the meaning of words used in a conversation, and what the parties intended to express by them, is exclusively for the jury to determine."[4] "It often happens, in conversation and in parol contracts, that the meaning of the parties may be understood, and is in fact intended to be, very different from the literal import of the words employed. What may have been said before or after, the use of

[1] Folsom *v.* Plumer, 43 N. H. 469, 472; Deming *v.* Foster, 42 N. H. 165; Murphy *v.* Bedford, 18 Mo. App. 279.

[2] Halbert *v.* Halbert, 21 Mo. 277, 284; Festerman *v.* Parker, 10 Ired. L. 474; Fowle *v.* Bigelow, 10 Mass. 379.

[3] Warnick *v.* Grosholz, 3 Grant Cas. (Pa.) 235, per Woodward, J.

[4] Brubaker *v.* Okeson, 36 Pa. St. 519, per Strong, J.

figurative expressions, emphasis upon particular words or sentences, reference to other matters, not fully expressed, but well understood by all in hearing, and many other circumstances, are material elements, and often have a controlling influence, in ascertaining the intention of those whose language is reported. Important contracts are made verbally, in terms not well suited to express the design of the parties, if they were used in a written instrument, but are understood by them and others with the utmost precision. Actions of slander are maintained upon words, which, taken literally, indicate no unworthy motive or conduct. In cases, where such evidence is adduced in support of the affirmative or negative of any proposition presented to a jury, it is their province to determine its meaning. To find what the language was, is nothing more than to find the evidence, which they adjudge to be true; the result of that as a fact, it is their duty to find, and the court cannot direct what it shall be; and if the jury omit to find the fact which is involved in the issue, the court have no power to infer it." [1]

§ 1106. Meaning ascertained, Court to declare the Legal Effect. — Where the sense in which the parties understood the language is thus ascertained by the jury, it is for the court to declare its legal effect.[2] When, therefore, a contract is proved by parol evidence, and its terms, as thus established, are distinct and explicit, it is the duty of the court to construe it, and not to submit its meaning to the jury.[3] The rule, as stated by Professor Parsons and judicially approved, is this: "What a contract means, is a question of law. It is the court therefore that determines the construction of a contract. They do not state the rules

[1] Copeland *v.* Hall, 29 Me. 93, 95, per Tenney, J.

[2] Warnick *v.* Grosholz, 3 Grant Cas. (Pa.) 235; Brubaker *v.* Okeson, 36 Pa. St. 519; Folsom *v.* Plumer, 43 N. H. 469, 472; Codding *v.* Wood, 112 Pa. St. 371, 377; Deming *v.* Foster, 42 N. H. 165; Islay *v.* Stewart, 4 Dev. & Batt. (N. C.) 160; Belt *v.* Goode, 31 Mo. 128; Judge *v.* Leclaire, 31 Mo. 127; De Ridder *v.* McKnight, 13 Johns. (N. Y.) 294; Smalley *v.* Hendrickson, 29 N. J. L. 371; Short *v.* Woodward, 13 Gray (Mass.), 86; Festerman *v.* Parker, 10 Ired. L. (N. C.) 477; Rhodes *v.* Chesson, Busbee (N. C.), 336.

[3] Diefenback *v.* Stark, 56 Wis. 462. See also Ranney *v.* Higby, 5 Wis. 62; Mowry *v.* Wood, 12 Wis. 413; Martineau *v.* Steele, 14 Wis. 272.

or principles of law by which the jury are to be bound in construing the language which the parties have used, and then direct the jury to apply them at their discretion, to the question of construction; nor do they refer to these rules unless they think proper to do so, for the purpose of illustrating and explaining their own decision. But they give to the jury, as matter of law, what the legal construction of the contract is, and this the jury are bound, absolutely, to take." "Unless this were so, there would be no certainty in the law; for a misconstruction by the court is the proper subject, by means of a bill of exceptions, of redress in a court of error, but a misconstruction by the jury cannot be set right at all effectually." [1] Thus, where, in an action upon an open account, the answer alleged that the account had been settled, and that the plaintiff had executed his promissory note to the defendant for a balance found due on settlement, it was error to instruct the jury to determine the legal effect of the note, that being a question of law for the court.[2]

§ 1107. [CONTINUED.] WHERE THERE IS DOUBT AS TO THE MEANING OF LANGUAGE USED. — It has been ruled that, where a doubt arises upon the meaning, force and construction of language used in oral speech, the language must be interpreted by the court; but where the doubt arises upon the question whether the words used are to be deemed the words of the speaker in his own behalf, or words which the speaker is using as an agent in behalf of his principal, this question of fact depends not so much on the meaning of the words, as on a just consideration of all the facts and circumstances in evidence, bearing upon the question of the agency and the intention and understanding of the parties as to what took place between them, and that the meaning of the language in such a case is for the jury.[3]

§ **1108. Rule restated as to Parol Contracts.** — Where the terms of a contract are to be gathered from the conversations and conduct of the parties, it is for the jury to determine what

[1] 2 Pars. Cont. (6th ed.) 492; *Id.* (7th ed.) 624. Quoted with approval in Estes *v.* Boothe, 20 Ark. 523, 590.

[2] Terry *v.* Shively, 64 Ind. 106.

[3] Whitney *v.* Swett, 22 N. H. 10, 14.

their understanding was.[1] The rule is said to be that the jury have the right to determine the existence of a parol contract,

[1] Tallon *v.* Grand Portage Copper Mining Co., 55 Mich. 147; Sines *v.* Superintendents of Poor, 55 Mich. 383; Kingsbury *v.* Buchanan, 11 Ia. 388, 398; Dennis *v.* Crooks, 23 Mo. App. 532; Carl *v.* Knott, 16 Ia. 379, 384; Codding *v.* Wood, 112 Pa. St. 371, 377; Houghton *v.* Houghton, 37 Me. 72; Copeland *v.* Hall, 29 Me. 93; Tobin *v.* Gregg, 34 Pa. St. 446. See also Strong *v.* Saunders, 15 Mich. 339; Maas *v.* White, 37 Mich. 126; Estate of Young, 39 Mich. 429; Engle *v.* Campbell, 42 Mich. 565; Colgan *v.* Aymar, Lalor Supp. (N. Y.) 27; Rhea *v.* Riner, 21 Ill. 526; Bartlett *v.* Tarbell, 12 Allen (Mass.), 123. As to when the plaintiff is to be nonsuited under the operation of this rule, there is an interesting case in the New York Court of Common Pleas, where the judges were divided in opinion. It was laid down by the majority that it is not a sound proposition that, upon proof of a contract, whether in writing or by parol, the terms of which are not varied by extrinsic evidence, it becomes necessary to submit the contract to the jury for interpretation as to the intention of the parties. It was held that if there is no dispute about the terms of the contract, it is the duty of the court to pass upon its validity and effect. Whether, under such proof, the plaintiff has, or has not made out a cause of action, is for the court to decide; and if the uncontradicted evidence of the terms of the contract is not sufficient to show the plaintiff's right to recover, the case cannot be strengthened by submitting the evidence to the jury to ascertain the intentions of the parties making it. But the court were also of opinion that, where the evidence leaves the terms of the contract or any other fact in doubt, then the facts may be found by the jury; but the court did not understand this rule to extend to a case where the construction of a contract is difficult, if there is no conflict in the evidence. From this conclusion Charles F. Daly, J., dissented. Among other things he said: "But I think the court below erred in granting him a nonsuit. Before a nonsuit can be directed, there must be no doubt in respect to what is proved by the evidence. The evidence must not only be taken to be true, but it must be so clear and conclusive, in respect to the facts upon which the conclusions of law are based, that it is in the power of the court to draw every inference which a jury might draw. Smyth *v.* Craig, 3 Watts & Serg. (Pa.) 18. If it is not of that character, the case must be submitted to the jury, under proper instructions from the court in respect to the law. This is especially so where no written agreement or contract is entered into, and a question arises as to the intent of the parties, to be gathered from their acts and declarations. Where the intent follows as the legal and logical conclusion from their acts, it may be passed upon by the court; but where, upon the evidence, it is so uncertain or doubtful as to justify a jury in finding either way, then it is not in the province of the court to pass upon the question, but the case must be submitted to the jury." Chapin *v.* Potter, 1 Hilt. (N. Y.) 366, 370. State of evidence on which it was held error to submit to the jury, as a question of fact, whether there was an *agreement to discharge an indorser:* East River Bank *v.* Kennedy, 9 Bosw. (N. Y.) 543.

its extent and limitations. They are to find not only what language was used, but its purport and meaning. In cases of written contracts, it is the duty of the court to define the meaning of the language used in them, but in verbal contracts such duty is confined to the jury. They are not barely to ascertain the words and forms of expression, but to interpret their sense and meaning.[1] This question, it has been well said, "is *single*, and cannot be separated so as to refer *one part* to the jury, and *another part* to the judge; but in its entirety the question is one of fact."[2] It is scarcely necessary to add that this question is to be determined from the evidence of what the parties said and did, and not from the *understanding* of *one* of the parties of what he said or did.[3]

§ 1109. ILLUSTRATIONS OF THE FOREGOING. — Applying this rule, it has been held that it is not for the trial court to rule, as matter of law, that certain words uttered in conversation amounted to an *estoppel in pais*.[4] - - - - So, where the action was *assumpsit* to recover the price of a cotton gin, and the defense was the *statute of frauds*, and there was neither the payment of earnest money, nor an acceptance of the article, nor a written contract, — the court held that the plaintiffs could not recover, unless work and labor were to be bestowed on the article which was the subject of the contract; and, as the evidence on this point was very inconclusive, a nonsuit was set aside, in order that a jury might answer, on another trial, whether the parties understood that the contract was for the sale of a gin merely, or for the sale of a gin on which work and labor were to be bestowed before delivery.[5] - - - - In an action by an executrix to recover for *professional services* rendered by her testator, as a general attorney of an estate of which the defendants were the representatives, after the testimony of several witnesses had been received, going to establish that the plaintiff's testator had for several years acted at the instance of the defendants as attorney of the estate, and placing estimates upon those services, it was testified by a witness for the defendants, that the plaintiff had admitted that her testator was

[1] Herbert *v.* Ford, 33 Me. 90; Copeland *v.* Hall, 29 Me. 93.

[2] McKenzie *v.* Sykes, 47 Mich. 294, 296.

[3] Farley *v.* Pettes, 5 Mo. App. 262.

[4] Brubaker *v.* Okeson, 36 Pa. St. 519.

[5] Winship *v.* Buzzard, 9 Rich. L. (S. C.) 103.

employed to collect money due to the estate represented by the defendants on a considerable number of notes which were placed in his hands, and that one of the defendants agreed to give him ten per cent. on all moneys collected. In this state of case, it was held that it should have been left to the jury to determine whether the agreement did not embrace all the notes which the plaintiff's testator had in his possession belonging to the estate, whether collected by means of suit or otherwise.[1] - - - - So, in *replevin for a horse* which had been loaned by the plaintiff to the defendant, to be returned at a subsequent date, the controversy turned upon a conversation between the parties, in which the plaintiff had said to the defendant: "Well, sell him and pay me;" or, "pay me and you can sell the horse;" or, "you can sell the horse, pay me, and I guess there will be no trouble." The court instructed the jury that it was for them to determine what language and words were used by the plaintiff; that the words, "pay me and sell the horse," would not imply an authority to sell the horse; but if the words were, "sell the horse and pay me," that they would authorize the defendant to sell the horse; that if the words were, "sell the horse, and there will be no trouble," they amounted to an authority to sell the horse; and that the last clause, "and there will be no trouble," did not alter the sense and made no difference in the effect of the words. It was held that, in giving these instructions, the court erred; since the jury ought to have been allowed to find, not only what language was used, but also the meaning of the language, in view of all the circumstances of the case.[2] - - - - In like manner, in an action of *assumpsit* on a *promise to pay the bond of another*, the following "point" was submitted to the trial court by the defendant: "That if the evidence in this case proves a promise, or has a tendency to prove a promise of any kind, it is a promise to pay both debts of $400 each, secured by the two judgment bonds and the two judgments entered on the same in consideration of total forbearance; and, plaintiff's having issued execution on one of the judgments and sold all the real estate of Isaac E. Kemp, and purchased the same themselves, cannot recover upon such promise." The answer of the trial court was: "It is not for us to say that the evidence proves or has a tendency to prove a promise as stated on this point; whether it does so is for the jury to say. If it does, however, the law is correctly stated in the point presented." In this the Supreme Court saw "no error, but only a careful demarcation of

[1] Broward *v.* Doggett, 2 Fla. 49. [2] Copeland *v.* Hall, 29 Me. 93, 95.

the line between the provinces of the judge and the jury."[1] - - - - So, it has been held proper to submit to the jury the question whether the defendant has contracted as a *common carrier* or as a mere *hirer* for the particular job, after telling them that "a common carrier is one who holds himself forth to the public to carry for hire from place to place," and that, "though the number of instances employed in carrying may be evidence of the character of a common carrier, it is not the rule which constitutes it. The law has fixed no number of instances which shall stamp him with the character. If he holds himself forth to the public to carry for hire, he is a common carrier, as much in his first trip as in his second, third or fourth. Did the defendant undertake as a common carrier? * * * This you will decide on all the evidence. If satisfied the defendant was a common carrier, the next question to be determined by the jury is, whether the contract in this case was one of affreightment as a carrier, or whether the defendant merely chartered and hired his boat, his hands, and himself, to the plaintiffs, placing all in their control, they running the boat on their own account, and only paying him wages for the hire of the boat, himself and hands."[2]

[1] Kun's Executor *v.* Young, 34 Pa. St. 60.

[2] Fuller *v.* Bradley, 25 Pa. St. 120.

CHAPTER XXXV.

EXISTENCE AND TERMS OF EXPRESS CONTRACTS.

SECTION
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§ **1112. Existence of Contracts.**— It will appear from the foregoing that, in every case where the existence of a contract is in issue, whether it is sought to prove its existence by parol or by a writing, there will be a preliminary question of fact for the jury. If the contract is in writing, and is the instrument sued on, the signature thereto is *admitted*, unless it is denied on oath, under a statutory rule existing in several jurisdictions. In cases outside the operation of this rule, it is necessary to prove first the *execution* (which includes signature) and secondly, the *delivery* of the instrument, — both of which are questions of fact. If it is sought to prove the contract by parol, it is also for the jury, as already seen,[1] to ascertain what the *understanding* of the parties was. Where the execution and delivery of the writing are proved or admitted, then, upon principles already stated,[2] it is for the court to say, upon an inspection of the instrument, whether or not it constitutes a contract. Where an oral conversation is proved, it is for the jury to say in what sense the language was used and understood, and, this being ascertained, it is for the court to decide,— generally upon hypothetical instructions to the jury, — whether or not it constitutes a contract.[3] These questions, in their general bearings, will be considered in this chapter. In relation to contracts of *sale*[4] and to certain other contracts,[5] they will be reserved for separate treatment.

§ **1113. Partly in Writing and Partly in Parol.** — In like manner where an action is brought upon a contract which is partly oral, and conflicting evidence is introduced in regard to the conversations which are alleged to have resulted in a completed contract, the questions whether a contract was in fact made and, if so, what were its terms are questions for the jury ;[6] and in such a case the legal effect of the contract may properly be submitted to the jury as a mixed question of law and fact,— they finding the facts, and the court directing them as to the legal results which

[1] *Ante*, §§ 1105, 1108; Waltheim *v.* Artz, 70 Iowa, 609.

[2] *Ante*, § 1065, *et seq.*

[3] *Ante*, § 1106.

[4] *Post*, § 1161, *et seq.*

[5] *Post*, §§ 1195, 1215, 1280, *et passim.*

[6] Bolckow *v.* Seymour, 17 C. B. (N. S.) 107.

follow.[1] For perhaps stronger reasons, where the contract rests partly in *correspondence*, and partly in oral communications, it is held that, whether or not there is a contract, is a question for the jury.[2]

§ 1114. Observations on the Rule that the existence of a contract is a Question of Fact. — Loose expressions are frequently found in judicial decisions to the effect that, whether a contract exists is always a question for the jury. It is obvious that it will or will not be a question for the jury, according to circumstances. Where the question rests wholly in parol evidence, or, as in the cases above stated, partly in writing and partly in parol, and there is the further condition that the evidence is conflicting, it will be a question for the jury. So, where the question depends entirely upon parol evidence, adduced by the party sustaining the burden of proof, and there is no conflict in the evidence, it may still be a question for the jury, since it will be for them to say whether they will believe the witnesses. So, where the question depends upon a written instrument, the

[1] *Ante*, § 1086; Farwell *v.* Tillson, 76 Me. 227; Homans *v.* Lambard, 21 Me. 308; Smith *v.* Faulkner, 12 Gray (Mass.), 256; Haney *v.* Caldwell, 35 Ark. 156, 164. In a recent case in Illinois, where the question touched the peculiar jurisdiction of the Supreme Court in cases which have reached it through the intermediate appellate court, it was ruled that where the *terms* of the contract are specifically determined, then the meaning or legal effect of the contract presents a pure question of law, and the court alone is permitted to construe it. But where not only the legal effect of the agreement upon the controversy in hand, is to be determined, but also the terms of the agreement itself are to be ascertained from extrinsic proofs, there is presented a mixed question of law and fact, to be determined by the jury, under proper instructions from the court. It is not necessarily true, that where, in the attempt to establish what were the terms of an agreement by extrinsic proofs, there is no conflict in the testimony, the question becomes purely one of law. Evidence tending to establish a contract may be all on one side, and yet may be of such a character as to leave the question as to whether a legal contract was in fact made or not, in extreme doubt; and in such case the question as to the making of the contract, and the purport of its terms, together with its legal effect, is a mixed question of law and fact. St. Louis National Stock Yards *v.* Wiggins Ferry Co., 102 Ill. 514.

[2] Goddard *v.* Foster, 17 Wall. (U. S.) 123, 142.

execution of which is denied, it will be a question for the jury whether the instrument was executed by the party sought to be charged as obligee therein.[1] But where the execution of the instrument which is offered as evidence of the contract, is either proved or admitted, then it will be the duty of the court to determine from an inspection of it, and to inform the jury whether it is or is not a contract — whether it is or is not that which fixes the liability sought to be fastened upon the obligee therein.[2] This is no doubt all that is meant by the general expressions found in judicial opinions that the jury are to find whether the contract was in fact made out, while the interpretation of it is for the court.[3] So, where the question is not whether the instrument has been executed at all, but whether, in a case requiring technical formality, it has been properly executed, the decision will be pronounced by the judge, upon an inspection of the instrument. Thus, the question whether a deed or mortgage has been properly executed and acknowledged, is a question of law, to be passed upon by the court, and it is error to leave such a question to the jury.[4] So, where a *proposal* for a contract is in writing, it is for the court to construe it; if the *acceptance* which is alleged is verbal, it is a question for the jury whether the offer has been accepted or not, but they cannot decide that it was without evidence.[5]

[1] May *v.* Burk, 80 Mo. 675, 680.

[2] Eyser *v.* Weissgerber, 2 Ia. 463, 479.

[3] Stokes *v.* Burrell, 3 Grant Cases (Pa.), 241. That the jury are to find whether the contract was in fact made, but the intent and the obligations of it they must find under the directions of the court, and any mistake in such instructions will be reviewed on error, see Ill. Cent. R. Co. *v.* Cassell, 17 Ill. 389, 394. See also Cunningham *v.* Cambridge Savings Bank, 138 Mass. 480.

[4] Bullock *v.* Narrott, 49 Ill. 65.

[5] Wagner *v.* Egleston, 49 Mich. 218. In a case in Tennessee the evidence tended to show that a parol contract had been agreed upon in the first instance, and afterwards a written contract had been signed, and it was held that the plaintiff had the right to have the question whether the written contract embraced all the terms of the previous parol agreement, submitted to the jury. Cobb *v.* Wallace, 5 Coldw. (Tenn.) 539. But this was probably a misapplication of the rule; for the rule which is generally applied in such cases is that the subsequent writing merges the preceding parol negotiations.

§ 1115. Illustrations. — This is well illustrated in a case in Texas, where an action was brought on the following instrument of writing, signed by the defendant: "There is a balance due the bearer, $475.00. C. R. Hopson to H. L. Kinney, August 15, 1852." It was held that this writing imported that the sum mentioned therein was due from the maker to the bearer, and that the law would imply a promise by him to pay such sum. But if the instrument was *addressed to a third person*, it was to be regarded merely as a memorandum of a fact, or as conveying information of a fact, without legal significance until explained, and was not, of itself, a contract for the payment of money; and it was for a jury to say what the fact was, of which the writing was a memorandum, or of which the writing was intended to convey information, or of which it was an acknowledgment, as the case might be. It was accordingly held that the court erred in refusing to instruct the jury as requested by the defendant, "that if they believed, from the evidence, that the plaintiff was employed by H. L. Kinney, or his agent, to work for him, and the writing sued on was a mere memorandum, informing Kinney of the amount due by him on such hiring, then they should find for the defendant."[1] - - - - A. and B. enter into a verbal contract by which A. undertakes to sell and deliver to B., at a certain time and place, fifty bales of cotton, for which B. is to pay A. at the rate of ten cents a pound. About the time fixed for the performance of the contract, the parties agree that the time for its performance shall be postponed to another named day, and that it shall be reduced to writing,— which, however is never done. On the day last appointed, B. and the agent of A. meet at the place designated for the delivery of the goods, and B. takes the agent of A. aside and says to him that A. ought to release B. from the contract. But the agent of A. proceeds nevertheless to tender to B. the cotton, which B. refuses to accept and pay for. Here, there is question of fact for a jury, whether the parties intended by the second agreement that the original contract should be *no longer binding unless reduced to writing*, or whether they intended merely that it should be reduced to writing, with the view of having more certain evidence of what the contract was.[2] - - - - It has been held a question of fact, to be determined from all the evidence bearing upon the case and the conduct of the parties, whether a *subscription to the capital stock* of a railway company, was made under the provision of the charter of the company, granted by a

[1] Hopson *v.* Brunwankel, 24 Tex. 607.

[2] Adams *v.* Davis, 16 Ala. 748.

special act of the legislature, or under a provision of the general law of the State relating to railway companies.[1] - - - - In an action by a railway company upon a contract of *subscription to its capital stock*, it appeared that the contract provided that the money so subscribed should be expended in the construction of the road from St. Johnsbury to "Derby Line," and also that it should not be binding until the whole road from St. Johnsbury to Derby Line should be put under contract for grading. The defendant having given evidence tending to show that the words "Derby Line" meant, in common usage, a village of that name in the town of Derby, it was held that it became a question of fact, for the jury to decide, whether the use of this term in the contract meant the north line of the town (or township) of Derby, or the village named Derby Line. The court said: "The more full and perfect the proof, the greater the probability of satisfying the jury and obtaining a verdict; but no amount of testimony on a point of this character could have the effect to change this question of fact to one of law, so as to warrant the court in taking it from the jury and deciding it as a matter of law. Indeed, all the evidence as to the general understanding of the meaning of this expression in the vicinity, has no direct application on the real question in issue. It bears only on the probabilities of the case; and if it had been proved, beyond all question, that, prior to the making of this contract, this expression had never been used with reference to the town line, it would not have been conclusive. The expression being a proper one to use in that connection, the parties may have used it in that sense in this contract for the first time. The question would still be open for the jury to say in what sense the parties *in fact* used it."[2] - - - - It has been held, in the case of a written contract which was the subject of parol explanation, that, whether it was an *absolute purchase* of a half interest in a mortgage, *or an assignment pro tanto* of the legal right, in consideration of a part payment, such as would toll the statute of limitations, should be left to the jury upon all the evidence.[3]

§ 1116. Mistakes in the terms of a Contract. — Whether a clause in a written contract was inserted by a mutual mistake of the parties, is a question which cannot generally arise in an

[1] Mastin *v.* Pacific R. Co., 83 Mo. 634.

[2] Connecticut &c. R. Co. *v.* Baxter, 32 Vt. 805, 812.

[3] Blair *v.* Lynch (N. Y.), 11 North East. Rep. 947; reversing *s. c.* 35 Hun, 663.

action at law; since the reformation of mistakes in contracts is one of the peculiar heads of equity jurisdiction.[1] But in cases where public policy is concerned in relieving against the hard features of certain classes of contracts, the question goes to the jury. This, it is assumed, is the case in regard to onerous provisions in contracts of *insurance*, and it has been held to be the rule in the case of clauses in contracts made with *public carriers* which limit the liability of the latter.[2]

§ 1117. Illustration. — Thus, in an action by a shipper against a carrier for damages to goods in transit, it has been held competent to submit to the decision of the jury the question whether a clause in the bill of lading, limiting the responsibility of the carrier was not inserted by a mistake, — the court no doubt meaning mutual mistake. The court below submitted the question to the jury upon an instruction which told them that the burden of showing the mistake was on the plaintiffs; that they must satisfy the jury of the mistake; and instructing them as to the difference between the liability of the defendant in case they should find that no mistake had been made in the bill of lading, and in case they should find that the words were inserted through mistake. This judgment was affirmed, the Supreme Court, in an opinion given by Jeremiah Black, C. J., saying, among other things: "It is of the utmost importance to the commerce of the country that carriers should be held to strict accountability. Gross wrongs would be practiced every day if the laws on this subject were relaxed. Slight evidence ought to be sufficient to set aside any special provision in the bill of lading, which is intended to relieve the carrier from his ordinary legal responsibility. And this not only because public policy requires that carriers should have the strongest interest in the performance of their duties, but also on account of the manner in which such stipulations are generally made. Goods are commonly sent by the owner to the carrier's place of busi-

[1] Gray *v.* Hornbeck, 31 Mo. 400. It was said in a case in New York that, where an issue is raised by an answer in *ejectment* upon the question whether a *deed* should be *reformed* (no issues having been settled with direction to try by jury), it should either be tried by the court prior to the trial of the principal issue, or reserved from the jury on submission of the jury issues; and if in such a case a trial occurs upon all the issues made, it is not error for the judge to refuse to submit the question of the reformation of the deed to the jury, under the evidence upon that issue. Olendorf *v.* Cook, 1 Lans. (N. Y.) 37.

[2] *Post*, § 1863.

ness, where they are received, and the bill of lading made out by the carrier or his clerk. It is often not seen by the owner until it is too late to insist on a change in the terms. It can hardly be called a contract, for a contract requires the assent of both parties. The better rule perhaps would be, to treat all provisions of this kind as void, unless inserted by the express consent of the employer." [1]

§ 1118. Whether a contract was verbal or in Writing. — It has been held that, where the whole evidence in a case presents a disputed question of fact, whether the contract by which the rights of the parties are governed, was in parol or in writing, evidence may be given by them, both as to the precise question, and as to the verbal declarations and acts of the parties, which are claimed to have constituted the alleged parol contract, and also as to the contents of the alleged written instrument; and that it may then be left to the jury to say whether the contract was in writing or in parol, with instructions that, if they first find that it was reduced to writing, they must afterward, in determining the terms of the contract, consider only that part of the evidence which tends to show the contents of such writing.[2]

§ 1119. Whether an Obligation is Independent or Dependent. — It has been held, in an action to enforce the specific performance of a contract to convey land, that the obligation upon which the action is predicated may be shown by parol evidence to be dependent upon the payment of a note given for the purchase-money, although the bond makes no reference to the note, nor the note to the bond. But the facts which show the interdependency of the two obligations must be both averred and proved; and it will be a question for the jury whether they were dependent, and the court ought not to assume that they were so as a fact.[3]

§ 1120. CONTRACT ENTIRE OR DIVISIBLE. — Whether a contract by which an attorney engaged to prosecute a petition for divorce was en-

[1] Choteaux *v.* Leech, 18 Pa. St. 224, 232.

[2] Jenness *v.* Berry, 17 N. H. 549, 555.

[3] Younger *v.* Welch, 22 Tex. 417, 425.

tire, and whether he was to be paid for his services before or after the contract was fully performed, have been held, under circumstances, to be questions of fact.[1]

§ **1121. Original or Collateral.** — If an undertaking to answer for the debt, miscarriage or default of another is not in writing, it is void under the *statute of frauds*, unless it assume the character of an original undertaking. Thus, if A. is unable to get credit from a merchant, and B. goes to the merchant and says, "Credit A. for what goods he wants, and I will pay for them, if A. does not," this is a collateral undertaking to answer for the default of A., and is void unless in writing. But if B. says to the merchant, "Sell and deliver to A. such and such goods, and charge the same to me, and I will pay for them," this is an original undertaking, and B. is answerable for it, although not in writing. Whether an agreement is original or collateral, also arises in respect of the *discharge of sureties*. Thus, if A. is indebted on a promissory note which is past due, upon which the liability of B. as an indorser has become fixed, and C. says to the payee, "Extend the time of payment to A., and I will pay the note if A. does not," this undertaking is void under the statute of frauds, unless in writing, and does not operate to discharge the indorser, because it is not binding upon the maker; it leaves him at liberty to sue upon the note at any time. But if C. enters into an arrangement with the holder of the note to pay it, in consideration of his giving time to A., this engagement will be an original undertaking, and not within the statute of frauds, and the agreement of forbearance will furnish a good consideration for it; and therefore such an agreement for extension will prevent the holder from suing upon the note before the expiration of the time so agreed upon, and, if made without the consent of the indorser, will discharge him. In these and like cases, it may be a question whether the contract is original or collateral, and also whether the question is to be decided by the court or by the jury. Professor Parsons seems to have obscured the question, or rather straddled it, by stating: "Whether a contract is collateral or or-

[1] Dodge *v.* Janvrin, 59 N. H. 16.

iginal may be a question of construction, and then it is for the court; but it is often regarded as a question of fact, and then it is for the jury."[1] Of course, if it is a question of construction, it is for the court, and if it is a question of fact, it is for the jury. In a case in Texas, although the promises were in writing, yet it was held, that the proper construction of the contract would be a question for the jury, unless the terms of the several promises in writing relied upon were such as to allow of a liability on the part of the defendants as either collateral or original undertakings on their part, accordingly as the facts which attended and formed a part of the contract would show them to be the one or the other. The court reasoned that the written terms which were used, being in themselves doubtful, suggested that there might be something in the transaction which gave rise to them, which would explain and render clear their meaning, and thus afford light for the interpretation of the contract as it was really intended. In this view, parol evidence would be admissible to explain it, and of course this would carry the question of its meaning to the jury.[2] Another court has held that, where a written instrument is so ambiguous in its terms that it may be considered either as a *guaranty* or as a *direct undertaking*, according to the circumstances under which it was given, and the testimony as to those circumstances is conflicting, it is error to give instructions based upon the assumption that it was a direct undertaking; but the question whether it was a direct undertaking or a guaranty should be submitted to the jury under proper instructions.[3]

§ 1122. Quantum Meruit — Value of Work done or Materials furnished. — In an action for what is termed a *quantum meruit*, or *quantum valebat*, that is, for the reasonable value of work done or goods furnished by the plaintiff to the defendant,

[1] 2 Pars. Contr. (5th ed.), p. 11.

[2] Hueske *v.* Broussard, 55 Tex. 201. The engagement concerning which this was held was an indorsement on the back of a note of the words: "Accepted, payable ninety days from Jan. 13th, 1870, with interest at ten per cent. per annum." *Ibid.*

[3] Philibert *v.* Burch, 4 Mo. App. 470.

at the request of the latter, the question what is the *reasonable value* of the services or the goods, is, of course, a question for the jury.[1] In such a case the true question for the decision of the jury is, what was the *ordinary price* for such work and materials, charged by other persons in the same business. In such an action, it is therefore erroneous to charge the jury: "It is not your province to say how much profit ought to be charged by the plaintiffs." But the court should content itself with saying: "You are not to set yourselves up as judges of what locomotive engine builders ought to charge as profits, but simply whether the charges in the plaintiff's bill are the usual charges in the trade." [2]

§ 1123. Collateral Purpose for which a Contract was made. — A branch of the doctrine that *purpose* and *intent* are questions of fact,[3] is found in a ruling to the effect that, while the interpretation of a deed of conveyance is a question for the court, yet the purpose for which it was given, — as in the case of an ordinary *quit-claim deed*, — may be a *question of fact* for the jury, in the determination of which, parol evidence, not contradicting or varying the terms of the deed, may be heard.[4]

§ 1124. Whether a Bill of Sale was Intended as a Mortgage. — The rule is now believed to be settled in all English and American jurisdictions, that, in a suit in equity, the object of which is to have a bill of sale of chattels or a deed of land, absolute on its face, declared to be a mortgage merely, and to let in the right of the vendor or grantor to redeem, it may be shown that the intention of the parties, notwithstanding the conveyance is couched in absolute language, was merely that it should stand as a security for money lent. Within the meaning of this rule, the intention of the parties to the instrument, outside of the language of the instrument itself, becomes a *question*

[1] Becker *v.* Hecker, 9 Ind. 497.

[2] Baumgardner *v.* Burnham, 93 Pa. St. 88.

[3] *Post*, § 1333.

[4] Huth *v.* Carondelet &c. Co., 56 Mo. 202.

of fact to be decided by the chancellor upon extrinsic evidence ;[1] and in many cases the question will arise in actions at law, in which cases the real intent of the parties to the instrument will be a question of fact for the jury.[2] In those jurisdictions where legal and equitable remedies are blended, it should seem that this should be regarded merely as a *rule of evidence*, and not as a rule of procedure depending upon the form of the action.[3] Accordingly, we find that it has been held, in an action brought to recover the possession of a slave, which the defendant held under an instrment of writing purporting to be an absolute bill of sale, that the plaintiff might show that the instrument was a mortgage merely, and that this question might be submitted to the jury. The court said: "This question was to be decided by the jury, upon the evidence, independently of the form of the instrument, or the phase sought to be put upon the transaction, by representations and admissions of the parties."[4] In determining whether a bill of sale, given in consideration of a pre-existing debt, is a mortgage, the question to be settled is whether the intention of the parties was to cancel the pre-existing debt, or to secure its payment; and this is a question of fact for a jury in all cases, depending upon the negotiations had at the time and the subsequent acts of the parties.[5] In Pennsylvania a mortgage, though in the form of a conveyance of title, is in reality not only in equity but also at law, only a security for the payment of money or for the performance of other collateral contract. It is none

[1] Parish *v.* Gates, 29 Ala. 254, 261; English *v.* Lane, 1 Porter (Ala.), 328; Kennedy *v.* Kennedy, 2 Ala. 571, 589; Eiland *v.* Radford, 7 Ala. 724; Bishop *v.* Bishop, 13 Ala. 475; Sledge *v.* Clopton, 6 Ala. 589; Turnipseed *v.* Cunningham, 16 Ala. 501; Locke *v.* Palmer, 26 Ala 312; Brantley *v.* West, 27 Ala. 542; West *v.* Hendrix, 28 Ala. 226; McCarron *v.* Cassiday, 18 Ark. 34, 49; Johnson *v.* Clark, 5 Ark. 321; Scott *v.* Henry, 13 Ark. 119; Bishop *v.* Williams, 18 Ill. 101.

[2] Bemis *v.* Phelps, 41 Vt. 1, 4; Cook *v.* Fire Ins. Co., 67 Cal. 369, 371; Wilson *v.* Shoenberger, 31 Pa. St. 295; McCoy *v.* Lassiter, 95 N. C. 88; Wood *v.* Matthews, 73 Mo. 477, 481.

[3] Quick *v.* Turner, 26 Mo. App. 29; Bassett *v.* Glover, No. 3895, St. Louis Ct. of App.

[4] Horne *v.* Puckett, 12 Tex. 201, 205. See also Simpson *v.* McKay, 12 Ired. L. (N. C.) 144; Stamper *v.* Johnson, 3 Tex. 1; Luckett *v.* Townsend, 3 Tex. 119; Stephens *v.* Sherrod, 6 Tex. 294.

[5] Cook *v.* Fire Ins. Co., 67 Cal. 369, 371.

the less so, because the defeasance, instead of appearing in the original deed, is contained in a contemporaneous or subsequently executed instrument. If an absolute deed, if other instruments operating as a defeasance be *simultaneously executed*, it is a conclusion of law that they constitute together a mortgage, and it is the duty of the court to declare that such is their legal effect. But if the alleged defeasance be *executed subsequently*, it is a question of fact for the jury, where the action is an action at law, whether the transaction was intended as a sale or merely as a security for money loaned.[1]

§ **1125. Penalty or Liquidated Damages.** — The Supreme Court of Pennsylvania, after reviewing several decisions,[2] concluded that the question whether the amount stated in a conditional bond or contract is to be taken as a penalty, or as a liquidation of damages arising from a breach of the condition, is to be determined by the *intention of the parties*, drawn from the words of the whole contract, examined in the light of its subject-matter and its surroundings; and that, in this examination, the court must consider the relation which the sum stipulated bears to the extent of the injury which may be caused by the several breaches provided against, the ease or difficulty of measuring a breach in damages, and such other matters as are legally or necessarily inherent in the transaction. The concurrent declarations of the parties are inadmissible, except to show mistake or fraud. Evidence, outside the contract, may in some cases be required to explain the subject-matter and exhibit the surroundings, and, in the investigation of the transaction in its various phases, the testimony of witnesses may be admitted for other

[1] Wilson *v.* Shoenberger, 31 Pa. St. 295. In Reitenbaugh *v.* Ludwick, 31 Pa. St. 131, the question whether a conveyance, absolute on its face, was intended as a deed of sale or as a security for money, was submitted to the jury as a question of fact, because the defeasance was not executed at the same time with the deed, but a few weeks later. See also Jaques *v.* Weeks, 7 Watts (Pa.), 261; Kerr *v.* Gilmore, 6 Watts (Pa.), 405; Rankin *v.* Mortimere, 7 Watts (Pa.), 372.

[2] Tayloe *v.* Sandiford, 7 Wheat (U. S.) 13; Robeson *v.* Whitesides, 16 Serg. & R. (Pa.) 320; Burt *v.* Todd, 41 Pa. St. 212; Streeper *v.* Williams, 48 Pa. St. 450; Shreve *v.* Brereton, 51

purposes, affecting the enquiries already stated. The truth of the facts thus shown is for the jury, but their legal effect is for the court.[1]

§ **1126. Gratification of a Contract.** — While the meaning of a written contract is thus to be determined by the court, what is sometimes termed its *gratification*, is matter for the jury. This, as hereafter seen,[2] is most frequently illustrated in applying a deed of conveyance to the land itself. Whether a given monument was intended by the deed, is, for instance, a question of fact for the jury. It is further illustrated in controversies in respect of the *identity* of things which are the subjects of written contracts, where, upon ascertained facts, the question may become one of *interpretation*, and hence for the court. Thus, it has been laid down that, whether certain property, *appurtenant* to the engine and machinery of a mill, passed to a mortgagee as after-acquired property under the terms of the *mortgage*, was a question of law for the court on the facts proved.[3] Extending the same idea, where a contract was *accepted conditionally*, to be paid upon the happening of a *contingency*, whether the contingency had happened was deemed a question for the court.[4]

§ **1127. Whether there has been a Novation.** — Closely allied to the proposition that the existence of a contract is a question of fact for the jury, is another proposition, which is, that whether there has been, by the act of the parties to a contract, a *release* of the obligor therein and an *assumption* by a third person of the obligation of performing it, is a question of fact for a jury, under proper instructions.[5] "The existence of such agreement, like any other fact of kindred import, may not be susceptible of direct proof, but it is to be determined by the jury from all the facts and circumstances in evidence."[6]

Pa. St. 175; Bagley *v.* Peddie, 5 Sandf. S. C. (N. Y.) 192; Gillis *v.* Hall, 2 Brewst. (Pa.) 342.

[1] March *v.* Allabough, 103 Pa. St. 335, 341.

[2] *Post*, § 1461, *et seq.*

[3] Hancock *v.* Whybark, 66 Mo. 672.

[4] Nagle *v.* Homer, 8 Cal. 353, 358.

[5] Brown *v.* Kirk, 20 Mo. App. 524.

[6] *Ibid.* 529, opinion by Philips, P. J.

§ 1128. **Delivery of a Deed.** — A deed is not operative until it is delivered. When, therefore, a deed is offered as evidence of a contract, the question whether or not the contract exists will depend upon the fact whether the deed has been delivered. This, where all the facts are undisputed, has been held a *question of law* for the court.[1] On the contrary, it has been ruled that whether, upon a given state of facts, it was the *intention* of a party who had executed a deed to deliver the deed, is a *question of fact* for a jury.[2] On the same subject another court has said: "The delivery of a deed is a question of fact. The law has prescribed no particular form in which it shall be made. When the question rests upon the attendant circumstances and the intention of the parties, the facts of their existence and their effect are peculiarly within the province of the jury. It is error, then, for a judge to tell the jury there is no evidence of a delivery, when any circumstances are proved from which it may be inferred, no matter how slight or inconclusive they may be. The party relying upon them has a right to have them submitted to the jury for their consideration."[3] A third view is that, what constitutes the delivery of a deed is a *mixed question of law and fact*.[4] In another court this view has been elaborated thus: "What constitutes a delivery of a deed is often a mixed question of law and fact. An arbitrary rule ought not to be laid down. Each case must stand more or less on its peculiar facts. The intent to convey is evidenced by the act of making out and duly executing and acknowledging a deed. The delivery may be evidenced by any act of the grantor, by which the control or dominion or use of the deed is made available to the grantee. It is not necessary it should be handed over actually to the grantee, or to any other person for him. It may be delivered under certain circumstances, though it remain in the possession of the maker. Where, however, there is not an actual transfer from the grantor to the grantee, it should affirmatively appear from the circumstances,

[1] Rogers *v.* Carey, 47 Mo. 232.

[2] Crain *v.* Wright, 36 Hun (N. Y.), 74, 77.

[3] Floyd *v.* Taylor, 12 Ired. L. (N. C.) 47, opinion by Nash, J.

[4] Jackson *v.* Phipps, 12 Johns. (N. Y.) 418, 421.

acts or words of the parties, that the intention to pass a title really existed."[1] In a case in New York, Spencer, J., used the following striking language: "It is requisite in every well made deed that there be a delivery of it. This delivery must be either actual, by doing something and saying nothing, or else verbal, by saying something and doing nothing; or it may be both. But by one or both of these it must be made; for otherwise, though it be never so well sealed and written, yet is the deed of no force."[2] In another case, the only infallible test was said to be, has the grantor divested himself of all dominion and control over the conveyance?[3] But it is obvious that this is not the only infallible test; for in many cases where there is plain evidence of an intent that the deed shall become presently operative, although remaining in the custody of the grantor, a delivery may be found to have taken place. Thus, it has been ruled, "that, when a deed to a minor child is absolute in form and beneficial in effect, and the father (and grantor) voluntarily causes the same to be recorded, acceptance by the grantee will be presumed, and such facts constitute, *prima facie*, a delivery, and afford reasonable presumption that the grantor intended to part with the title, and clear proof should be made that a person who, under such circumstances, has executed and acknowledged and caused a deed to be recorded, before the court would be warranted in declaring that he did not intend to part with his title."[4] Another court has held that the act of taking the deed to the *recorder of deeds*, for the purpose of having it recorded, may, under circumstances, be a sufficient delivery, although the deed be not in fact recorded.[5] Another court has stated what seems to be the better rule under this head, that, while the *recording* of a deed is not in itself a de-

[1] Burke *v.* Adams, 80 Mo. 504, 512.

[2] Jackson *v.* Phipps, 12 Johns. (N. Y.) 418, 421. This language has been four times quoted with approval by the Supreme Court of Missouri. Huey *v.* Huey, 65 Mo. 689, 693; Turner *v.* Carpenter, 83 Mo. 333, 336; Miller *v.* Lullman, 81 Mo. 311, 316; Burke *v.* Adams, 80 Mo. 504, 512.

[3] Huey *v.* Huey, 65 Mo. 689, 694.

[4] Tobin *v.* Bass, 85 Mo. 654, 658. The cases cited in support of this *dictum* were: Cecil *v.* Beaver, 28 Ia. 242; Robinson *v.* Gould, 26 Ia. 89; Masterson *v.* Cheek, 23 Ill. 72; and Mitchell *v.* Ryan, 3 Oh. St. 377.

[5] Burt *v.* Cassety, 12 Ala. 734.

livery of the deed, yet it is *evidence* from which a delivery may be found, and is therefore an assurance by the grantor of the title in the grantee.[1] From the foregoing, it would appear that the delivery of a deed may be established by *circumstances*, as well as by *direct proof*, and that, when it is sought to be proved by circumstantial evidence, the court should submit the circumstances, with proper instructions, to the jury for their finding upon the question.[2]

§ 1129. Acceptance of the Deed by the Grantee. — In the case of a *deed poll*, conveying land to a grantee for a consideration recited to have been paid, an acceptance by the grantee will generally be *presumed*, since an acceptance is manifestly for the interest of the grantee. But there are cases where the question has been submitted to juries. Thus, it has been held, under circumstances, that the facts should have gone to the jury, for them to say whether the grantee had knowledge of a deed of bargain and sale made to him, and whether he gave his assent thereto, directly or otherwise; and that the court did not err in refusing to rule that the deed had never been delivered, nor in instructing the jury, at the instance of the plaintiff, that, assuming the facts which the evidence tended to prove, there was no delivery of the deed.[3] In another case it has been ruled that, whether a deed of conveyance of real estate has been accepted by the grantee, so as to pass the title and oblige him to seek his remedy, if any he has, for a failure of title, on the covenants in the deed, or go without any, if those covenants were without authority and void, — is a *mixed question of law and fact*, to be settled by the jury, under the advice of the court.[4]

§ 1130. Date of the Delivery of a Deed or of the taking Effect of a Contract. — In the absence of any evidence as to the date of the delivery of a deed, the *presumption* is that it was

[1] Blight *v.* Schenck, 10 Pa. St. 289. Compare Miller *v.* Lullman, 81 Mo. 311; affirming *s. c.* 11 Mo. App. 419; Gregory *v.* Walker, 38 Ala. 26, 33; McLure *v.* Colclough, 17 Ala. 96; Morris *v.* Warner, 32 Ala. 499.

[2] Van Hook *v.* Walton, 28 Tex. 59.

[3] Bensley *v.* Atwill, 12 Cal. 231, 236.

[4] Earle *v.* Earle, 20 N. J. Law 348, 363.

executed and delivered at the time when it bears date.[1] This principle is held to apply, both in respect of the question of the date of the execution, and the date of the delivery of the deed.[2] But this is not a conclusive presumption. It is what Mr. Best calls a *prima facie presumption*, and it has been said that, even where the evidence is free from doubt in the mind of the court, the question of the date at which a deed was delivered is to be submitted to the jury.[3] But where the indorsement on a deed was all the evidence offered as to the time when it had been admitted to record, it was said that the trial court did not err in refusing to submit that question to the jury; though, if countervailing proof had been offered, the jury would have been the proper tribunal for its determination.[4] But this presumption does not hold in relation to deeds in fee, unattested and unacknowledged.[5] Whether such a deed was actually executed and delivered at the time it bears date, or not, is a question of fact for the jury, which must always be submitted to them where the evidence is conflicting.[6] The question which of two instruments was *first executed*, they not referring to each other, and one of them being undated, is a question of fact.[7]

§ **1131. Whether delivered as an Escrow.** — A deed or other written obligation is said to be delivered as an *escrow*, when it is delivered to a third person, upon condition that it shall not take effect until a future date, or the happening of a future event. Whether a deed was so delivered, must generally be a question of fact for a jury.[8] Thus, where a contract in duplicate

[1] Best on Presumptions, 181.

[2] Smith *v.* Battens, 1 Mood. & Rob. 341; Stone *v.* Grubbam, 1 Rolle Rep. 3, pl. 5; Ofley *v.* Hicks, Cro. Jac. 263; Barry *v.* Hoffman, 6 Md. 79, 86.

[3] Barry *v.* Hoffman, *supra*.

[4] Budd *v.* Brooke, 3 Gill (Md.), 198, 221. See also Trasher *v.* Everhart, 3 Gill & J. (Md.) 234.

[5] Elsey *v.* Metcalf, 1 Denio (N. Y.), 323; Genter *v.* Morrison, 31 Barb. (N. Y.) 155.

[6] Genter *v.* Morrison, *supra*.

[7] Coons *v.* Chambers, 1 Abb. App. Dec. (N. Y.) 439.

[8] Where, upon the trial of a cause, it is doubtful, upon the evidence, whether a written contract for the sale of goods signed by the vendor, and delivered to the purchaser, was delivered absolutely or conditionally, the question must be submitted to the jury. Scott *v.* Pentz, 5 Sandf. S. C. (N. Y.) 572.

was left by the parties with a third person, and the evidence as to the arrangements for its subsequent delivery and the terms upon which it was to become operative was conflicting, — it was held that the question of the terms and conditions upon which it was to become operative was one of fact for a jury, depending upon the *intention* of the parties, to be gathered from the *whole transaction*, and that the court was right in refusing to instruct the jury that delivery in a particular mode was essential.[1] A party who purports to be bound by a written instrument, — as for instance, a promissory note, may show *by parol* that it was delivered as an *escrow*, or that it was delivered to be held upon a condition to be performed before the rights of the holder could attach.[2] But upon this subject it has been said: "A deed can only be delivered as an escrow to a *third person*. If it be intended that it shall not take effect until some subsequent condition shall be performed, or some subsequent event shall happen, such condition must be inserted in the deed itself, or else it must not be delivered to the grantee. Whether a deed has been delivered or not, is a question of fact, upon which, from the very nature of the case, parol evidence is admissible. But whether a deed when delivered, shall take effect absolutely, or only upon the performance of some condition not expressed therein, cannot be determined by parol evidence. To allow a deed, absolute on its face, to be avoided by such evidence, would be a dangerous violation of a cardinal rule of evidence." [3]

§ **1132. Existence of a Partnership.** — It is frequently said that the question whether a partnership exists is a question of fact.[4] But this is an example of the inconsiderate manner in

[1] Jaquith *v.* Hudson, 5 Mich. 123.

[2] Ricketts *v.* Pendleton, 14 Md. 321, 329; Bell *v.* Ingestre, 64 Eng. C. L. 317; *s. c.* 12 Ad. & El. (N. S.) 317.

[3] Lawton *v.* Sager, 11 Barb. (N. Y.) 349, 351, opinion by Harris, J.; citing Gilbert *v.* North American Fire Ins. Co., 23 Wend. (N. Y.) 43; Ward *v.* Lewis, 4 Pick. (Mass.) 518; Jackson *v.* Catlin, 2 Johns. (N. Y.) 248, per Platt, J., *arguendo*.

[4] McDonald *v.* Matney, 82 Mo. 358, 363; McMullan *v.* MacKenzie, 2 G. Greene (Ia.), 368; Doggett *v.* Jordan, 2 Fla. 541, 549. Accordingly, it was ruled that a finding by a judge, sitting as a jury, that there was no partnership between the plaintiff and the de-

which legal propositions are frequently stated by the courts. What constitutes a partnership, that is, what amounts to a partnership in contemplation of law, is a question of law for the court ;[1] whether a partnership exists in a particular case, will be a question for the decision of the judge or of the jury, accordingly as the facts are established or in dispute. If they are established, the judge will declare their legal effect and will determine whether or not they show the existence of a partnership; if not, the conclusion will be for the jury, under the instructions of the court. Therefore, where an issue is raised as to whether a partnership exists, and the evidence is conflicting, or the inferences to be drawn from the facts in evidence are not clear, it is the duty of the judge to explain to the jury what will constitute a partnership, and leave it to them to say whether the testimony adduced is sufficient to establish the facts necessary to the existence of a partnership.[2]

§ 1133. INSTRUCTIONS ON WHICH THIS QUESTION HAS BEEN SUBMITTED TO JURIES. — "If the jury find that the defendants were jointly interested in the business, in which the work and labor charged in the complaint were performed, sharing the profits and losses between them, that constitutes the defendants copartners, and renders them liable as such for liabilities incurred on account of such business."[3] - - - - To constitute a partnership there must be an agreement between the parties, both consenting thereto, that they will, from a certain day or time, share the profits and be responsible for debts and losses and carry on the business for their mutual benefit; and there must be an entering upon or conducting or doing business under such agreement, or some business preparatory thereto, to make them or either of them liable to third parties as partners.[4] - - - - "If the defendants, Cole and Damson, on or about the middle of October, 1860, and before the date of the note sued on, entered into an agreement to sell goods in copartnership at Indian Point, and after said agreement was made, the defendant, Cole,

fendants, was not a conclusion of law, but of fact. Kahn *v.* Central Smelting Co., 2 Utah, 371; Borman, J., dissenting.

[1] Cumpston *v.* McNair, 1 Wend. (N. Y.) 457, 463.

[2] Dulany *v.* Elford, 22 S. C. 304, 308.

[3] Approved in Warner *v.* Myrick, 16 Minn. 94.

[4] Approved in Lucas *v.* Cole, 57 Mo. 145.

represented to plaintiffs that they were in copartnership, and bought goods and gave a note in the joint names of both defendants, the court will find the issue for the plaintiffs, even though the court may believe from the evidence, that no invoice was taken, and that the said copartnership was dissolved soon after the 27th October, 1860.[1] - - - - "If the jury find that the defendants had any arrangement for shipping cattle from Stoutsville, by which it was agreed that either of them might buy the stock on his own responsibility, and, upon its delivery for shipment at said place, the others might take an interest in any stock so purchased and delivered, if, upon examination of it, they thought it suitable to ship, or not purchased too high; or by which, if they purchased stock when all together, it was to be shipped on joint account; or if, after looking at or agreeing to take an interest in stock purchased by any one of them before delivered at said place, it was to be shipped on joint account, and the parties to share in the profits and losses, such facts or agreements did not constitute them general partners, but only partners in each transaction.[2]

§ **1134. Genuineness of Signature.** — The genuineness of a signature, when disputed, is, of course, a question of fact for a jury.[3]

§ 1135. How Proved. — A signature may be proved by the evidence of a witness who has seen the person write. "It is held sufficient for this purpose that the witness has seen him write but once, and then only his name. The proof in such case must be very light, but the jury will be permitted to weigh it."[4] Such evidence will take the question to the jury.[5] So, a witness who has seen a party make his signature *by a mark* on several occasions, has been held competent to testify as to the genuineness of his signature.[6] Where, however, the

[1] *Ibid.*

[2] Approved in Valentine *v.* Hickle, 39 Ohio St. 23, 24; citing Bank *v.* Sawyer, 38 Ohio St. 339; Peterson *v.* Roach, 32 Ohio St. 374; Bevan *v.* Lewis, 3 Eng. Ch. 377; Harvey *v.* Childs, 28 Ohio St. 319; Saville *v.* Robertson, 4 T. R. 720; McGar *v.* Drake, 5 Reptr. 347 (Tenn.); Wall *v.* Fife, 37 Pa. St. 394.

[3] Magee *v.* Osborn, 32 N. Y. 669.

[4] 1 Greenl. Ev., § 577.

[5] Garrells *v.* Alexander, 4 Esp. 37; Magee *v.* Osborn, 32 N. Y. 669, 682; Eagleton *v.* Kingston, 8 Ves. 464, 473; Powell *v.* Ford, 2 Stark. 164; Lewis *v.* Sapio, 1 Mood. & Malk. 39; Com. *v.* Levy, 2 Wheel. Cr. Ca. 246; Utica Ins. Co. *v.* Badger, 3 Wend. (N. Y.) 102; Mudd *v.* Suckermore, 5 Ad. & El. 730.

[6] George *v.* Surrey, 1 Mood. & Malk. 516.

knowledge of the handwriting has been obtained by the witness from seeing the party write his name, *for that purpose*, after the commencement of the suit, the evidence has been held inadmissible.[1] In an action on a promissory note, the defendant having denied the genuineness of his signature, called his son as a witness, who testified that certain words in another note, which his father had actually given, were written by the witness himself. On cross-examination, the witness was required to *write* the same words *in the presence of the jury*, for their inspection and comparison with the note in controversy. It was held that this was competent evidence and proper on cross-examination.[2] In respect of the proof of handwriting by comparison, the Supreme Court of Missouri have adopted the rule stated by Prof. Greenleaf, which is this: That the general rule is that handwriting cannot be proved by a comparison of the disputed signature with signatures admitted to be genuine; but that this rule has been relaxed in two cases: 1. When the writings are of such *antiquity* that living witnesses cannot be had, and yet are not so old as to prove themselves. 2. When other writings, *admitted to be genuine*, are already in the case. Here, the comparison may be made by the jury, with or without the aid of experts.[3] The reason assigned for the second exception to the rule is that, as the jury are entitled to look at the writings for one purpose, it is better to permit them, under the advice and direction of the court, to examine them for all purposes, than to embarrass them with impracticable distinctions to the peril of the cause.[4] In Rose *v.* First Nat. Bank,[5] the rule was reexamined, and held to apply in the case of the *cross-examination* of a witness, as in the case of his direct examination; and accordingly it was held error to introduce certain fictitious signatures on the cross-examination of an expert witness, for the purpose of testing his knowledge as to the handwriting of the plaintiff. According to Wagner, J.: "The strongest and best reason in support of the rule for rejecting evidence founded on comparison of handwritings in ordinary cases, is that the writings, intended as specimens to be compared with the disputed paper, would be brought together by a party to the suit, who is interested to select

[1] Stranger *v.* Searle, 1 Esp. 14. Compare Mudd *v.* Suckermore, 1 Nev. & P. 32, 56; *s. c.* 5 Ad. & El. 703; Titford *v.* Knott, 2 Johns. Cas. (N. Y.) 211; Com. *v.* Hammond, 2 Maine, 33; Cunningham *v.* Hudson River Bank, 21 Wend. (N. Y.) 557; Williams *v.* Davis, 1 Penn. (N. J.) 177; Handy *v.* State, 7 Har. & J. (Md.) 42.

[2] Huff *v.* Nims, 11 Neb. 364; *ante*, § 620.

[3] State *v.* Clinton, 67 Mo. 380, 383; State *v.* Scott, 45 Mo. 302, 305.

[4] 1 Greenl. Ev., sec. 578; State *v.* Scott, *supra*.

[5] 91 Mo. 399.

such writings only as may best subserve his purpose; and that they are not likely, therefore, to exhibit a fair specimen of the general character of handwriting."[1] Another reason is that, to permit the introduction of such papers, would embarrass the case by the trial of an indefinite number of *collateral issues*.[2]

§ **1136. Consideration of a Contract.**— It is scarcely necessary to say that, where the want of consideration of a promissory note, which is the foundation of the actions, is pleaded, or where, under the practice in some jurisdictions, notice is given that proof of consideration will be required at the trial, and there is conflicting evidence on the question, it will be a question for the jury to determine whether a consideration has been satisfactorily proved.[3]

§ **1137. Whether a Forbearance was the Acceptance of a Promise to Pay the Debt of another.**— It has been held that a promise to pay the debt of another cannot be rendered binding by proof that it was in consideration of forbearance, unless there be something to show, not only that it was made for the purpose of obtaining time, and that time was actually given, but that the indulgence thus accorded was in pursuance of the request implied by the promise; and that the *question* is one *of fact*, which can not be found affirmatively in the absence of proof.[4] By parity of reasoning, it is held that, whether actual forbearance, following a promise to pay interest upon interest for the forbearance, is evidence of an acceptance of the promise, is a *question of fact*.[5] Upon this subject, the Supreme Court of Illinois have said: "If, under all the circumstances in evidence throwing light upon the question, it is reasonable to believe the party acted upon the faith of, and pursuant to the promise, a jury would be justified in finding that he so acted; otherwise not. But it is a mere matter of reasoning about human affairs, in which the individual knowl-

[1] State *v.* Scott, *supra*.

[2] State *v.* Scott, *supra;* Rose *v.* First Nat. Bank, *supra*.

[3] Swain *v.* Ettling, 32 Pa. St. 486.

[4] Edgerton *v.* Weaver, 105 Ill. 43, 46; Snyder *v* Leibengood, 4 Pa. St. 305; Cobb *v.* Page, 17 Pa. St. 469; Shupe *v.* Galbraith, 32 Pa. St. 10; Young *v.* Hill, 67 N. Y. 167.

[5] Edgerton *v.* Weaver, 105 Ill. 43, 47.

edge and experience of the reasoner as to the motives of human action become a factor. It is finding a fact from circumstantial evidence, or, as is said by some writers on evidence, a principle fact from subordinate evidentiary facts. If the question were, whether there was an express acceptance by words, there could be no difficulty in perceiving the question to be purely one of fact; yet the only difference between that and the present question is that between direct and circumstantial evidence. There the proof is direct, and it is only to determine whether it shall be believed; here it is indirect, and requires reasoning as well as perception and memory. But the conclusion is all the time one of fact, — in the one case, from evidence directly to the point; in the other case, from evidence more remote, but, it may be, equally convincing." [1]

§ 1138. Whether a Written Promise was founded upon an Illegal Consideration. — The rule seems to be that, in an action upon a written promise, where the defense is that it was given for a *wagering consideration*, it is the duty of the court, if the writing contains evidence of its invalidity upon its face, to exclude it from the jury; but if there is not sufficient upon its face to render it void, extrinsic evidence should be admitted to show the real nature of the agreement and the consideration upon which the promise was executed; and it should be left to the jury to determine the question of the legality of the consideration, under an instruction that, if they find it was given upon a wager, or that the whole or any part of the consideration was for money or property laid or staked upon a bet or wager, the promise is absolutely void, even in the hands of an innocent purchaser.[2] Where the facts speaking upon this question are undisputed, obviously it is for the court to say whether the instrument was valid or not, and in such case the court may direct the verdict; [3] but obviously where the facts which are offered in

[1] Edgerton *v.* Weaver, 105 Ill. 43, 47, opinion by Scholfield, J.

[2] Craig *v.* Andrews, 7 Iowa, 17, 22; Danforth *v.* Evans, 16 Vt. 538.

[3] Porter *v.* Havens, 37 Barb. (N. Y.) 343.

evidence to impeach the instrument are disputed, the question must go to the jury, upon proper instructions as to the conclusions of law upon the facts, as the jury may find them. Thus, it has been held, in a case where the evidence was conflicting and doubtful as to the consideration of a note which promised to pay $160.00, with 10 per cent. interest, "on and after the election of James Buchanan to the presidency," — that the question whether it was given upon a wager, or whether the whole or any part of the consideration was for money or property laid or staked upon a bet or wager, should be submitted to the jury, with the instruction that, if it was so given, it was absolutely void, and no recovery could be had upon it against the maker, even in the hands of an innocent purchaser.[1]

§ 1139. Whether the Contract is Real or Colorable to cover up a Gambling Transaction. — What are called "*option deals*," that is, contracts, usually made upon the floor of merchants' exchanges, and in smaller establishments of the same kind called "bucket shops," are, it is well known, void as against *public policy*, where no delivery of the article ostensibly contracted for is contemplated, but where the intention of both parties is merely to bet upon the future state of the market, and to settle, or to "ring out the deal" (to use the slang of this species of gambling) by the payment of "differences," — are void as against public policy.[2] These contracts are generally evidenced by a written memorandum, and are valid in form, and *presumptively* so in law. It is, therefore, held that the *burden* is upon the party assailing the validity of such a contract, to show that actual

[1] Craig *v.* Andrews, 7 Ia. 17.

[2] Waterman *v.* Buckland, 1 Mo. App. 45; Kent *v.* Miltenberger, 13 Mo. App. 503; Williams *v.* Tiedemann, 6 Mo. App. 269; Fareira *v.* Gabell, 89 Pa. St. 89; Smith *v.* Bouvier, 70 Pa. St. 325; Bruas's Appeal, 55 Pa. St. 294; Lehman *v.* Strassburger, 2 Woods (U. S.), 554; Sawyer *v.* Taggart, 14 Bush (Ky.), 729; Barnard *v.* Backhaus, 52 Wis. 593; Tenney *v.* Foot, 4 Bradw. (Ill.) 594; *s. c.* affirmed, 95 Ill. 99; Hibblewhite *v.* McMorine, 5 Mees. & W. 462. Many of the foregoing cases hold the sales under consideration valid; and, although they are not harmonious, several of them lay down clear distinctions between valid sales for future delivery and mere wagering contracts.

delivery was *not intended* by the parties to it, but that it was a mere cloak to cover up a gambling transaction. This may, of course, be shown by extrinsic evidence; and whether the evidence adduced is sufficient to establish the fact will, in many cases, be a question of fact for a jury.[1]

§ **1140. Whether a Market was "Manipulated" or Fictitious.** — In dealing with a case of this kind, where there was a by-law of the exchange regulating sales for future delivery and providing that nothing therein should be construed "as authorizing unjust or unreasonable claims based upon manipulated or fictitious markets," it was held that the court could not determine, as matter of law, that prices produced by speculation in articles of trade were unreal or fictitious prices, but that the question as to whether the prices, at which the settlement of such a contract was required to be made on a given day, were fictitious, as based upon a manipulated market, or were the true values for the purpose of consumption or manufacture, — was a question of fact for the jury: and that the finding of the jury on this question would not be disturbed on appeal, where there was any substantial evidence to support it.[2]

§ **1141. Performance or Waiver of Performance.** — Whether a contract has been *performed*, or its performance *waived*, will be in most cases a question of fact for a jury. The court in instructing the jury will tell them whether specific acts which the evidence tends to show do or do not amount to a performance or a waiver.[3]

§ **1142. Place where a Contract is to be Performed.** — It is said to be a principle of universal law that, in every forum, a contract is governed by the law with a view to which it was made.[4] It is well settled that the validity of a contract is to be

[1] Ream *v.* Hamilton, 15 Mo. App. 577.

[2] Kent *v.* Miltenberger, 15 Mo. App. 480, 489, 491. The question is reasoned at considerable length.

[3] Spaulding *v.* Hollenbeck, 39 Barb. (N. Y.) 80, 84; *post*, § 1250, *et seq.*

[4] Wayman *v.* Southard, 10 Wheat. (U. S.) 1, 48, per Marshall, C. J.

determined by the law of the place of performance. Suppose, in the case of a written contract, it is so framed that the place of performance is left in doubt: Shall the court decide, as a matter of law, where it was to be performed, or submit the question to a jury? In one case it was held that the question, being one of *intent*, should be submitted to a jury. The action was upon a promissory note made by a husband and wife, who resided in Indiana, to a payee, who resided in Ohio. The husband being indebted to the payee, it was agreed that a note should be given for the amount due, signed by him and his wife, and that the latter should charge her separate estate with its payment. The note in suit was accordingly given, and a clause so binding the property of the wife was inserted. The note was made and delivered in Indiana, but dated in Ohio, and the place of payment was left in blank. By the laws of Indiana such a note was not binding on the wife, but by the laws of Ohio it was. It was held that the plaintiff was entitled to have the question *submitted to the jury*, as to the place where the parties intended that the contract should be performed, and whether they contracted with reference to the law of Indiana, or the law of Ohio.[1]

§ 1143. Whether or not a Contract is Usurious. — Whether or not a contract is usurious has been held a *question of law;*[2] and, upon hypothetical or established facts, the court is to say, in instructing the jury, whether it is usurious or not. But this is true only where the question is one of *interpretation*, arising on the terms of a written instrument, or upon a state of conceded facts. In most cases it will be a mere question of *intent*, whether the amount reserved or agreed to be paid in excess of the legal rate of interest was *understood* by the parties to be a compensation for forbearance or for the use of money, or whether it was intended as a compensation for some other service.[3] It is, therefore, *in most cases*, *a question of fact* for the jury.[4] "The

[1] Shillito *v.* Reineking, 30 Hun (N. Y.), 345.

[2] Belden *v.* Gray, 5 Fla. 504; *s. c.* 3 Fla. 110.

[3] *Ante*, §§ 1105, 1108; *post*, § 1333.

[4] Andrews *v.* Pond, 13 Pet. (U. S.) 77; Mix *v.* Madison Ins. Co., 11 Ind. 117, 120; Williams *v.* Reynolds, 10 Md. 57; Durant *v.* Banta, 27 N. J. L. 625, 637; Cuyler *v.* Sanford, 8 Barb.

taking of usury," says Monell, J., "must be in pursuance of a corrupt agreement, express or implied; and it is difficult to conceive of a case, tried before a jury, where the judge would be justified in depriving a party of the right of having it passed upon by them, whether there was such corrupt agreement, especially when it is to be made out from circumstances, and must be determined in a great degree by the intent of the parties." [1] It is scarcely necessary to add that, in order to warrant the court in submitting the question whether a particular transaction was a device to evade the statute against usury, there must always be some *evidence prima facie* raising such inference.[2] But such evidence may be wholly *circumstantial*. Thus, where there was no direct evidence that an usurious agreement was made at the time of the loan, but it was proved that, twenty-two days thereafter, the borrower paid and the lender received, for the use of the money from the time of the loan to that date, a sum equal to the interest at a rate much greater than the lawful rate, — it was held a *question for the jury* whether or not the loan was made upon an usurious agreement. This holding was under a rule that a note given upon an usurious consideration is void.[3]

§ **1144. Further of this Subject.** — It is said to be quite immaterial in what manner or form, or under what pretense, an usurious contract is cloaked; if the *intention* is to receive a greater rate of interest than the law allows for the use of money, this will taint the contract with usury; [4] and whether the trans-

(N. Y.) 225, 232; Tucker *v.* Wilamouicz, 8 Ark. 157.

[1] Chatham Bank *v.* Betts, 9 Bosw. (N. Y.) 552, 557. To the same conclusion is Robbins *v.* Dillaye, 33 Barb. (N. Y.) 77, 80; Ayrault *v.* Chamberlain, 33 Barb. (N. Y.) 229. Compare White *v.* Stillman, 25 N. Y. 541. Thus, it was properly left to the jury to decide, on all the facts, whether a commission charged for the sale of produce in connection with a loan of money, was a cover for usury. Hollis *v.* Swift, 74 Ga. 595; Cockle *v.* Flack, 93 U. S. 344.

[2] Williams *v.* Reynolds, 10 Md. 57, 67; Ayrault *v.* Chamberlain, 33 Barb. (N. Y.) 229, 236; White *v.* Stillman, 25 N. Y. 541.

[3] Catlin *v.* Gunter, 11 N. Y. 368.

[4] "In order to constitute usury, there must be a corrupt intent to take more than the legal rate for the use of money loaned." Tyler on Usury, 98, 103, 108. See Bush *v.* Buckingham, 2 Ventr. 83; Nevison *v.* Whitley, Cro.

action is so intended, when valid on its face, is a question of fact for a jury.[1] Where, however, the question depends merely upon the *interpretation* of a written instrument, it may be a question for the court.[2] It is said that whether the lender *intended* to take more than the legal rate of interest is a *question of fact*, and if it be found that he did, the law annexes to the intention the element of corruption; for ignorance of the law will not excuse in such cases any more than in others.[3] The distinction is well stated by Mr. Justice Story thus: "In construing the usury laws, the uniform construction in England has been (and it is equally applicable here), that, to constitute usury within the prohibitions of the law, there must be an *intention*, not only to contract for, but to take usurious interest; for if neither party intended it, but acted *bona fide* and innocently, the law will not infer a corrupt agreement. Where, indeed, the contract upon

Car. 501; Buckley *v.* Guildbank, Cro. Jac. 678; New York &c. Ins. Co. *v.* Sturges, 2 Cow. (N. Y.) 664, 667; Murray *v.* Harding, 2 Wm. Bl. 859, 865; Nourse *v.* Prime, 7 Johns. Ch. (N. Y.) 77; Bank of U. S. *v.* Waggener, 9 Pet. (U. S.) 378, 399; Button *v.* Downham, Cro. Eliz. 643; Bedingfield *v.* Ashley, Cro. Eliz. 741; Roberts *v.* Trenayne, Cro. Jac. 507; Floyer *v.* Edwards, Cowp. 112; Hammett *v.* Yea, 1 Bos. & Pul. 144; Doe *v.* Gooch, 3 Barn. & Ald. 664; Solarte *v.* Melville, 7 Barn. & Cres. 431; Lloyd *v.* Scott, 4 Pet. (U. S.) 205, 224; Condit *v.* Baldwin, 21 N. Y. 219; De Forrest *v.* Strong, 8 Conn. 513, 519; Beckwith *v.* Windsor Manf. Co., 14 Conn. 594, 606; Belden *v.* Lamb, 17 Conn. 441, 453; Trotter *v.* Curtis, 19 Johns. (N. Y.) 161; Doak *v.* Snapp, 1 Coldw. (Tenn.) 180, 185; Judy *v.* Gerard, 4 McLean (U. S.), 360; Marvine *v.* Hymers, 12 N. Y. 223, 231, 236; N. Y. Fireman's Ins. Co. *v.* Ely, 2 Cow. (N. Y.) 678; Archibald *v.* Thomas, 3 Cow. (N. Y.) 289; Heath *v.* Cook, 7 Allen (Mass.), 59; Childers *v.* Dean, 4 Rand. (Va.) 406; Stockett *v.* Ellicott, 3 Gill & J. (Md.) 123; Gibson *v.* Stearns, 3 N. H. 185, 187; Busbee *v.* Finn, 1 Oh. St. 409; Otto *v.* Durege, 14 Wis. 574; Fay *v.* Lovejoy, 20 Wis. 407; Hayward *v.* Le Baron, 4 Fla. 404; Horton *v.* Moot, 60 Barb. (N. Y.) 27.

[1] Andrews *v.* Pond, 13 Pet. (U. S.) 72, 76; Mitchell *v.* Napier, 22 Tex. 120, 128; Fleming *v.* Mulligan, 2 McCord (S. C.), 173; Crau *v.* Hendricks, 7 Wend. (N. Y.) 569, 635; Beckwith *v.* Windsor Manf. Co., 14 Conn. 594, 606; Belden *v.* Lamb, 17 Conn. 441, 453; Seymour *v.* Marvin, 11 Barb. (N. Y.) 80, 83; *s. c.* affirmed, *sub nom.* Smith *v.* Marvin, 27 N. Y. 137; Thurston *v.* Cornell, 38 N. Y. 281, 283; Barretto *v.* Boughton, 5 Wend. (N. Y.) 181; Robbins *v.* Dillaye, 33 Barb. (N. Y.) 77, 80; Horton *v.* Moot, 60 Barb. 27; Tyler on Usury, 98.

[2] Levy *v.* Gadsby, 3 Cranch (U. S.), 180.

[3] Maine Bank *v.* Butts, 9 Mass. 49.

its face imports usury, as by an express reservation of more than legal interest, there is no room for presumption, if the intention is apparent; *res ipsa loquitur*. But where the contract on its face is for legal interest only, then it must be proved that there was some corrupt agreement, or device, or shift, to cover usury, and that it was in the full contemplation of the parties. * * * The *quo animo* is, therefore, an essential ingredient in all cases of this sort."[1] It is true, that here, as in cases of negligence, and indeed in other cases, the court will be able to say, in certain states of the evidence, that there is *no evidence* tending to show usury.[2] On the other hand, in many cases, where the evidence is undisputed, or where the case depends upon the construction of an instrument of writing, the court will be able to say that the transaction was usurious *per se*.[3]

[1] Bank of U. S. *v.* Waggener, 9 Pet. (U S.) 378, 399; quoted with approval in Condit *v.* Baldwin, 21 N. Y. 219, 221.

[2] Stockett *v.* Ellicott, 3 Gill & J. (Md.) 123.

[3] *Ante*, § 1142.

CHAPTER XXXVI.

IMPLIED PROMISES.

SECTION
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§ 1147. Three General Propositions Stated. — The following propositions are often met with in the books, either stated in terms or assumed as the basis of decision: 1. That a promise will not be implied *contrary to the real understanding* of the parties.[1] 2. That a *moral obligation* will not support an implied

[1] Page *v.* Marsh, 36 N. H. 305; Maltby *v.* Harwood, 12 Barb. (N. Y.) 473; Harney *v.* Owen, 4 Blackf. (Ind.) 337; Fitch *v.* Peckham, 16 Vt. 150; Griffin *v.* Potter, 14 Wend. (N. Y.) 209; Livingston *v.* Ackeston, 5 Cow. (N. Y.) 531; Urie *v.* Johnston, 3 Pa. (Penr. & W.) 212; Alfred *v.* Fitzjames, 3 Esp. 3; Williams *v.* Hutchinson, 3 N. Y. 312; Williams *v.* Finch, 2 Barb. (N. Y.) 208; Olney *v.* Myers, 3 Ill. 311; Robinson *v.* Cushman, 2 Denio (N. Y.), 149; Guild *v.* Guild, 15 Pick. (Mass.) 129; Andrews *v.* Foster, 17 Vt. 556; Swires *v.* Parsons, 5 Watts & S. (Pa.) 357; Guenther *v.* Birkicht, 22 Mo. 439; Gillett *v.* Camp, 27 Mo. 541; Coleman *v.* Roberts, 1 Mo. 97; Morris *v.* Barnes, 35 Mo. 412.

promise,[1] and perhaps not an express promise.[2] 3. That a *request* is necessary to raise an implied promise.[3] It is proposed to consider what these propositions mean and how far they are true.

§ 1148. Proposition 1: That a Contract will not be implied contrary to the Real Understanding of the Parties. — I shall

[1] Atkins *v.* Banwell, 2 East, 505; Edwards *v.* Davis, 16 Johns. (N. Y.) 281; Bartholomew *v.* Jackson, 20 Johns. (N. Y.) 28; Dunbar *v.* Williams, 10 Johns. (N. Y.) 28; Dunbar *v.* Williams, 10 Johns. (N. Y.) 249; Rensselaer Glass Factory *v.* Reed, 5 Cow. (N. Y.) 587, 602, per Colden, Senator; *Ibid.* 620, per Spencer, Senator; Wennall *v.* Adney, 3 Bos. & P. 247; Newby *v.* Wiltshire, 2 Esp. 739; Brooks *v.* Read, 13 Johns. (N. Y.) 380; Everts *v.* Adams, 12 Johns. (N. Y.) 351; Mumford *v.* Brown, 6 Cow. (N. Y.) 475; Doane *v.* Badger, 12 Mass. 65; Loring *v.* Bacon, 4 Mass. 575; Frear *v.* Hardenburg, 5 Johns. (N. Y.) 272.

[2] It should seem that, upon a question so elementary and so necessary to be understood by all men, the law ought to be well settled; but there is an irreconcilable conflict of opinion among the highest courts and the ablest judges, whether a moral or a conscientious obligation is of itself a sufficient consideration to support an express promise. In favor of the proposition that it is, we find the distinct opinions of Lord Mansfield (Lee *v.* Muggeridge, 5 Taunt. 36, 46), Lord Ellenborough (Atkins *v.* Banwell, 2 East, 505), and Chief Justice Kent. Stewart *v.* Eden, 2 Caines (N. Y.), 150. These opinions are supported by considerable *dicta* and perhaps by some express decisions. Adkins *v.* Hill, Cowp. 288; Hawkes *v.* Saunders, *Id.* 290; Trueman *v.* Fenton, *Id.* 544; Scott *v.* Nelson, 1 Esp. N. P. 95; Watson *v.* Turner, Bull. N. P. 147; Doty *v.* Wilson, 14 Johns. (N. Y.) 378; McMorris *v.* Herndon, 2 Bail. Law (S. C.), 56; *s. c.* 21 Am. Dec. 515; Cardwell *v.* Strother, Lit. Sel. Cas. (Ky.) (S. C.) 429; 12 Am. Dec. 326. Contrary conclusions are to be drawn from the following cases: Bret *v.* J. S., Cro. Eliz. 755; Harford *v.* Gardener, 2 Leon. 30; Ehle *v.* Judson, 24 Wend. (N. Y.) 97; Smith *v.* Ware, 13 Johns. (N. Y.) 257; Hunt *v.* Bate, Dyer, 272; Frear *v.* Hardenburg, 5 Johns. (N. Y). 272; Barnes *v.* Hedley, 2 Taunt. 184; Thorne *v.* Deas, 4 Johns. (N. Y.) 84; Kelbourn *v.* Bradley, 3 Day (Conn.), 356; *s. c.* 3 Am. Dec. 237; Cook *v.* Bradley, 7 Conn. 57; *s. c.* 18 Am. Dec. 79; Nixon *v.* Vanhise, 2 South. (N. J.) 491; *s. c.* 8 Am. Dec. 618; Greenbaum *v.* Elliott, 60 Mo. 25. The inquirer who curiously pursues the subject will find it either elucidated or confounded by a comparison of the following decisions: Bessich *v.* Coggill, Palmer (K. B.), 559; Butcher *v.* Andrews, Carthew, 446; Church *v.* Church, cited in Sir T. Raym. 260; Hayes *v.* Warren, 2 Strange, 933; Style *v.* Smith, cited in 2 Leon. 111; Barber *v.* Fox, 2 Saund. 136; Hunt *v.* Swain, 1 Lev. 165; *s. c.* Sir T. Raym. 127; 1 Sid. 248; Loyd *v.* Lee, 1 Strange, 94; Cockshott *v.* Bennett, 2 T. R. 763.

[3] *Infra*, sec. 4; Schmidt *v.* Smith, 57 Mo. 135; Price *v.* St. Louis Life Insurance Co., 3 Mo. App. 262; Sloan *v.* St. Louis &c. R. Co., 58 Mo. 220.

show: 1. That this proposition however understood, is not universally true. 2. That it is not true in any case in the full sense which the words in which it is couched import. (1.) Whether this proposition is understood in a strict sense according to the import of the words in which it is couched, or in the loose sense which I shall hereafter point out, it is not universally true. Two exceptions cut in upon it so extensively as almost to destroy its character as a rule. The first exception is, that it does not apply where the act out of which the promise is implied is in itself a *tort*. The second is, that it does not apply in the case of *building contracts*.

§ **1149. Exception No. 1.** — The first of these exceptions introduces the well-known principle that where A. unjustly, by force or by fraud,[1] gets from B. that which belongs to B., B. may either sue A. for the tort and recover the damages which he may have suffered, including special or consequential damages where such damages are pleaded and proved, and, in aggravated cases, exemplary damages given by way of punishment and example; or he may *waive the tort* and recover, as upon a contract, in some cases, the money which A. has received for the thing taken, and in other cases its reasonable value. Thus, if a man wrongfully takes my goods and chattels and converts them into money, albeit through a larceny,[2] I can waive the tort, sue him on an implied promise and recover the money.[3] A man forcibly ab-

[1] Magoffin *v.* Muldrow, 12 Mo. 512; Walker *v.* Davis, 1 Gray (Mass.), 506; Boston R. Co. *v.* Dana, 1 Gray (Mass.), 83; Howe *v.* Clancey, 53 Me. 130.

[2] Howe *v.* Clancey, 53 Me. 130; Boston R. Co. *v.* Dana, 1 Gray (Mass.), 83.

[3] Hambley *v.* Trott, Cowp. 373; Gilmore *v.* Wilbur, 12 Pick. (Mass.) 120; *s. c.* 22 Am. Dec. 410; Cummings *v.* Noyes, 70 Mass. 433; Glass Co. *v.* Walcott, 2 Allen (Mass.), 227; Boston &c. R. Co. *v.* Dana, 1 Gray (Mass.), 83; Mann *v.* Locke, 12 N. H. 216; White *v.* Brooks, 13 N. H. 402; Smith *v.* Smith, *Id.* 536; Balch *v.* Patten, 45 Me. 41; Shaw *v.* Coffin, 58 *Id.* 254; Howe *v.* Clancey, 53 *Id.* 130; Lord *v.* French, 61 *Id.* 420; Rand *v.* Nesmith, *Id.* 111; Pearsoll *v.* Chapin, 44 Pa. St. 9; Goodenow *v.* Snyder, 3 Greene (Ia.), 599; Moses *v.* Arnold, 43 Ia. 187; Fratt *v.* Clark, 12 Cal. 89; Halleck *v.* Mixer, 16 *Id.* 574; Crow *v.* Boyd, 17 Ala. 51; Pike *v.* Bright, 21 *Id.* 332; Staat *v.* Evans, 35 Ill. 455; Center Turnpike Co. *v.* Smith, 12 Vt. 212; Stearns *v.* Dillingham, 22 Vt. 624; Randolph Iron Co. *v.* Elliott, 37 N. J. L. 184; Budd *v.* Hiler, 27 *Id.* 43; Hutton *v.* Wetherald,

ducts, or entices away, or knowingly harbors and conceals my child (the same being my servant) or my apprentice; I can maintain an action for the tort[1] and recover, not only direct compensatory damages, but also indirect or consequential damages where the same are laid and proved,[2] and also exemplary damages

5 Harr. (Del.) 38; Watson *v.* Stever, 25 Mich. 386; Norden *v.* Jones, 33 Wis. 600; Stockett *v.* Watkins, 2 Gill & J. (Md.) 326; *s. c.* 20 Am. Dec. 428. The doctrine seems to be in great confusion, as will appear by a learned note of Mr. Freeman in 31 Am. Dec. 242, *et seq.* The incongruity of the common law is such that if a man tortiously gets possession of my house, and holds it adversely to me, I cannot waive the tort and recover on an implied promise for use and occupation. Lloyd *v.* Hough, 1 How. (U. S.) 160; Stockett *v.* Watkins, 2 Gill & J. (Md.) 326; *s. c.* 20 Am. Dec. 438; Smith *v.* Stewart, 6 Johns. (N. Y.) 46; *s. c.* 5 Am. Dec. 186; Fitzgerald *v.* Beebe, 7 Ark. 305; *s. c.* 46 Am. Dec. 285; Henwood *v.* Cheeseman, 3 Serg. & R. (Pa.) 500; Hayes *v.* Acre, Cam. & M. 19; Stuart *v.* Fitch, 2 Vroom (N. J.), 17; Hall *v.* Southmayd, 15 Barb. (N. Y.) 32; Moore *v.* Harvey, 50 Vt. 297; Osgood *v.* Dewey, 13 Johns. (N. Y.) 240; Gunn *v.* Scovil, 4 Day (Conn.). 228; Couch *v.* Briles, 7 J. J. Marsh. (Ky.) 257; Estep *v.* Estep, 23 Ind. 114; Nance *v.* Alexander, 48 *Id.* 516; Dalton *v.* Landahn, 30 Mich. 349; Edmondson *v.* Kite, 43 Mo. 176; Sylvester *v.* Rawlston, 31 Barb. (N. Y.) 286; Newby *v.* Vestal, 6 Ind. 412; Redden *v.* Barker, 4 Harr. (Del.) 179; Williams *v.* Hollis, 19 Ga. 313; Dudding *v.* Hill, 15 Ill. 61; McNair *v.* Schwartz, 16 *Id.* 24; Dixon *v.* Haley, *Id.* 145; Boston *v.* Binney, 11 Pick. (Mass.) 1; Scales *v.* Anderson, 26 Miss. 94; Cohen *v.* Kyler, 27 Mo. 122; Brewer *v.* Craig, 18 N. J. L. 214; Stewart *v.* Fitch, 31 *Id.* 17; Hurd *v.* Miller, 2 Hilt. (N. Y.) 540; Campbell *v.* Renwick, 2 Bradf. (N. Y.) 80; Coit *v.* Planer, 4 Abb. Pr. (N. S.) (N. Y.) 140; LaForge *v.* Park, 1 Edm. Sel. Cas. (N. Y.) 223; Pierce *v.* Pierce, 25 Barb. (N. Y.) 243; Espy *v.* Fenton, 5 Ore. 423; Langford *v.* Green, 52 Ala. 108; Folsom *v.* Carli, 6 Minn. 420; Ryan *v.* Marsh, 2 Nott & M. (S. C.) 156; Wiggins *v.* Wiggins, 6 N. H. 298; Richey *v.* Hinde, 6 Ohio, 371; Howe *v.* Russell, 41 Me. 446; Sampson *v.* Shaeffer, 3 Cal. 196; O'Connor *v.* Corbitt, *Id.* 370; Cincinnati *v.* Walls, 1 Ohio St. 222; Wharton *v.* Fitz Gerald, 3 Dall. (U. S.) 503; Byrd *v.* Chase, 10 Ark. 602; Eastman *v.* Haward, 30 Me. 58; Curtis *v.* Treat, 21 *Id.* 525; Croswell *v.* Crane, 7 Barb. (N. Y.) 191; Watson *v.* Brainard, 33 Vt. 88; Ramirez *v.* Murrey, 5 Cal. 222.

[1] Gilbert *v.* Schwenck, 14 Mees. & W. 488; Magee *v.* Holland, 27 N. J. L. 86; Plummer *v.* Webb, 4 Mason (U. S.), 380; Steele *v.* Thatcher, 1 Ware (U. S.), 91; Evans *v.* Walton, L. R. 2 C. P. 615; *s. c.* 36 L. J. (C. P.) 307; Stowe *v.* Haywood, 7 Allen (Mass.), 118; Wood *v.* Coggeshall, 2 Met. (Mass.) 89; Caughey *v.* Smith, 47 N. Y. 244; Blake *v.* Lanyon, 6 T. R. 221; Sykes *v.* Dixon, 9 Ad. & El. 693; Pilkington *v.* Scott, 15 Mees. & W. 657; Hartley *v.* Cummings, 5 C. B. 248.

[2] Gunter *v.* Astor, 4 J. B. Moore, 12; Flemington *v.* Smithers, 2 Car. & P. 292; Wilt *v.* Vickers, 8 Watts (Pa.), 227; Magee *v.* Holland, 27 N. J. L. 86.

given as a punishment and for mental suffering;[1] or I can waive the tort and sue as upon a contract for the value of the services of the child or apprentice while so kept away.[2] In all these cases the law raises the implication of a contract, although no contract was intended by either party. It raises it on the principle of an estoppel. It allows the plaintiff to assert it, and prohibits the defendant from denying it, although it is not true. It will not permit the defendant to deny it, because it will not permit him to avoid a right of action founded in plain justice, by proving his own wrong.[3]

§ 1150. Exception No. 2. — The second exception, that which arises in the case of *building contracts*, is equally marked. A. contracts with B. to build a house upon the land of the latter, according to certain plans and specifications. A., endeavoring in good faith to complete the contract, fails to complete it, or fails to complete it according to the specifications, or fails to complete it within the time agreed upon. Nevertheless, as B. has received benefit from the labor and materials of A., the law *implies a new promise* on his part to pay to A. what they are reasonably worth,[4] less the *damage* which B. may have sustained

[1] Magee *v.* Holland, 27 N. J. L. 86; Stowe *v.* Haywood, 7 Allen (Mass.), 118.

[2] Lightly *v.* Clauston, 1 Taunt. 112.

[3] Lightly *v.* Clauston, 1 Taunt. 112.

[4] Hayward *v.* Leonard, 7 Pick. (Mass.) 181; *s. c.* 19 Am. Dec. 268; Smith *v.* First Congregational Meeting House, 8 Pick. (Mass.) 178; Jewell *v.* Schroeppel, 4 Cow. (N. Y.) 564; Hayden *v.* Madison, 7 Me. 78; Lee *v.* Ashbrook, 14 Mo. 378; *s. c.* 55 Am. Dec. 110; Marsh *v.* Richards, 29 Mo. 105; Lowe *v.* Sinclair, 27 Mo. 310; Lamb *v.* Brolaski, 38 Mo. 53; Creamer *v.* Bates, 49 Mo. 525; Yeates *v.* Ballentine, 56 Mo. 530; Cullen *v.* Sears, 112 Mass. 299, 308; Walker *v.* Orange, 16 Gray (Mass.), 193; Cordell *v.* Bridge, 9 Allen (Mass.), 355; Powell *v.* Howard, 109 Mass. 192; Moulton *v.* McOwen, 103 Mass. 587; Bragg *v.* Town of Bradford, 33 Vt. 35; Dyer *v.* Jones, 8 Vt. 205; Brackett *v.* Morse, 23 Vt. 354; Morrison *v.* Cummings, 26 Vt. 486; Hubbard *v.* Belden, 27 Vt. 645; Barker *v.* Troy &c. R. Co., *Id.* 780; Swift *v.* Harriman, 30 Vt. 607; Kettle *v.* Harvey, 21 Vt. 301; Corwin *v.* Wallace, 17 Ia. 378; Tait *v.* Sherman, 10 Ia. 60; Phelps *v.* Sheldon, 13 Pick. (Mass.) 50; *s. c.* 23 Am. Dec. 659; Norris *v.* School District No. 1, 12 Me. 293; *s. c.* 28 Am. Dec. 182; Merrill *v.* Ithaca &c. R. Co., 16 Wend. (N. Y.) 586; Shipton *v.* Casson, 5 Barn. & Cres. 378; Sinclair *v.* Bowles, 9 Barn. & Cres. 92. Mr. Freeman, the learned editor of the American Decisions, has contributed a valuable note

through the breach of the express contract which subsisted between the parties;[1] which contract, breach, and consequent damage, may be pleaded by B. as a *counter-claim* to the action of A.[2] This principle is extended in some jurisdictions to contracts to perform labor or furnish materials other than building contracts,[3] and in some jurisdictions it is denied as to building contracts.[4] It is perceived that, where the rule as to building contracts prevails, it results in this: That the law allows a party to recover upon an implied promise which did not exist in fact, and which is distinctly variant from the terms of a written contract which did exist.

§ **1151. Commentary on the foregoing Proposition.** — Having thus shown that the proposition that a contract cannot be implied contrary to the real understanding of the parties is not universally true, I shall next show that the proposition is not true in any case in the full sense which the words in which it is couched import. Indeed, this must be apparent from what has

on the subject of these contracts (19 Am. Dec. 272, 282) in which he concludes that "this doctrine seems to be recognized, or to be growing in favor. Where, under a special contract, a party has in good faith bestowed some labor or parted with some articles to the benefit of another, who has as a matter of fact enjoyed the benefit of the labor or the articles, whether voluntarily or involuntarily, and where the incomplete performance has not been the result of the party's own provoking, or of causes which he might, with ordinary diligence, have provided against, the one receiving such benefit must pay therefor."

[1] Sickles *v.* Pattison, 14 Wend. (N. Y.) 257; *s. c.* 28 Am. Dec. 527; Pettee *v.* Tenn. Manufacturing Co., 1 Sneed (Tenn.), 386; Crouch *v.* Miller, 5 Humph. (Tenn.) 586; Stump *v.* Estill, Peck (Tenn.), 175; Irwin *v.* Bell, 1 Tenn. 485; Yeats *v.* Ballentine, 56 Mo. 530; Williams *v.* Porter, 51 Mo. 441; Eyerman *v.* Mt. Sinai Cemetery Asso., 61 Mo. 489; Ahern *v.* Boyce, 19 Mo. App. 552; Austin *v.* Keating, 21 Mo. App. 30.

[2] Britton *v.* Turner, 6 N. H. 481; *s. c.* 26 Am. Dec. 713. Compare Marshall *v.* Jones, 11 Me. 54.

[3] Porter *v.* Woods, 3 Humph. (Tenn.) 56; *s. c.* 39 Am. Dec. 153; Eldridge *v.* Rowe, 7 Ill. 91; *s. c.* 43 Am. Dec. 41; Britton *v.* Turner, 6 N. H. 481; *s. c.* 26 Am. Dec. 713; McClay *v.* Hedge, 18 Ia. 66. Compare Larkin *v.* Buck, 11 Oh. St. 568.

[4] Smith *v.* Brady, 17 N. Y. 173 (compare Glacius *v.* Black, 50 N. Y. 145; Sinclair *v.* Talmadge, 35 Barb. (N. Y.) 602; Phillip *v.* Gallant, 62 N. Y. 256, 264); Erwin *v.* Ingram, 24 N. J. L. 519; Haslack *v.* Mayers, 26 N. J. L. 284; School Trustees *v.* Bennett, 27 N. J. L. 513; Brown *v.* Fitch, 33 N. J. L. 418.

just been said with regard to building contracts. Here the parties have entered into a contract in which everything which is to be done is specified with minute detail. There is no defect in the real understanding of the parties. The contract is not performed as made, and yet a recovery is allowed for a partial performance. But it does not follow that the law has allowed a recovery upon an implied promise which is *totally opposed* to the intention of the parties; for such contracts do not import that if, after a *bona fide* effort at performance, something is left undone, nothing shall be paid for what has been done. This is not what the rule means. It means that no recovery can be had upon an *implied assumpsit* which is entirely opposed to the understanding of the parties. It means that, where the parties have made one contract for themselves, the law cannot make a totally different contract for them, and one which would lead to results totally opposed to those which they contemplated. This is well illustrated by a class of cases where persons occupy towards each other, by consent, the relation of *parent and child*.[1] A father is not liable at law to support his adult son or daughter, nor entitled to his or her services. The same may be said of a step-father in respect of his step-child; of an uncle in respect of his nephew or niece, and so on; and yet, if the latter come to live with the former, and live in his family for years as a child lives with its parents, rendering services, and receiving in return shelter, clothing and subsistence, without any distinct contract as to wages, the latter cannot hereafter recover wages of the former, or of his executor or administrator, although the value of the services rendered may have been greater than the value of the shelter, clothing and subsistence received; and the reason is that, for the law to raise such a promise would be to raise a promise directly opposed to the obvious understanding of the parties.[1] So, where a *slave* voluntarily continues in his master's

[1] Robinson *v.* Cushman, 2 Den. (N. Y.) 149; Guild *v.* Guild, 15 Pick. (Mass.) 129; Fitch *v.* Peckham, 16 Vt. 150; Andrus *v.* Foster, 17 Vt. 556; Williams *v.* Hutchinson, 3 N. Y. 312. Contrary to this principle, it has been held in Massachusetts that a man who supports his wife's child by a former husband may maintain an action against such child, upon an implied *assumpsit*, for necessaries furnished the latter. Freto *v.* Brown, 4 Mass.

service after being entitled to his freedom, and renders services and is supplied with necessaries, without an understanding that he is to receive wages, he cannot recover them on an implied *assumpsit*,[1] though it is otherwise where he is held involuntarily.[2] So, it has been held that, if an *apprentice* continue in the service of his master under voidable indentures, he cannot thereafter recover wages contrary to the covenants of the indentures.[3] But this is very doubtful; for an "understanding" with an *infant*, is not the same as an understanding with a person who is *sui juris*. It is the privilege of infancy to avoid contracts not clearly for the infant's benefit; and, accordingly, the better opinion seems to be that the infant may, in such a case, disaffirm the contract of apprenticeship, abandon the service, and sue for the reasonable value of his services.[4]

§ 1152. Proposition 2: That a Moral Obligation will not of itself Support an Implied Promise. — It must occur to the philosophical mind that, in any correct system of laws, no substan-

675, per Parsons, C. J.; Worcester *v.* Marchant, 14 Pick. (Mass.) 510. But this is denied in Missouri. Gillett *v.* Camp, 27 Mo. 541. And see Cooper *v.* Martin, 4 East, 76; Gay *v.* Ballou, 4 Wend. (N. Y.) 403. Under special circumstances, a widowed mother has been allowed to maintain a like action against her daughter for support during her minority. Worcester *v.* Marchant, 14 Pick. (Mass.) 510.

[1] Griffin *v.* Potter, 14 Wend. (N. Y.) 209; Livingston *v.* Ackeston, 5 Cow. (N. Y.) 531; Urie *v.* Johnston, 3 Pa. (Penr. & W.) 212; Alfred *v.* Fitzjames, 3 East, 3.

[2] Peter *v.* Steel, 3 Yeates (Pa.), 250.

[3] Maltby *v.* Harwood, 12 Barb. (N. Y.) 473; Harney *v.* Owen, 4 Blackf. (Ind.) 337. See, in support of this principle, Weeks *v.* Leighton, 5 N. H. 343; McCoy *v.* Huffman, 8 Cow. (N. Y.) 84 (overruled in Medbury *v.* Watrous, 7 Hill (N. Y.), 110).

[4] Vent *v.* Osgood, 19 Pick. (Mass.) 572; Moses *v.* Stevens, 2 Pick. (Mass.) 332. See also Corpe *v.* Overton, 10 Bing. 252 (overruling, it seems, Holmes *v.* Blogg, 8 Taunt. 508; *s. c.* 2 J. B. Moore, 552; *dictum* of Lord Mansfield in Drury *v.* Drury, 2 Eden, 39; *s. c.* Wilmot's Opinions, 226, note *a*); Olney *v.* Myers, 3 Ill. 311. The nature of implied promises is curiously illustrated by the rule that, while an *infant* can, with certain exceptions, avoid his express contract, he cannot avoid his implied promise: which shows that an implied promise is no contract at all. Thus, an infant's tort can be waived and *assumpsit* maintained against him under the same circumstances as in case of an adult. Elwell *v.* Martin, 32 Vt. 217; Shaw *v.* Coffin, 58 Me. 254; Walker *v.* Davis, 1 Gray (Mass.), 506.

tial distinction should exist between moral and legal obligations, but that, whatever a man is bound in conscience, or according to good morals or good usage, to do for the reparation of another, the law ought to compel him to do at the suit of that other. It is, perhaps, the greatest reproach upon the common law, which was made by our ancestors when they were barbarians, that it exhibits in many instances a wide divergence between legal and moral obligations. It traveled in narrow and unbending grooves; its rigid technicality expelled conscience from the administration of justice, and created the necessity for another court and a supplementary system of jurisprudence, which should find the means to compel the doing of right, where the common law sanctioned or permitted the doing of wrong. The doctrine that a moral obligation is not of itself sufficient to raise an implied promise, is laid down again and again in books of the common law. I recall but one case where it has been distinctly denied. A master drove his female slave from his house half naked, shockingly beaten, and having an iron weighing fifteen pounds attached to her foot. The plaintiff, from motives of humanity, took the slave to his house, clothed, fed, cared for and cured her, against the protests of the master, who declared that he would not pay the plaintiff for his services, but would sue him for harboring his slave. Nevertheless, the plaintiff sued the master in assumpsit and recovered the value of his services, on the ground that the moral obligation of the master to provide for his slave was sufficient to raise an implied promise to indemnify the plaintiff, although contrary to his express declarations.[1] This was a *nisi prius* decision, and not of high authority. It undoubtedly reached the right result, but gave an erroneous reason for it. The true reason was, that a master is bound to furnish necessaries for his slave, just as a father is for his child, or a master for his apprentice; that this obligation is not only a moral but a legal obligation; and that it is the legal obligation which raises the promise and not merely the moral obligation. These suggestions, perhaps, conduct us to the true rule; it is, that a moral obligation is not a

[1] Fairchild *v.* Bell, 2 Brev. (S. C.) 129; *s. c.* 27 Am. Dec. 702.

sufficient ground in law for implying a promise, except in those cases where the legal obligation moves forward to the line of the moral obligation and concurs with it. The rule then is, that *a moral obligation which is not a legal obligation* is not sufficient to support an implied promise. This rule is necessarily and universally true; for the reason that an implied promise is nothing more nor less than a legal obligation, and therefore the moral obligation which will raise such a promise must necessarily also be a legal obligation.

§ **1153. Illustrations.** — A son is under the strongest moral obligation to support his infirm and indigent parents, but as he is under no legal obligation to do so, the law will not raise a promise on his part to do so.[1] So, a father may be under the strongest moral obligation to support his adult indigent child, but clearly a promise to do so will not be implied; because this moral obligation has been held not sufficient to support an express promise to pay expenses previously incurred on behalf of such a child.[2] So, parish officers may be under a moral obligation to support their indigent poor, who happen to fall sick or receive wounds while temporarily sojourning in another parish. But they are under no legal obligation to do so; and if such a pauper receives assistance from such other parish, no action can be sustained against the officers of the former parish for reimbursement.[3]

[1] Edwards *v.* Davis, 16 Johns. (N. Y.) 281. A son being under no legal obligation to pay debts contracted by his indigent father for the latter's necessary support, his written promise to pay such debts is without consideration, and therefore incapable of being enforced in law. Cook *v.* Bradley, 7 Conn. 57; *s. c.* 18 Am. Dec. 79.

[2] Thus, a son who was of full age and had ceased to be a member of his father's family, was suddenly taken sick among strangers, and, being poor and in distress, was relieved by the plaintiff. Afterwards the father wrote to the plaintiff promising to pay him the expenses incurred. It was held that this promise would not sustain an action. Mills *v.* Wyman, 3 Pick. (Mass.) 207.

[3] Atkins *v.* Banwell, 2 East, 505; Wennall *v.* Adney, 3 Bos. & P. 247 (overruling Simmons *v.* Wilmott, 3 Esp. 91, and Scarman *v.* Castell, 1 Esp. 270).

§ 1154. Proposition 3: That a Request is Necessary to Raise an Implied Promise. — As a general rule, a man cannot make another man his debtor, without the consent of that other before or after the fact. If, therefore, one gratuitously or officiously do something which he may regard as beneficial to another, the law will not impl[illegible] a promise on the part of that other to pay for it;[1] unless, having power either to keep or reject the benefit conferred, he elects to keep it; in which case he may be held liable to pay for it, on a principle somewhat similar to that upon which a party is often held to have ratified an unauthorized act done professedly on his behalf. The general rule is said to be that a request is necessary to raise an implied promise.[2] It has been so held where the plaintiff rendered services necessary to save the defendant's property from destruction by fire;[3] where the plaintiff, a physician, administered medicine to the defendant's slave, in a case not of pressing necessity;[4] where the parish officer furnished surgical assistance to the defendant's servant who had sustained an accident;[5] where the plaintiff and defendant were tenants in common of a building, and the plaintiff made repairs, but not at the request of the defendant;[6] where the plaintiff without the request of the defendant, repaired a well and pump situated on the land of the defendant, which the plaintiff claimed the privilege of using;[7] where the plaintiff, owning the upper, and the defendant the lower floor of a house,

[1] Watkins *v.* Trustees, 41 Mo. 303; Bailey *v.* Gibbs, 6 Mo. 45; Jones *v.* Wilson, 3 Johns. (N. Y.) 434; Beach *v.* Vandenburg, 10 Johns. (N. Y.) 361; Stokes *v.* Lewis, 1 T. R. 20; Child *v.* Morley, 8 T. R. 613; Winsor *v.* Savage, 8 T. R. 290; Lewis *v.* Lewis, 8 Strobh. L. (S. C.) 530.

[2] Bartholomew *v.* Jackson, 20 Johns. (N. Y.) 28; Dunbar *v.* Williams, 10 Johns. (N. Y.) 249; Rensselaer Glass Factory *v.* Reid, 5 Cow. (N. Y.) 587, 602, per Colden, Senator; *Ibid.* 620, per Spencer, Senator; Wennall *v.* Adney, 3 Bos. & P. 247; Atkins *v.* Banwell, 2 East, 505; Newby *v.* Wiltshire, 2 Esp. 739; Brooks *v.* Read, 13 Johns. (N. Y.) 380; Everts *v.* Adams, 12 Johns. (N. Y.) 352.

[3] Bartholomew *v.* Jackson, 20 Johns. (N. Y.) 28.

[4] Dunbar *v.* Williams, 10 Johns. (N. Y.) 249.

[5] Newby *v.* Wiltshire, 2 Esp. 739.

[6] Mumford *v.* Brown, 6 Cow. (N. Y.) 475. A tenant in common at common law, may compel his co-tenant to join him in making repairs, by writ *de raparatione facienda*, which remedy probably still survives in some form.

[7] Doane *v.* Badger, 12 Mass. 65

repaired the roof, after requesting the defendant to join him in it, which the latter refused to do;[1] where the overseers of the poor of one town assisted a pauper belonging to another town, he being so sick that he could not be removed to such other town;[2] where a physician furnished medicine to a pauper, but not at the request of the overseers of the poor, and then sued them for payment;[3] and where the plaintiff rendered particular services as a mere kindness to the defendant, without any expectation of being paid therefor.[4] But where the plaintiff rendered services to the defendants, intending that they should be gratuitous,[5] or relying upon the generosity of the latter for compensation;[6] or rendered services in the mere expectation of being compensated by a legacy,[7] it was held that he could not recover compensation for them.

[1] Loring *v.* Bacon, 4 Mass. 575.

[2] Brooks *v.* Read, 13 Johns. (N. Y.) 380; Wennall *v.* Adney, 3 Bos. & P. 247 (overruling Simmons *v.* Wilmott, 3 Esp. 91, and Scarman *v.* Castell, 1 Esp. 270); Atkins *v.* Banwell, 2 East, 505. Compare Wing *v.* Mill, 1 Barn. & Ald. 104.

[3] Everts *v.* Adams, 12 Johns. (N. Y.) 352. But where a person has, at the request of an overseer of the poor, and on his promise that he would see him paid, boarded a pauper, he may maintain *assumpsit* therefor against the overseer, although no order has been made for the relief of the pauper. King *v.* Butler, 15 Johns. (N. Y.) 281. Compare Palmer *v.* Vandenburg, 3 Wend. (N. Y.) 193; Fox *v.* Drake, 8 Cow. (N. Y.) 191; Minklaer *v.* Rockfeller, 6 Cow. (N. Y.) 276; Gourley *v.* Allen, 5 Cow. (N. Y.) 644; Flower *v.* Allen, *Id.* 654; Olney *v.* Wickes, 18 Johns. (N. Y.) 122.

[4] James *v.* O'Driscoll, 2 Bay (S. C.), 101; *s. c.* 1 Am. Dec. 632.

[5] Gore *v.* Summersoll, 5 Monr. (Ky.) 513; Whaley *v.* Peak, 49 Mo. 80; Asbury *v.* Flesher, 11 Mo. 610.

[6] Jacob *v.* Ursuline Nuns, 2 Mart. (La.) 269; *s. c.* 5 Am. Dec. 730.

[7] Little *v.* Dawson, 4 Dall. (U. S.) 111; Osborne *v.* Governors of Guy's Hospital, 2 Stra. 728; Le Sage *v.* Coussmaker, 1 Esp. 187; Plume *v.* Plume, 7 Ves. 258; Lee *v.* Lee, 6 Gill & J. (Md.) 316. Compare Patterson *v.* Patterson, 13 Johns. (N. Y.) 379; Gary *v.* James, 4 Desau. (S. C.) 185; Roberts *v.* Swift, 1 Yeates (Pa.), 209. But if, in such a case, both parties really intended that the services should be compensated in some way, an action upon a *quantum meruit pro opere et labore* will lie; and whether or not they so intended is a *question of fact* for a jury or other trier of facts. Osborne *v.* Governors of Guy's Hospital, 2 Stra. 728; Jacobson *v.* LeGrange, 3 Johns. (N. Y.) 199; Le Sage *v.* Coussmaker, 3 Esp. 187; Higginson *v.* Fabre, 3 Desau. 88, 91; Shakspeare *v.* Markham, 10 Hun (N. Y.), 322, 326; *s. c.* in Court of Appeals, 72 N. Y. 400, 406; Robinson *v.* Raynor, 36 Barb. (N. Y.) 131; *s. c.* in Court of Appeals, 28 N. Y. 497; Quackenbush *v.* Ehle, 5 Barb. (N. Y.) 472; Campbell *v.* Campbell, 65

§ **1155. Observations on this Proposition.** — A *request* being necessary to the existence of an implied promise, it follows that, in *counting* upon such a promise, the *pleader* must allege a request,[1] or at least, it must appear that the party promising was under a legal obligation to do the act himself, or to procure it to be done.[2] And here again, we find ground for the conclusion that this rule, that a request is necessary to support an implied promise, is not of universal application; for we find that, under certain states of fact, the *request* itself will be *implied*.[3] This, however, is not a presumption of law, but a *conclusion of fact* to be drawn from the evidence in particular cases. But, like most other facts, it may be proved by circumstantial evidence; and the beneficial nature of the services, though not enough when standing alone, may be very important in a chain of circumstances tending to establish such a conclusion.[4]

§ **1156. Further Observations.** — It may be added to the foregoing that the law will never imply a promise *contrary to the manifest justice of the case*.[5] Indeed, this whole doctrine of implied promises appears to have been originally a fiction of law, devised for the purpose of reaching substantial justice. The law in its development has passed through the age of fiction, and it is submitted that it is time to call this doctrine by another name. There can be no such thing as an implied promise. The very term involves a contradiction. The particular promise either was made by the party sought to be charged, or was not made by him. If it was made by him, it is matter to be pleaded and proved, like any other fact. I have shown that the doctrine in-

Barb. (N. Y.) 644; Martin *v.* Wright, 13 Wend. (N. Y.) 460; *s. c.* 28 Am. Dec. 468.

[1] Durnford *v.* Messiter, 5 Maule & S. 446.

[2] Comstock *v.* Smith, 7 Johns. (N. Y.) 87; Parker *v.* Crane, 6 Wend. (N. Y.) 647; Hicks *v.* Burhans, 10 Johns. (N. Y). 243; Livingston *v.* Rogers, 1 Caines (N. Y.), 583.

[3] See Fairchild *v.* Bell, 2 Brev. (S. C.) 129; *s. c.* 27 Am. Dec. 702.

[4] Ehle *v.* Judson, 24 Wend. (N. Y.) 97, 99; Hicks *v.* Burhans, 10 Johns. (N. Y.) 243; Oatfield *v.* Waring, 14 Johns. (N. Y.) 188; 1 Saund. Pl. & Ev. 264, n. 1. See also Doty *v.* Wilson, 14 Johns. (N. Y.) 378.

[5] Weir *v.* Weir, 3 B. Mon. (Ky.) 645; Skeen *v.* Johnson, 55 Mo. 24.

volves the absurdity of creating a fictitious promise where no promise whatever was made, where a different promise was made, and where there was an entire repudiation of the promise which the law created. What, then, is the real substance of this doctrine? It is not that the law creates a promise where none existed, or where a different one existed, for that would be impossible and absurd; but it is that the law *raises a duty* or *creates an obligation*. Ought we not, then, to abolish this worn-out nomenclature, and in its stead to speak of the *duty or obligation* which the law creates and enforces in the situations named? If the common law should ever be codified, and the words "implied promise" or "implied assumpsit" should be found in the code, they would be a monument of reproach to its authors.

§ **1157. Question of Law or Fact.** — Whether the law, under given circumstances, implies a promise is *for the court*, and not for the jury; since the jury are not judges of the law;[1] but where the law does not imply the promise, it is a *question for the jury*, what the parties really *intended*.[2] Thus, a *step-father* is under no legal obligation to support a *step-son;* but where the step-son lives in the family of the step-father and labors for him as his own son would do, without any express understanding as to the terms upon which he so resides and labors with the latter, the law implies neither a promise on the part of the step-father to pay the step-son for his services, nor a promise on the part of the step-son to pay the step-father for his support; but it is assumed that the parties intended that the parental relation should exist between them.[3] But in such a case, it may be a question for the jury upon the facts, whether the step-son was living with the step-father upon his hospitality, as children ordinarily live with their parents.[4] In an action of assumpsit against a *married woman*, evidence that the plaintiff furnished materials and labor on the defendant's house, held by her in her

[1] Prickett *v.* Badger, 37 Eng. L. & Eq. 428 (overruling, it seems, on this point, De Bernardy *v.* Harding, 8 Exch. 822). Compare Planch *v.* Colburn, 8 Bing. 14.

[2] *Ante*, § 1154, last note.

[3] *Ante*, § 1151.

[4] Myers *v.* Malcolm, 20 Ill. 621.

own right, at the request of her husband, with no request on her part, but with her knowledge and consent, is not conclusive, in law, of a promise by her to pay for such labor and materials, but is evidence from which the jury may find such a promise.[1] On a similar theory, it has been held that a written acknowledgment of A., who is in the occupation of land, that he holds it as the *tenant* of B., does not raise a presumption of law that he *promises to pay rent*, nor transfer from B. to A. the burden of proof on the question of fact whether the understanding was that rent should be paid. "From the defendant's occupation and acknowledged tenancy, the law does not imply a promise to pay rent. The question whether there was such a promise, is a question of fact." [2]

§ 1158. Instructions as to Implied Contract between Members of Family to pay for Board, etc. — "If the jury find from the evidence that the defendant has lived in the family of the plaintiff and has had her boarding and washing done and furnished by the plaintiff and his family, and that there was no contract or agreement between the plaintiff and defendant, and as to how much defendant should pay plaintiff for said boarding and washing, then I charge you that the law is, that there was an implied contract that the defendant was to pay plaintiff what said boarding and washing were reasonably worth for the time said defendant so boarded at plaintiff's house; and you will so find for plaintiff such reasonable compensation, not to exceed the amount claimed in plaintiff's petition. The rule above applies, unless the jury find from the evidence that defendant lived with her son as a part of his family." [3] - - - - "If

[1] Bickford *v.* Dane, 58 N. H. 185.

[2] Savings Bank *v.* Getchell, 55 N. H. 281, 285. In giving the opinion of the court, Doe, C. J., also reasons thus: "The practice of shifting the burden of proof by a legal presumption is largely abandoned in this State. It often materially encroached upon the province of the jury, but caused less injustice when parties were not allowed to testify than it would now. When courts assumed the power of excluding the testimony of the parties, for reasons alleged to have been satisfactory in a certain state of society, they did not hesitate, by legal presumptions and other measures, to extensively control the jury in the decision of questions of fact. The tendency in this State is toward a correction of those errors, and the establishment and observance of the true line between law and fact, and between the duty of the court and the duty of the jury."

[3] Approved in Greenwell *v.* Greenwell, 28 Kans. pp. 678, 679.

the jury find from the evidence that the defendant is the mother of the plaintiff, and that, for the time mentioned in plaintiff's petition, the defendant lived with the plaintiff as one of his family, assisting in performingthe ordinary duties of the household, and there was no express contract that the defendant was to pay for her board and washing, and no understanding by either party that such board and washing were to be paid for, then I charge that, as between mother and son, there is no implied promise to pay for such board and washing, and the plaintiff cannot recover in this case." [1] - - - - "Usually when one person performs services or labor for another, which is of value, the law implies a promise or legal obligation on the part of the person receiving the service to pay what such services are reasonably worth. Yet this is not always the case. When, from the circumstances and situation of the parties, it could not reasonably be expected that either party could suppose or apprehend there was anything to be paid or received, and did not so understand at the time, then the law does not imply any legal obligation to pay. - - - - If you find from the evidence that defendant, at the request of a friend of the plaintiff, when the plaintiff was a child of five or six years old, took him into his family and nurtured and cared for him when he was too young to provide for himself, and he remained there as a member of the family of defendant, and, when he became of sufficient age, performed service and labor for defendant, and continued to receive his board and clothes, and continued to make the defendant's house his home, then, for the time being, the legal obligations existing between the parties were the same that they would be between parent and child, and the law will imply no legal obligation on the part of defendant to pay him for his services, nor could defendant maintain any action against the plaintiff for his board or clothes, or care in rearing him and providing for him a home." [2] - - - - "If the plaintiff, after she arrived at full age, continued to live with her father, as she had done previously, with no new duties or responsibilities assumed in the family by her, and was provided with necessaries, etc., as one of the family, she would not be entitled to recover for such services, unless there was an express understanding between her and her father, before these services were rendered, that she should receive such compensation; and if the note was given for such past services, and there was no such understanding existing between them, she cannot recover. But if the note was given for such past services, the fact that it was given, will raise a presump-

[1] *Ibid*; citing Ayres *v.* Hull, 5 Kans. 419.

[2] Approved in Boyer *v.* Riley, 41 Iowa, 14, 15.

tion that there had been a previous understanding or agreement between the plaintiff and her father that such compensation was to be made, and unless such presumption is overcome by evidence that no such understanding existed, the plaintiff will be entitled to recover." [1]

[1] Approved in Pitt's Adm'r *v.* Pitts, 21 Ind. 314. A more elaborate instruction, in a case where a son resided with his father after coming of age and then sued for the value of his services, may be found in Hilbish *v.* Hilbish, 71 Ind. 30. See also Smith *v.* Denman, 48 Ind. 65.

CHAPTER XXXVII.

SALES OF PERSONAL PROPERTY.

ARTICLE I. — WHAT QUESTIONS FOR THE COURT AND WHAT FOR THE JURY.
ARTICLE II. — PRECEDENTS OF INSTRUCTION TO JURIES.

ARTICLE I. — WHAT QUESTIONS FOR THE COURT AND WHAT FOR THE JURY.

SECTION

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1175. Delivery of Personal Property purchased with Land.
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1177. Under what Circumstances Question withdrawn from the Jury.

§ 1160. Preliminary. — The subject of discussion in this chapter is little more than an illustration or amplification of a subject already discussed.[1] The question whether a sale at common law exists, stands on the same footing as the question whether any

[1] *Ante*, chap. XXXV.

other contract exists, and is to be answered by the court or by the jury, according to principles already stated.[1] But the *statute of frauds* has introduced a special rule in regard to this species of contract. There must be a *delivery* by the vendor, and an *acceptance* by the vendee, of the thing intended to be sold, where the contract is not in writing; and this complicates the question of sale or no sale with the further question whether or not there has been such a delivery and acceptance as satisfies the statute of frauds. Moreover, the law recognizes two kinds of contract in respect of sales of personal property: an agreement to make a future sale, and a present contract of sale.[2] These elements sufficiently differentiate the contract of sale of personal property from other contracts, to justify a separate inquiry into the question under what circumstances the existence of such a contract is to be pronounced as a question of law and under what circumstances found as a conclusion of fact.

§ **1161. Loosely said to be a Question of Law.** — It has been said that the question of sale or no sale is a question of law, and is not to be decided by the *opinions* of witnesses.[3] Certainly it is a sound conclusion that it is not to be decided by the opinions of witnesses; for whatever it may be, it is not a mere question of private opinion. It is also said to be a question of law, and very often a question extremely difficult to decide, what shall be deemed a delivery upon a sale of goods.[4] This conception does not carry us any farther than the obvious conclusion that the *rule of sale*, like the rule or measure of damages, is a rule of law. If it is intended to convey the idea that the application of this rule to doubtful, complicated or equivocal facts is for the judge, and not for the jury, then it is a palpably erroneous conception.

§ **1162. Said to be a Question of Law where Facts proved or not Controverted.** — Again it is said that, where the facts are

[1] *Ante*, §§ 1112, 1114.

[2] Benj. on Sales, § 309.

[3] Belt *v.* Marriott, 9 Gill (Md.), 331, 336.

[4] Belt *v.* Marriott, *supra*.

proved or are not controverted, it is a question of law whether they show a sale.[1] This is no more than a branch of the general rule which applies to all questions arising in judicial administration: the facts being ascertained, the judge pronounces the conclusion of law. But what are the *facts*, within the meaning of this rule? As elsewhere seen, in respect of various questions,[2] they embrace not only what are termed *constitutive facts*, but they embrace also those ulterior *inferences of fact* which the court, and not the jury, are to draw. One of these ulterior inferences of fact is that of *intent*. The question of contract or no contract is involved ultimately in this question of intent, — that is, whether both parties *intended* that there should be a contract, — whether there was an *aggregatio mentium*, a meeting of minds, a concurrence of intent. In many cases the constitutive facts, — that is, all the facts which need be stated by the pleader or deposed to by the witnesses, will be indisputably established; but yet whether this concurrence of intent existed, — in other words, whether there was a sale, — will remain an inference of fact to be drawn by the jury. This, however, forms an *exception* to the general rule that the judge pronounces the law upon conceded or established facts; and undoubtedly, in the great majority of cases of this kind, the judge, and not the jury, will draw the conclusion. This introduces us to another conception, which is, —

§ 1163. Question for Jury where Facts in Doubt. — There is no doubt whatever upon the proposition that, where the facts are in doubt, the question is to be resolved by the jury in every case where they return a general verdict, — the court assisting

[1] Fuller *v.* Bean, 34 N. H. 299; Houdlette *v.* Tallman, 14 Me. 403; Burrows *v.* Stebbins, 26 Vt. 659. It was so held in Glasgow *v.* Nicholson, 25 Mo. 29, where a delivery of a certificate of the city weigher of the weight of five hogsheads of sugar which lay on the wharf, together with a bill of the price, was held to constitute a delivery of the sugar. In Bass *v.* Walsh, 39 Mo. 192, the delivery by the vendor of a ticket describing the goods (two hundred and twenty-three bales of hay lying on the Levee at St. Louis), and the price at which they were sold, the ticket authorizing the purchaser to take possession as soon as the hay could be weighed, was held sufficient evidence to warrant the jury in finding that the hay had been delivered.

[2] *Ante*, §§ 1112, 1114; *post*, § 1333.

them with instructions as to the applicatory principles of law, based upon hypothetical facts within the scope of the evidence. Whenever, then, the material facts are left in doubt, the question is to be decided by the jury, under suitable instructions as to the law.[1] Or, to throw this rule into contrast with the preceding: "When the law can pronounce, upon a state of facts, that there is or is not a delivery and acceptance, it is a question of law, to be decided by the court. But when there may be uncertainty and difficulty in determining the true *intent* of the parties respecting the delivery and acceptance, from the facts proved, the question of acceptance is to be decided by the jury."[2] Again, it is said: "When there is no dispute as to the facts, it is a question of law; when the evidence is conflicting, the jury must decide."[3] In such a case the court should leave it to the jury, upon the evidence, to decide whether the facts which are adduced for the purpose of showing delivery and acceptance were true, and should direct them hypothetically that, if such facts are true, they do or do not constitute a delivery.[4]

§ **1164. Cases where ruled as a Question of Law.** — The last preceding statements undoubtedly embody the general rule; and cases are found where the question has been ruled as a matter of law, as indeed it should be where the facts are both settled and unequivocal. Thus, where a sale of wheat was made which had been consigned to B., and a delivery order was given to the vendee, and the wheat was burned in an elevator before the vendee had time to send the delivery order to F., it was held that the sale was incomplete, because the legal title was in F., through whose co-operation alone it could have been vested in the plaintiff. The legal title was held to be in F., because of the wheat having been placed in his elevator and mingled with his wheat, in conformity with a peculiar rule in regard to storage

[1] Fuller *v.* Bean, 34 N. H. 299; Riddle *v.* Varnum, 20 Pick. (Mass.) 283; George *v.* Stubbs, 20 Me. 250; Draper *v.* Jones, 11 Barb. (N. Y.) 269; Smith *v.* Dennie, 6 Pick. (Mass.) 266; Bishop *v.* Shillito, 2 Barn. & Ald. 329, note.

[2] Houdlette *v.* Tallman, 14 Me. 400; Glass *v.* Gelvin, 80 Mo. 297, 300.

[3] Glass *v.* Gelvin, *supra;* Hatch *v.* Bailey, 12 Cush. (Mass.) 29.

[4] Williams *v.* Gray, 39 Mo. 201, 206.

in elevators.[1] Indeed, there seems to be nothing in the subject of sale and delivery to take the case out of the general principle, subject to the exception already and hereafter explained,[2] that, where the facts are found or conceded, whether there has been a delivery to satisfy the statute of frauds and constitute a sale, is a question of law for the court. This in most cases is necessarily so; for we find that modern courts do not submit the question to the jury upon the whole evidence without instructions, but that they instruct them hypothetically whether a given state of facts, shown by the evidence, does or does not constitute a sale. Thus, in a case in Maine, it was held proper for the judge to charge the jury, under proper evidence, that, if they found that the defendant purchased all the logs charged in the plaintiff's account, and that the logs were all deposited at the same place, and that the defendant, at the time of the purchase, employed B. to haul them out, and he actually did haul out a portion of them on the same day in which the bargain was made, and as soon thereafter as could be conveniently done, and that they were received and used by the defendant under the contract, — this was such a delivery and acceptance as the law required, and that the defendant would be chargeable for the whole property sold.[3] In this case the court did no more than apply to a hypothetical state of facts the principle that, where there has been a parol sale, a delivery and acceptance of a part is a delivery of the whole, so as to satisfy the statute of frauds and transfer the title.[4]

§ 1165. Question Drawn to the Jury where a Question of Intent. — The authorities agree that if, as between the buyer and the seller, *anything remains to be done* before the goods are to be delivered, the right of property does not pass.[5] But while

[1] Perkins *v.* Dacon, 13 Mich. 81.

[2] *Ante*, § 1162; *post*, §§ 1165, 1333.

[3] Davis *v.* Moore, 13 Me. 424.

[4] Waldron *v.* Chase, 37 Me. 414; Damon *v.* Osborn, 1 Pick. (Mass.) 476; Riddle *v.* Varnum, 20 Pick. (Mass.) 280.

[5] Warren *v.* Buckminster, 24 N. H. 336; Outwater *v.* Dodge, 7 Cow. (N. Y.) 87; Draper *v.* Jones, 11 Barb. (N. Y.) 263; Barrett *v.* Pritchard, 2 Pick. (Mass.) 512; Bishop *v.* Shillito, 2 Barn. & Ald. 329, note; Evans *v.* Harris, 19 Barb. (N. Y.) 416; Tarling *v.* Baxter, 6 Barn. & Cres. 360; Whitehouse *v.* Frost, 12 East, 614; Hanson

this is so, it is conceded that the parties may agree, either expressly or tacitly, to change this rule, and that title to the property shall pass at once.[1] "The question," said Lord Brougham, "must always be, what was the *intention* of the parties in this respect, and that is of course to be collected from the terms of the contract."[2] Other authorities emphasize the idea that it is a question of intent.[3] Intent being generally a question for a jury, except where it is declared in a written instrument,[4] it follows as a necessary conclusion, that, in many cases, whether the title has passed will be a question of fact to be submitted to a jury upon all the evidence;[5] though it has been said that when the facts are ascertained, either by the written agreement of the parties or by the findings of the court, * * * they are questions of law.[6] This is in accordance with the

v. Meyer, 6 East, 614; Rugg *v.* Minett, 11 East, 209; Simmons *v.* Swift, 5 Barn. & Cres. 857; Wallace *v.* Breeds, 13 East, 522; Macomber *v.* Parker, 13 Pick. (Mass.) 183. It is said that a contract of sale is not complete until the happening of an event expressly provided for, or so long as anything remains to be done to the thing sold, to put it in a condition for sale, or to identify it, or discriminate it from other things. McClung *v.* Kelly, 21 Ia. 508, 511. Nor is the sale complete while anything remains to be done to determine the quality of the goods, if the price depends upon the quality, unless this is to be done by the buyer alone; and even if earnest money, or if part of the price be paid, the sale is not for that reason complete. It has been inaccurately said that "no sale is complete, so as to vest in the vendee an immediate right of property, so long as anything remains to be done between the buyer and seller in relation to the thing sold." McClung *v.* Kelley, *supra*. See Story on Sales, § 296 and note 2; Chitty Contr. (10th Am. ed.) 396, 397; Add. Contr. (2d Am. ed.) 225, 228.

[1] Alexander *v.* Gardner, 1 Bing. N. Cas. 671; Schindler *v.* Houston, 1 Denio (N. Y.), 51; Mixer *v.* Cook, 31 Me. 340; Draper *v.* Jones, 11 Barb. (N. Y.) 263.

[2] Logan *v.* Le Mesurier, 6 Moore P. C. 116.

[3] Furniss *v.* Hone, 8 Wend. (N. Y.) 256; Smith *v.* Dennie, 6 Pick. (Mass.) 266; Smith *v.* Lynes, 4 N. Y. 44; Elgee Cotton Cases, 22 Wall. (U. S.) 180, 187; Hatch *v.* Oil Co., 100 U. S. 124, 131; Terry *v.* Wheeler, 25 N. Y. 520, 525; Callahan *v.* Myers, 89 Ill. 566, 570; Sewell *v.* Eaton, 6 Wis. 490; Fletcher *v.* Ingram, 46 Wis. 191, 201. "It is," said Bigelow, C. J., "a question of intent, arising on the interpretation of the entire contract in each case." Briggs *v.* A. Light Boat, 7 Allen (Mass.), 287.

[4] *Post*, § 1333, *et seq.*

[5] Fuller *v.* Bean, 34 N. H. 290, 305.

[6] Terry *v.* Wheeler, 25 N. Y. 520, 525.

views of the late Mr. Benjamin, who, after pointing out the distinction between a sale and a mere promise to sell, says: "Both these contracts being equally legal and valid, it is obvious that, whenever a dispute arises as to the true character of an agreement, the question is one rather of fact than of law. The agreement is just what the parties intended to make it. If that intention is clearly and unequivocally manifested, *cadit quæstio*. But parties very frequently fail to express their intentions, or they manifest them so imperfectly as to leave it doubtful what they really mean; and when this is the case, the courts have applied certain rules of construction, which, in most instances, furnish conclusive tests for determining the controversy.[1]

§ 1166. Whether the Parties intended that Title should pass, although Something remains to be done to the Property. —Restating the rule of the preceding section, it seems to be that the question whether a sale is completed or only executory, is usually one to be determined from the *intent* of the parties, as gathered from their contract, and from the situation of the thing sold and the circumstances surrounding the sale; that where the goods sold are designated so that no question can arise as to the thing intended to be sold, it is not absolutely essential that there should be a delivery, or that the goods should be in deliverable condition, or that the quantity or quality, when the price depends upon either or both, should be determined, — these being circumstances indicating intent, but not conclusive; but that, where anything is to be done by the vendor, or by the mutual concurrence of both parties, for the purpose of ascertaining the price of the goods, as by weighing, testing or measuring them, where the price is to depend upon the quantity or quality of the goods, the performance of those things, in the absence of anything indicating a contrary intent, is to be deemed presumptively a condition precedent to the transfer of the property, although the individual goods be ascertained, and they appear to be in a state in which they may be and ought to be

[1] Benjamin on Sales (3d ed.), § 309.

accepted.[1] "Presumptively," says Cooley, C. J., "the title does not pass, even though the articles be designated, so long as anything remains to be done to determine the sum to be paid; but this is only a presumption, and is liable to be overcome by such facts and circumstances as indicate an intent in the parties to be controverted." And it was held that the Circuit Court erred in treating the question as a question of law, instead of deciding it as a question of fact.[2]

§ 1167. Cases where Decided as a Question of Fact. —Upon conflicting or equivocal evidence, the question whether a sale of property has taken place is, then, a question of fact for a jury.[3] It has been ruled, in a good many cases, where the contract rested in parol, that, whether there has been a complete sale or not, is a question of fact for a jury.[4] On like evidence, it has been frequently held a question for a jury, whether there has been a delivery by the seller and an acceptance by the buyer, according to the contract or intent of the parties, so as to transfer title from one to the other and satisfy the statute of frauds.[5] It has been held that, when the facts and the intention of the parties are ascertained, it is for the court to decide whether in law

[1] Lingham *v.* Eggleston, 27 Mich. 324; restated by Cooley, J., in Byles *v.* Colier, 54 Mich. 1, 4. Other cases in affirmation of the same doctrine are: Hatch *v.* Fowler, 28 Mich. 205; Hahn *v.* Fredericks, 30 Mich. 223; Wilkinson *v.* Holiday, 33 Mich. 386; Grant *v.* Merchants &c. Bank, 35 Mich. 515; Scotten *v.* Sutter, 37 Mich. 526; Carpenter *v.* Graham, 42 Mich. 191; Brewer *v.* Salt Asso., 47 Mich. 526; Kelsea *v.* Haines, 41 N. H. 246; Southwestern Freight Co. *v.* Stanard, 44 Mo. 71; Shelton *v.* Franklin, 68 Ill. 333; Straus *v.* Minzesheimer, 78 Ill. 494; Crofoot *v.* Bennett, 2 N. Y. 258; Groat *v.* Gile, 51 N. Y. 431; Burrows *v.* Whitaker, 71 N. Y. 291; Dennis *v.* Alexander, 3 Pa. St. 50; Galloway *v.* Week, 54 Wis. 608; Caywood *v.* Timmons, 31 Kan. 394.

[2] Byles *v.* Colier, 54 Mich. 1, 5.

[3] *Ante*, § 1114. See, for illustration, Globe National Bank *v.* Ingalls, 130 Mass. 8. Compare National Bank *v.* Ingalls, 126 Mass. 209.

[4] De Ridder *v.* McKnight, 13 Johns. (N. Y.) 293; McClung *v.* Kelley, 21 Ia. 508, 511; Gatzweiler *v.* Morgan, 51 Mo. 47.

[5] Kelsea *v.* Haines, 41 N. H. 246, 253; Phillips *v.* Bistolli, 2 Barn & Cres. 511; Chaplin *v.* Rogers, 1 East, 192; Cunningham *v.* Ashbrook, 20 Mo. 553; Pratt *v.* Chase, 40 Me. 269; Jones *v.* Hook, 47 Mo. 329; Rhea *v.* Riner, 21 Ill. 526, 531; Weld *v.* Came, 98 Mass. 152; Ober *v.* Carson, 62 Mo. 209, 214.

they constitute an acceptance; but if they are disputed it is a question for the jury whether there has been a delivery and acceptance in point of fact, and their finding that there has been an acceptance puts an end to the question of law.[1] It has also been said: "Whether the passing of the sale note was symbolical of a delivery, or whether the buyer's request that it [the goods] should not be weighed until the next morning, his agreeing to pay the charges and expenses from the time of the sale, and employing Hawley to see that it was properly covered on his account, amounted to an acceptance and receipt, were all matters of fact to be found by the jury."[2]

§ 1168. Illustrations of the Foregoing. — After a bargain and sale of a stack of hay, between parties on the spot, evidence that the vendee actually sold part of it to another person (by whom, though against the vendee's approbation, it was taken away), was held sufficient to warrant the jury in finding a delivery by the original and an acceptance by the vendee, such as to satisfy the statute of frauds.[3] - - - - In an action by an administrator to recover possession of certain slaves, it was shown that the intestate, some forty years before, purchased one of the slaves and took a bill of sale for her to himself; that he subsequently sought to divest himself of the title and vest it in his wife; and that to that end, the original bill of sale was surrendered, the vendor substituting in place of it another written transfer to the testator's wife, under whom the defendants claimed title. It was held, on this evidence, that the court erred in directing a verdict for the defendant. The court said: "The title of Seals (the plaintiff's intestate) prior to March, 1830, is unquestioned. It is equally clear that he intended and attempted to effect a valid legal transfer to Mrs. Seals. Whether he succeeded in carrying his intention into effect is the question. There being no creditors to complain, it was his right to deal with his property as he pleased — to give it to whom he thought proper. The intention to part with his title and to vest that title in his wife being clear, it would require but slight evidence, after the lapse of nearly forty years, to satisfy the minds of either court or jury that the intention of the parties was effectuated by a proper delivery, even if it should be consid-

[1] Chaplin *v.* Rogers, 1 East, 192.
[2] Bass *v.* Walsh, 39 Mo. 192, 201.
[3] Chaplin *v.* Rogers, 1 East, 192.

ered that the claim of the husband's representatives was not of too stale a nature to deserve consideration in a court of justice. Nevertheless, upon the issue of delivery or no delivery, title or no title, the facts should have been submitted to the judgment and finding of the jury."[1] - - - - Where A. bought the boards to be made out of a certain quantity of logs in the possession of B., to be paid for at a stipulated price per hundred feet, when the boards should be sawed, and the boards were sawed, piled, and notice given to the purchaser,— it was ruled, seemingly as a matter of law, that, considering the nature of the articles sold, the delivery was sufficient to render the sale valid and to transfer the title to the purchaser.[2] - - - - By the condition of a sale at auction, the purchaser was to pay 30 per cent. upon the price, upon being declared the highest bidder, and the residue before the goods were removed. A lot was knocked down to A. as highest bidder, and delivered to him immediately. After it had remained in his hands three or four minutes, he stated that he had been mistaken in the price, and refused to keep it. No part of the price had been paid. It was held that it was a question of fact for the jury, whether there had been a delivery by the seller and an actual acceptance by the buyer, intended by both parties to have the effect of transferring the right of possession from one to the other.[3] - - - - In an action for the purchase price of lumber, the evidence being conflicting, it was held for the jury, not for the court, to determine: 1. Whether the lumber was delivered under one entire contract, so that the acceptance of a part would operate as an implied acceptance of the whole; 2. Whether the lumber delivered was of the kind and quality contracted for; and, if not, 3. Whether, after discovering the defects and notifying the plaintiff thereof, the defendant kept the lumber in a safe and suitable place, reasonably convenient for delivery to the plaintiff upon demand and the payment of lawful charges.[4]

§ 1169. Whether Delivery of Part a Delivery of the Whole.— A sale of personal property and a receipt, acknowledging payment with delivery of a *portion*, do not necessarily transfer to the vendee title in the whole property sold. Delivery of a part

[1] Jones *v.* Hook, 47 Mo. 329, opinion by Currier, J.

[2] Bates *v.* Conkling, 10 Wend. (N. Y.) 389.

[3] Phillips *v.* Bistolli, 2 Barn. & Cres. 511. Compare Blenkinsop *v.* Clayton, 1 J. B. Moore, 328; Carter *v.* Toussaint, 5 Barn. & Ald. 255.

[4] Rood *v.* Priestly, 58 Wis. 255.

operates as a constructive delivery of the whole only in cases where it is *intended* by the parties that such shall be the result.[1] Whether delivery of a part is a delivery of the whole is therefore a question of fact to be *submitted to a jury*,[2] and it is error to instruct them that "a sale of the whole and receipt for payment and delivery of part, as between the vendor and vendee, would be a delivery of the whole, which was then manufactured, toward the contract," etc.[3]

§ 1170. ILLUSTRATION. — An agreement was made between A. and B., by which A. was to have the right to take possession of the goods of B., and sell them to pay a debt of B. to A. At the time when the agreement was made, B. kept the goods in a certain store, from which a portion was afterwards moved to a new store. A. went to the new store and told B. that he had a right to take possession and did take possession, and put B. in as keeper, and directed him to sell the goods for A. B. agreed to do it. It was held that this was sufficient evidence of a taking possession of the goods in both stores, to entitle A. to maintain replevin against an officer who subsequently attached the goods in the old store as the property of B., and it was for the jury to determine whether possession was taken of a part for the whole.[4]

§ 1171. Bona Fide Purchaser for Value. — Where it is a material question, in an action of replevin for a chattel, whether the defendant is a *bona fide* purchaser for value, as where the defendant bought it from the plaintiff's vendee, who had paid counterfeit money to the plaintiff for it, — it has been held that the question was one *for the jury*.[5] This is obviously so, it being a question of *intent*.[6]

§ 1172. Whether a Sale was Conditional. — Whether a sale of personal property was an absolute or conditional one is a ques-

[1] Pratt *v.* Chase, 40 Me. 269, 273; Dixon *v.* Yates, 5 Barn. & Ad. 313, per Littledale, J.; Bunny *v.* Poyntz, 4 Barn. & Ad. 568; Simmons *v.* Swift, 5 Barn. & Cres. 857.

[2] As was done in Shurtleff *v.* Willard, 19 Pick. (Mass.) 202. See also Boynton *v.* Vezie, 24 Me. 286.

[3] Pratt *v.* Chase, 40 Me. 269, 273.

[4] Wilson *v.* Russell, 136 Mass. 211.

[5] Green *v.* Humphrey, 50 Pa. St. 212.

[6] *Post*, § 1333, *et seq.*

tion of fact *for the jury*.[1] In a contest touching title to a chattel, where the question depends upon whether the sale of the chattel was absolute or conditional, if the plaintiff claims under an absolute sale, the *burden* is upon him; or, if he claims under a conditional sale, the burden is equally upon him, to prove a compliance with the condition.[2] Where the evidence touching the agreement rests in parol, it is to be left to the jury, upon all the evidence, to decide which kind of a sale it was.[3]

§ 1173. Instruction as to an Absolute Sale Intended as a Pledge. — "The court instructs the jury that, although they may believe that there was a verbal sale, absolute in its terms, of the property to Mudd (the defendant), by Ingle (the plaintiff), and a delivery of it to Mudd, with a condition or understanding between them that Ingle should have his team back upon complying with the conditions of the agreement, — then said sale is simply a pledge of the property to secure the indebtedness, and the ownership of the property is and was all the time in plaintiff, subject to the payment of the indebtedness existing between them, for the security of which the property was delivered to Mudd." [4]

§ 1174. Whether a Sale and a Delivery of Chattels were Parts of one Transaction. — It has been held, under circumstances, that, whether a sale of personal property and a delivery of certain chattels were parts of the same transaction, or were separate transactions, is a question *for the jury*.[5]

§ 1175. Delivery of Personal Property purchased with Land. — Where one purchases land and receives a conveyance therefor, and at the same time buys personal property situated on the land, the question whether the vendee had actual possession of the land, is an important one, in determining whether there was an actual delivery of possession of the personal property;

[1] Richey *v.* Burnes, 83 Mo. 362.

[2] See Whitwell *v.* Vincent, 4 Pick. (Mass.) 449; Reed *v.* Upton, 10 Pick. (Mass.) 522; Heath *v.* Randall, 4 Cush. (Mass.) 195.

[3] Sawyer *v.* Spofford, 4 Cush. (Mass.) 598.

[4] Approved in Ingle *v.* Mudd, 86 Mo. 216. The action was replevin for the property spoken of.

[5] Keen *v.* Preston, 24 Ind. 395.

which latter question is to be regarded, it seems, a question *for the jury*.[1]

§ 1176. Compliance with a Contract of Sale which contains the Words "More or Less." — "In sales of merchandise, especially in large quantities, where it is impossible to ascertain with precise accuracy the number or weight of the articles, before concluding the contract for their purchase, it is necessary and usual to insert the words 'more or less,' or 'about,' in connection with the specific amount which forms the subject of the contract, in order to cover any variation from the estimate, which is likely to arise from differences in weight, errors in counting, diminution by shrinkage, or other similar causes. But in such cases, parol evidence is not admitted to show that the parties intended to buy and sell a different quantity or amount from that stated in the written agreement. On the contrary, it is held to be a contract for the sale of the quantity or amount specified; and the effect of the words 'more or less' is only to permit the vendor to fulfill his contract by a delivery of so much as may reasonably and fairly be held to be a compliance with the contract, after making due allowance for excess or short delivery arising from the usual and ordinary causes, which prevent an accurate estimate of the weight or number of the articles sold; or, as it is sometimes briefly expressed, it is 'an absolute contract for a specific quantity within a reasonable limit.' What is a reasonable limit, and a substantial compliance with such contract, if the facts are not in dispute between the parties, is a *question for* the determination of the *court*."[2]

[1] Cahoon *v.* Marshall, 25 Cal. 197.

[2] Cabot *v.* Winsor, 1 Allen (Mass.), 546, 550, opinion by Bigelow, C. J. See also Bourne *v.* Seymour, 16 Com. Bench, 336; Pemboke Iron Co. *v.* Parsons, 5 Gray (Mass.), 589. In the case first cited, under the circumstances, five per cent in five hundred bundles of gunny bags was held not to be such a deficiency as to fall outside of a fair and reasonable limit of short delivery; and that, by proof of a delivery of a portion of the 475 bundles, and a readiness to deliver the residue of the lot, the plaintiff proved a full compliance with the terms of his contract. In Cross *v.* Eglin, 2 Barn. & Adolph. 106, the question was likewise ruled as a question of law, and it was held that where the contract was for "about

§ 1177. Under what Circumstances Question withdrawn from the Jury. — It is said by Mr. Browne in his treatise on the statute of frauds: "Whether there has been a delivery and acceptance sufficient to satisfy the statute of frauds is a mixed question of law and fact. But it is for the court to withhold the facts from the jury, when they are not such as can afford good ground for finding an acceptance; and this includes cases where, though the court might admit that there was a scintilla of evidence tending to show an acceptance, they would still feel bound to set aside a verdict finding an acceptance upon that evidence."[1] Quoting this language, it was said in a case in Massachusetts: "What this scintilla is, needs to be stated a little more definitely; otherwise it may be understood to include all cases where, on a motion for a new trial, a verdict would be set aside, as against the weight of evidence. It would be impossible to draw a line theoretically, because evidence, in its very nature, varies from the weakest to the strongest, by imperceptible degrees. But the practical line of distinction is that, if the evidence is such that the court would set aside any number of verdicts rendered upon it, *toties quoties*, then the cause should be taken from the jury, by instructing them to find a verdict for the defendant. On the other hand, if the evidence is such that, though one or two verdicts rendered upon it would be set aside on motion, yet a second or third verdict would be suffered to stand, the cause should not be taken from the jury, but should be submitted to them under instructions. This rule throws upon the court a duty which may sometimes be very delicate; but it

300 quarters more or less," and 350 quarters were tendered, the vendee was not bound to receive such a large excess, at least in the absence of evidence showing that an excess above the quantity named was in contemplation. Compare Moore *v.* Campbell, 10 Exch. 323; Stebbins *v.* Eddy, 4 Mason (U. S.), 414; Thomas *v.* Perry, 4 Pet. C. C. (U. S.) 49; Nelson *v.* Matthews, 2 Hen. & M. (Va.) 164; Quesnel *v.* Woodlief, *Id.* 173, note; Hall *v.* Cunningham, 1 Munf. (Va.) 330; Twiford *v.* Wareup, Finch, 311; Winch *v.* Winchester, 1 Ves. & B. 375; Smith *v.* Evans, 6 Binn. (Pa.) 109; Boar *v.* McCormick, 1 Serg. & R. (Pa.) 166; Glenn *v.* Glenn, 4 Serg. & R. (Pa.) 488; Anon., 2 Freem. (Miss.) 107; Joliffe *v.* Hite, 1 Call (Va.), 301.

[1] Browne St. of Frauds, chap. 15, § 321

seems to be the only practicable rule which the nature of the case admits." [1]

ARTICLE II. — PRECEDENTS OF INSTRUCTION TO JURIES.

SECTION

1180. How a Jury Instructed in such Cases.
1181. Precedent of an Instruction: When Sale Complete so as to cast Risk of Ownership upon Buyer.
1182. Another Precedent.
1183. Delivery of Sale Ticket a Symbolical Delivery.
1184. Delivery of Sale Ticket, Goods to be Subsequently Weighed.
1185. Another Statement of the Same Conclusion.
1186. Validity of Sale as Against Subsequent Purchaser in Action of Replevin Under Iowa Statute.
1187. What Delivery of Possession Necessary as against Attaching Creditor of Vendor.
1188. Another Precedent.
1189. Symbolical Delivery by Delivery of Bill of Lading.

§ 1180. How a Jury Instructed in such Cases. — It is for the court to instruct the jury what would amount in law to a sale; and where a custom of trade has been proved, governing the particular transaction, it is proper to refer them to the custom as the standard by which to determine whether the contract was completed; but the ultimate question whether a sale in fact took place is, where the evidence is conflicting, a question for the jury.[2] It has been held error for the court to instruct the jury, in substance, in a case where the question related to a sale of hogs, that, if the hogs were sold by the net weight, to be ascertained by weighing after they were slaughtered and cleaned, then the presumption that the sale was completed by the delivery is met and repelled, and the loss falls on the plaintiff as owner, unless he shows that the parties intended the sale to be complete upon the delivery, — there being no such presumption, but the circumstance being merely for the consideration of the jury, in de-

[1] Denny *v.* Williams, 5 Allen (Mass.), 1, 5. The court then proceeded to set out a state of facts on which it was held that there was not even a scintilla of evidence to prove an act of delivery and acceptance, and that a verdict for the defendant should have been directed.

[2] Erisman *v.* Walters, 26 Pa. St. 467.

termining the intention of the parties.[1] On the other hand, proceeding upon the conception that, "what amounts to a delivery of the goods sold, when the facts are given, is a question of law," an instruction was approved which directed the jury that if a given state of facts, presented by the evidence, was true, they constituted a good delivery.[2] The language of Chancellor Kent would seem to form a good text for a hypothetical instruction to a jury in such a case: "The good sense of the doctrine on this subject would seem to be that, in order to satisfy the statute [of frauds], there must be a delivery of the goods by the vendor, with an intention of vesting the right of possession in the vendee, and an actual acceptance by the vendee, with the intention of taking possession as owner." [3]

§ 1181. Precedent of an Instruction — When Sale Complete so as to cast Risk of Ownership upon Buyer. — "That when the terms of a sale are agreed upon and the bargain is struck, and everything which the seller has to do about the property is complete, the contract of sale is then perfect — the ownership of the property vests at once in the buyer, and this he takes at once; the property, and all the risks of accident to the property is upon the buyer who is the owner thereof." [4]

§ 1182. Another Precedent. — "All that is necessary to pass property is that the buyer and seller agree. If one who has a long course of dealing with another, have a correspondence in regard to certain specific property, nearer to the purchaser than the seller, and more properly, by reason of their business relations, in the control of the purchaser, and they agree one to buy and the other to sell, the sale is complete, just as soon as they agree and the seller charges the buyer, and the buyer credits their respective books with the price of the property." [5]

§ 1183. Delivery of Sale Ticket a Symbolical Delivery. — "If the court finds that the plaintiffs, by their agent, sold the hay in ques-

[1] Cunningham *v.* Ashbrook, 20 Mo. 554.

[2] Williams *v.* Gray, 39 Mo. 202, 206. So held in Glass *v.* Gelvin, 80 Mo. 297, 300; Hatch *v.* Bayley, 12 Cush. (Mass.) 27.

[3] 2 Kent Com. 504.

[4] Approved in Robinson *v.* Uhl, 6 Neb. 328, 331, 332. See Gen. Stat. of Neb., chap. 25, § 11.

[5] Robinson *v.* Uhl, 6 Neb. 328, 332.

tion to the defendants at $33 per ton, and, at the time delivered to him a sale ticket, as described in evidence, and that by custom said sale ticket authorized defendant to receive the hay and place the same under his control, then there was a valid sale and delivery of the hay." [1]

§ 1184. DELIVERY OF SALE TICKET — GOODS TO BE SUBSEQUENTLY WEIGHED. — "If it appear from the evidence that plaintiffs, by their agent, Hawley, agreed to sell, and that the defendant agreed to buy the 223 bales of hay at the price and sum of $33 per ton; that Hawley thereupon handed defendant a ticket showing the number of bales of hay and where the same was, and that by the custom of merchants the said ticket would authorize the hay to be delivered to the defendant as soon as the same was weighed, and that defendant thereupon stated that he did not want it weighed on that day; that plaintiff assented thereto, upon condition that said hay should be at the charge of defendant, to which condition defendant assented, — then plaintiffs are entitled to recover of the defendant the price agreed on." [2]

§ 1185. ANOTHER STATEMENT OF THE SAME CONCLUSION. — "If it appear, from the evidence in this case, that, by the contract between the parties, the hay was to be weighed merely for the purpose of ascertaining how much money defendant was to pay at $33 per ton, the price having been agreed upon; that the hay was at the levee, at the time of such contract of sale, separate from any other hay; that it was not in the actual possession of some third party, nor in the actual possession of any one; that a ticket, or other badge of authority to receive or take the hay, either before or after the hay should be weighed, was given by the plaintiff's agent to the defendant, — then the sale and purchase is complete, and the defendant is liable for the value of the hay at the contract price." [3]

§ 1186. VALIDITY OF SALE AS AGAINST SUBSEQUENT PURCHASER IN ACTION OF REPLEVIN UNDER IOWA STATUTE. — "Under the laws, a sale of personal property is not valid as against a subsequent purchaser, for value, without notice thereof, unless the same is duly recorded, when the possession of the property remains with the vendor. In this case

[1] Approved in Bass *v.* Walsh, 39 Mo. 193.

[2] Approved in Bass *v.* Walsh, 39 Mo. 193.

[3] Approved in Bass *v.* Walsh, 39 Mo. 193.

you will notice that the parties herein both claim title from John O'Hara. The plaintiff claims that O'Hara sold and delivered the cattle to him, prior to the making and recording of the mortgage to the defendant, but admits that his sale was not recorded. Now, if it should turn out, upon the evidence (and you therefore find) that the plaintiff did, in good faith, purchase the cattle in controversy of said O'Hara, and that, in pursuance of such sale, said O'Hara delivered the possession thereof to the plaintiff prior to the execution of the mortgage, and the same was still in plaintiff's possession at the time of the execution of defendant's mortgage, then you should find your verdict in favor of the plaintiff. In such case, O'Hara having made a complete sale by delivery of possession, the rights of the plaintiff would be perfect, and O'Hara could not impart any title or right as against the plaintiff by a subsequent mortgage to defendant. If you find a sale of the cattle to plaintiff by contract, then, to make the sale perfect as against a subsequent mortgage, taken in good faith and without notice, there must have been an actual delivery or change of the possession of the cattle prior to the making of the mortgage; that is to say, they should have been placed in the custody of plaintiff by setting the cattle apart to him, or such other act as the nature of the property would reasonably admit of, and such custody or actual possession should be continued down to the time of the execution of the mortgage. In other words (to more accurately state the law), the actual possession of the property should not remain and be in said O'Hara, plaintiff's vendor." [1]

§ 1187. What Delivery of Possession Necessary as Against Attaching Creditor of Vendor. — "As between the parties, delivery of possession is not essential to the completion of a sale of chattels, unless made so by the terms of the bargain; but as against an attaching creditor, such delivery of possession, actual or constructive, is essential to the completeness of such a sale. The change of possession, like other parts of the transaction, must be by the will of both parties, and with the design of rendering the sale complete. If anything remains to be done by the vendor which is material or important before the vendee can identify or possess the thing sold, or before it become deliverable,

[1] Approved in Sutton *v.* Ballou, 46 Iowa, 519, 520. See also Adal *v.* Zangs, 41 Iowa, 541; Tegler *v.* Shipman, 33 Iowa, 194. For an instruction applicable to a state of facts where a bill of lading was issued and negotiated, see Toledo &c. R. Co. *v.* Gilvin, 81 Ill. 513.

the sale is executory and incomplete, and the property does not pass absolutely to the vendee." [1]

§ 1188. Another Precedent. — 1. "If there was a *bona fide* sale of the pictures in dispute, by John How to plaintiff, and if, prior to the levy on them by defendant, there was actual, visible, continued change of the possession of the same, then the jury will find for the plaintiff. 2. If the jury believe from the evidence, that the plaintiff did not in good faith purchase the said pictures, and that there was no actual, visible and continued change of possession of said pictures prior to the levy thereon by defendant, they will find for the defendant. 3. If the jury believe from the evidence that, prior to the levy by defendant on the pictures, the plaintiff notified and informed Mr. Dyer, that he had bought said pictures, and that he was the owner thereof, then there was such change of possession, as is contemplated by instructions one and two." [2]

§ 1189. Symbolical Delivery by Delivery of Bill of Lading. — "In order to constitute a valid sale and delivery of the screenings by Slaughter to plaintiffs, Slaughter must have done everything which, by the terms of the bargain, was incumbent on him to do; he must have intended to part with possession of the screenings, and must have actually parted with the possession thereof, and the plaintiffs must have received said screenings with the intention and for the purpose of holding same as owner. But the court instructs the jury that a delivery of the bill of lading read in evidence to the plaintiffs, if, in fact, there was such a delivery, constitutes a sufficient delivery of the screenings to pass title thereto." [3]

[1] Approved in Morgan *v.* Taylor, 32 Texas, 364. The court said: "The charge to the jury was characterized by great clearness and logical precision in expounding the law."

[2] Approved in How *v.* Taylor, 52 Mo. 592, 595, 596.

[3] Approved in Kirkpatrick *v.* Kansas City &c. R. Co., 86 Mo. 341.

CHAPTER XXXVIII.

WARRANTIES IN SALES OF CHATTELS.

SECTION
1195. What Constitutes an Express Warranty.
1196. Court to Declare the Legal Effect of Written Warranties.
1197. Jury to Interpret Oral Warranties.
1198. Whether Statement a Warranty or a mere Expression of Opinion.
1199. Jury to Determine whether Purchaser relied on Statement.
1200. Precedent of Instruction in such a Case.
1201. Whether Quality equal to Warranty.
1202. What Constitutes "Unsoundness" in an Animal.
1203. Instruction as to what Disease will Constitute an Unsoundness.
1204. [Continued.] Instruction that "Texas Itch" in a Horse is such a Disease.
1205. Instruction as to Rule of Caveat Emptor.
1206. [Continued.] What Constitutes a Warranty in the Sale of a Chattel.
1207. [Continued.] Vendor not Responsible for Representation of Honest Belief.
1208. Instruction as to Effect of Warranty of Machine, in Action for Price with Breach of Warranty as Counter-Claim.
1209. [Continued.] Instructions as to Measure of Damages in such a Case.
1210. [Continued.] Instructions as to Effect of Agreement to Rescind in Case of Failure of Warranty.

§ 1195. What constitutes an express Warranty. — "It is well settled that neither the word 'warrant,' nor any precise form of expression, is necessary to create an express warranty; but it may, under certain circumstances, result from any affirmation of the quality or condition of personal chattels, made by the vendor at the time of the sale. A bare affirmation, not intended by the vendor to have that effect, will not constitute a warranty; and this, for the plain reason that a warranty in its nature is a contract, and no contract or agreement can be made or entered into without the consent and co-operation of two contracting parties."[1] The rule of law on this subject has been well said to be,

[1] Edwards *v.* Marcy, 2 Allen (Mass.), 486, 489, opinion of the court by Merrick, J.

that "any affirmation of the quality or condition of the thing sold, made by the seller at the time of the sale, for the purpose of assuring the buyer of the truth of the fact affirmed, and inducing him to make the purchase, if so received and relied on by the purchaser, is an express warranty."[1] "To prove, in any particular instance, that there was a warranty by the vendor, it is therefore not sufficient to show merely that, at the time of the sale, he affirmed in clear and definite language a fact relative to the essential qualities or condition of the goods or things sold; but to this there must be superadded proof that he intended thereby to influence the mind of the purchaser and to induce him to buy, and that the latter did buy upon the faith of and in reliance upon the affirmation. This is essential to show that there was in fact a contract between the parties upon the subject."[2]

§ **1196. Court to Declare the Legal Effect of Written Warranties.** — "When the contract is in writing, and the affirmation is incorporated into or makes a part of it, the court is to declare its legal effect; the exposition of it involving a mere question of law.[3] * * * But in all oral contracts, it is within the

[1] Osgood *v.* Lewis, 2 Harr. & G. (Md.) 495; Edwards *v.* Marcy, 2 Allen (Mass.), 486, 489. See Henshaw *v.* Robins, 9 Metc. (Mass.) 83, where the same principle is asserted in substantially the same terms. Also Nauman *v.* Overlee (Mo.), 3 S.W. Rep. 380; Dulaney *v.* Rogers, 64 Mo. 201; Walsh *v.* Morse, 80 Mo. 568; Jones *v.* Railroad Co., 79 Mo. 92; Blaney *v.* Pelton (Vt.), 13 Atl. Rep. 564; McClintock *v.* Emick (Ky.), 7 S. W. Rep. 903; Warder *v.* Bowen (Minn.), 17 N. W. Rep. 943. To constitute a warranty, neither the word "warrant," nor any equivalent word, is indispensable. Warder *v.* Bowen (Minn.), 17 N. W. Rep. 943. It is sufficient if the language used by the vendor amounts to an undertaking that the goods are as represented. Patrick *v.* Leach (Neb.), 1 N. W. Rep. 853; Neave *v.* Arntz (Wis.), 14 N. W. Rep. 41. That the representation of the vendor, to become a warranty, must have been relied upon by the purchaser: Halliday *v.* Briggs (Neb.), 18 N. W. Rep. 55; Torkelson *v.* Jorgenson (Minn.), 10 N. W. Rep. 416.

[2] Edwards *v.* Marcy, *supra.*

[3] Edwards *v.* Marcy, 2 Allen (Mass.), 486, 490. This was done in the following cases: Henshaw *v.* Robins, 9 Metc. (Mass.) 83; Hastings *v.* Lovering, 2 Pick. (Mass.) 214; Rice *v.* Codman, 1 Allen (Mass.), 377; Shepherd *v.* Kain, 5 Barn. & Ald. 240. See also Borrekins *v.* Bevin, 3 Rawle (Pa.), 23; Batturs *v.* Sellers, 5 Harr. & J. (Md.) 117; and 6 Harr. & J. (Md.) 249; Yates *v.* Pym, 6 Taunt. 446;

province of the jury to determine, in view of all the circumstances attending the transaction, whether the necessary ingredients to constitute such warranty, namely, the intention of the vendor that his affirmation should operate as an inducement to the purchaser to buy, and the acceptance of or reliance to some extent upon it by the vendee, as one of the grounds, motives or reasons for making the purchase, do actually exist." [1]

§ 1197. Jury to Interpret Oral Warranty. — In conformity with the principles already stated,[2] the interpretation of oral warranties is generally left to the jury. "A warranty may be verbal or written. When it is reduced to writing, it is the province of the court to expound it; but when it is merely verbal, it is for the jury to interpret the words of the witness who testifies concerning it. The court may explain to the jury what constitutes a warranty, when it rests altogether on oral proof; but as no particular form of words is essential, and it is mostly a question of intention on the part of both the vendor and vendee, that question, like any other question of fact, must be left to the jury." [3]

§ 1198. Whether Statement a Warranty or a mere Expression of Opinion. — The rule is that, whenever the vendor, at the time of the sale, makes an assertion or representation, respecting the kind, quality or condition of the thing sold, upon which he intends that the vendee shall rely, and upon which the vendee does rely in making the purchase, it amounts to a warranty.[4] If,

Chandelor *v.* Lopus, Cro. Jac. 4; Power *v.* Barham, 4 Ad. & El. 573; Freeman *v.* Baker, 2 Nev. & Man. 446; Chapman *v.* Murch, 19 Johns. (N. Y.) 290; Swett *v.* Colgate, 20 Johns. (N. Y.) 196; Seixas *v.* Woods, 2 Caines (N. Y.), 48.

[1] Edwards *v.* Marcy, 2 Allen (Mass.), 486, 490. See to the same effect Osgood *v.* Lewis, 2 Harr. & G. (Md.) 495.

[2] *Ante*, § 1105.

[3] Lindsay *v.* Davis, 30 Mo. 406, 410, opinion by Napton, J.

[4] *Ante*, § 1195; Lamme *v.* Gregg, 1 Metc. (Ky.) 444. See also as to what amounts to a warranty: Smith *v.* Miller, 2 Bibb (Ky.), 617; Bacon *v.* Brown, 3 Bibb (Ky.), 35; Dickens *v.* Williams, 2 B. Monr. (Ky.) 374; Duffee *v.* Mason, 8 Cow. (N. Y.) 25; Vernon *v.* Keys, 12 East, 632, 639; Morrill *v.* Wallace, 9 N. H. 111; Chapman *v.* Murch, 19 Johns. (N. Y.) 290; Cook *v.* Moseley, 13 Wend. (N. Y.) 278; Foggert *v.* Blackweller, 4 Ired. L. (N. C.) 238; Baum *v.* Stephens, 2 Ired. L. (N. C.) 411.

however, the vendor, by what he says, merely intends to express an *opinion* or *belief* about the matter, and not to make an affirmation of a fact, then the statement will not amount to a warranty ;[1] and where doubts exist upon the evidence whether, in the case of an oral statement, the vendor intended to assert a fact, or merely to express an opinion or belief, that question must be left to the jury to decide.[2] Where the representation is in writing, but is not incorporated into or made a part of the contract of sale, the question whether it amounted to a contract of warranty, or whether it was the mere expression of an opinion, not accepted or acted upon by the vendee so as to constitute a contract, has been held equally a question for the jury. Thus, in an action upon an alleged warranty in the sale of a horse, it appeared that the plaintiff wrote to the defendant: "You will remember that you represented the horse to me as five years old," etc., and the defendant replied: "The horse is as I represented it." Here it was left to the jury to determine whether the defendant, at the sale, gave an undertaking to the effect mentioned in the letter.[3]

§ 1199. Jury to Determine whether Purchaser relied on the Statement. — So, where an action for damages is predicated upon the ground that a certain statement, made by the vendor touching the character or quality of the thing sold, was a war-

[1] Henson *v.* King, 3 Jones L. (N. C.) 419; Rogers *v.* Ackerman, 22 Barb. (N. Y.) 134; Congar *v.* Chamberlain, 14 Wis. 258; Osgood *v.* Lewis, 2 Harr. & G. (Md.) 495; Bond *v.* Clark, 35 Vt. 577; Foster *v.* Estate of Caldwell, 18 Vt. 176; Beeman *v.* Buck, 3 Vt. 53; Thornton *v.* Thompson, 4 Gratt. (Va.) 121; Buswell *v.* Roby, 3 N. H. 467; Tuttle *v.* Brown, 4 Gray (Mass.), 457, 460; DeSchawnberg *v.* Buchanan, 5 Carr. & P. 343; Power *v.* Barham, 4 Ad. & El. 473. At least, upon proper instructions as to the effect of the language which the jury may find to have been used. Denning *v.* Foster, 42 N. H. 165, 176. Compare, as to the difference between warranties and expressions of opinion, Salmon *v.* Ward, 2 Carr. & P. 211; Jendwine *v.* Slade, 1 Esp. 572; Omrod *v.* Hath, 14 Mees. & W. 664; Dunlop *v.* Wright, 1 Peake N. P. 123; Budd *v.* Fairmaner, 5 Carr. & P. 78; Richardson *v.* Brown, 8 Moore, 338; *s. c.* 1 Bing. 344. The statement must be such as to justify the vendee in relying upon it as a statement of fact, as distinguished from an opinion. Manufacturing Co. *v.* Thomas (Iowa), 5 N. W. Rep. 737; Worth *v.* McConnell (Mich.), 4 N. W. Rep. 198.

[2] Lamme *v.* Gregg, 1 Metc. (Ky.) 444.

[3] Salmon *v.* Ward, 2 Carr. & P. 211.

ranty, it is for the jury to determine whether the purchaser accepted and acted upon the statement as such; since, as already seen,[1] this acceptance and action are necessary to give to the statement the quality of a contract,— in other words, to lift it out of the character of a mere representation and to make it a warranty. Thus, where a railroad company issued and sold bonds which bore on their face a certificate, signed by persons describing themselves as trustees, that the bonds were secured by a first mortgage to such persons in trust for the bondholders,— it was held that there was no absolute presumption that a purchaser of such a bond relied upon the certificate, and that, in an action upon a note given by him as a part of the consideration of the purchase, the defense being a breach of this assumed contract of warranty, the question should be submitted to the jury, to determine whether the defendant accepted the bond relying to any extent on the certificate.[2]

§ 1200. Precedent of an Instruction in Such a Case. — "If during the negotiation for the sale of the horse, the defendant made an assertion of soundness, which assertion was intended to cause the sale of the horse, and was operative or effectual in causing such sale, then such assertion would constitute a warranty. But a mere expression of an opinion is not enough to constitute a warranty."[3]

[1] *Ante*, § 1195.

[2] Edwards *v.* Marcy, 2 Allen (Mass.), 460.

[3] Approved in Little *v.* Woodworth, 8 Neb. 283. The court said (p. 284): "It is well settled that no particular form or set of words are necessary to constitute a warranty of the character or soundness of chattels, but that any form of words, whereby a vendor, pending a negotiation, makes affirmation or assertion that his article of traffic is possessed of a particular character, for the purpose of inducing a purchase, when such affirmation or assertion is relied upon by the purchaser, will constitute a warranty. Some cases make a distinction between affirmation and mere assertion, but in the sense in which the words are used in this connection, there is no difference. Again, many cases make a distinction between the assertion of a fact and the expression of an opinion. Whether certain words, would be regarded as the affirmation of a fact or the expression of an opinion would often depend upon the nature of the article commended. Words, which might amount to a warranty of soundness of a horse, might be regarded as a mere expression of opinion when applied to the merits of a patent washing machine. We see no objection to the instruction given, as it very fairly expresses the law of the case, as we understand it."

§ 1201. Whether Quality Equal to Warranty. — In an action for the purchase price of a manufactured article, sold with warranty, the question of the strength and capacity of the article to undergo the service for which it was intended, is a pure *question of fact*. So is the question what is proper management in the use of such an article.[1]

§ 1202. What Constitutes "Unsoundness" in an Animal. — On like grounds, in an action for a breach of warranty of the soundness of an animal, it has been laid down that what constitutes an unsoundness is a matter for the jury. "It is not the province of the judge to determine the character of diseases. When we say, therefore, that distemper would have been an unsoundness as well as glanders, we mean, of course, if the jury should so consider it from the evidence submitted to them. Whether glanders is an aggravated form of distemper or a distinct disease, or whether either of the diseases would constitute an unsoundness, are questions of fact with which the court has nothing to do."[2] So, it has been ruled, in an action for a breach of warranty, that the question whether corns in a horse's feet constitute unsoundness, is a question of fact, to be determined upon the evidence, and the general legal definition of unsoundness. The court say: "The law gives a general definition of unsoundness, and leaves it to the trier of the facts to find whether the infirmity of corns, in the particular case, is within the general definition of unsoundness, — whether that defect materially diminishes the value of the horse and his ability to perform service. Such a diminution of value and ability is an unsoundness, although it be temporary and curable."[3]

[1] Tyson *v.* Tyson, 92 N. C. 288.

[2] Lindsay *v.* Davis, 30 Mo. 406, 412. A warranty of soundness of a horse, unless expressly restricted, extends to all manner of unsoundness, whether known to the vendor or not. Van Hoesen *v.* Cameron (Mich.), 20 N. W. Rep. 609. A warranty that a horse is sure-footed, and all right in every way, excepting only stumbling from temporary causes, is broken if he has such an organic defect that his stumbling can only be avoided by a peculiar mode of shoeing, which the vendee, using reasonable diligence, cannot discover. Morse *v.* Pitman (N. H.), 4 Atl. Rep. 880.

[3] Alexander *v.* Dutton, 58 N. H. 282. Compare Kiddell *v.* Burnard, 9 Mees. & W. 668; Roberts *v.* Jenkins, 21 N. H. 116, 119.

§ 1203. INSTRUCTION AS TO WHAT DISEASE WILL CONSTITUTE AN UNSOUNDNESS. — "The rule of law as it is laid down in the books in this class of cases is, that if, at the time of the sale, an animal has any disease which actually does diminish the actual usefulness of the animal, so as to make it less capable of work of any description, or which, in its ordinary progress, will diminish the natural usefulness of the animal; or if the animal has, either from disease or accident, undergone any alteration of structure, which either actually does at the time of sale, or in its ordinary effects will diminish the usefulness of the animal, such animal is unsound." [1]

§ 1204. [CONTINUED.] INSTRUCTION THAT "TEXAS ITCH," IN A HORSE, IS SUCH A DISEASE. — "If it is true that Briggs [warrantor] himself, and also several witnesses for him, who had in various ways been connected with the herd, neither knew nor had observed that the horses sold said Dunbar were diseased; yet, if you are satisfied from the evidence that said horses were at the time of said sale, in fact infected with said disease, known as the 'Texas itch,' this will be sufficient to show a breach of the warranty of the soundness of said horses; if you believe from the evidence there was in fact any such warranty, made by said Briggs, as claimed by said defendant." [2]

§ 1205. INSTRUCTION AS TO RULE OF CAVEAT EMPTOR. — "On the sale of an article of personal property, no action can be maintained for any difference in quality between the thing contracted for and the thing delivered, unless there be an express warranty made by the seller, or there be fraud on his part. Without an express warranty by the seller, or fraud on his part, the buyer must stand all losses." [3]

§ 1206. [CONTINUED.] WHAT CONSTITUTES A WARRANTY IN THE SALE OF A CHATTEL. — "In order to constitute a warranty, there must be an affirmation as to the quality or condition of the thing sold (not asserted as a matter of opinion or belief), made by the seller at the time of the sale, for the purpose of assuring the buyer of the truth of the fact affirmed, and inducing him to make the purchase, which is so received and relied on by the purchaser, and that the purchase-money was paid

[1] Approved in Van Hoesen *v.* Cameron, 54 Mich. 616, 617.

[2] Approved in Dunbar *v.* Briggs, 18 Neb. 94, 97.

[3] Approved in Wallace *v.* Wren, 32 Ill. 148.

for the undertaking of the seller, that the article sold was of a particular quality." [1]

§ 1207. [CONTINUED.] VENDOR NOT RESPONSIBLE FOR REPRESENTATION OF HONEST BELIEF. — "If the seller of an article of personal property represents what he himself believes as to the qualities or value of an article, and leaves the determination to the judgment of the buyer, there is no fraud or warranty in the case, and the seller would not be liable for any defect in the quality of the thing sold." [2]

§ 1208. INSTRUCTION AS TO EFFECT OF WARRANTY OF MACHINE, IN ACTION FOR PRICE WITH BREACH OF WARRANTY AS COUNTER-CLAIM. — "The question for you to determine is this: Was the machine warranted as represented? If so, did it fail to operate as it was warranted to do? And if it did so fail, what was the amount of damages sustained by the defendant? The burden of proof, to establish these allegations, is upon the defendant, and he must satisfy your minds by a preponderance of evidence that the machine was warranted and that it failed to operate as warranted, or it will be your duty to return a verdict for plaintiffs for the full amount due on the note by its terms." [3]

§ 1209. [CONTINUED.] INSTRUCTION AS TO MEASURE OF DAMAGES IN SUCH A CASE. — "If you find from the evidence that the plaintiff's agent did warrant the machine as represented, and that it failed to answer its warranted character, then the measure of defendant's damages is the difference between the value of the machine in the condition in which it actually was at the time of the sale, and what it would have been had it answered its warranted character." [4]

§ 1210. [CONTINUED.] INSTRUCTION AS TO EFFECT OF AGREEMENT TO RESCIND IN CASE OF FAILURE OF WARRANTY. — "The defendant alleges in his answer that it was the contract between the parties, that if the machine, upon trial of the same, did not perform as it was warranted, upon being notified, plaintiff would receive back the same

[1] *Ibid.*

[2] *Ibid.*

[3] Approved in McCormick *v.* Dunville, 36 Iowa, 645, 648; citing Aultman *v.* Theirer, 34 Iowa, 272; and distinguishing Bamberger *v.* Griener, 18 Iowa, 477; Grammar *v.* Borgam, 27 Iowa, 369; Williams *v.* Donaldson, 8 Iowa, 108.

[4] McCormick *v.* Dunville, 36 Iowa, 645, 649.

and return the defendant the money paid, and that the defendant notified plaintiffs of the fact that the machine would not work, and requested them to receive it back and return the money, which they refused to do. If you find that this was the contract between the parties, then you are instructed that defendant cannot recover on his counter-claim for damages without having returned the machine to plaintiffs, or without proving an offer to return, and a refusal by them to receive it, provided the plaintiffs or their agent could be found." [1]

[1] *Ibid.* 649.

CHAPTER XXXIX.

NEGOTIABLE INSTRUMENTS.

SECTION
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1245. Instruction as to Duty of Indorsee of Check to Make Effort to Collect same before suing Drawer.

§ 1215. Reasonable Diligence in Presenting Commercial Paper. — The right of the holder of a bill of exchange which has not matured, or of a bill of exchange or promissory note which has matured, to hold the drawer in case of a bill of exchange, or the maker in case of a promissory note, for the amount named in the instrument, in the case of non-acceptance before maturity or non-payment after maturity, — seems to depend upon the exercise of reasonable diligence upon the part of the holder in presenting the paper, for acceptance or payment as the case may be, and in giving notice to the indorser of its non-acceptance or non-payment. Active diligence, it has been said, is imposed upon the obligee in pursuing the obligor, for a recovery of the sum due on a bill assigned to him, so that nothing shall be lost by his laches; and the question is whether he did use due diligence, which is a *question for the decision of the court.*[1] This measure of diligence is discharged by making presentment within what the law calls a *reasonable time.*

§ 1216. In presenting Bill of Exchange for Acceptance. — A bill of exchange must be presented for acceptance within a *reasonable time*, with reference to the interest of the drawer to put the bill in circulation, or the interest of the drawee to have the bill speedily presented; and what constitutes a reasonable time is a *mixed question of law and fact*, for the determination of the court and jury,[2] — which means that the question must be submitted to the jury under proper instructions.[3] Where there was no evidence of a *general usage*, and the testimony as to the *opinion of merchants* on the point was conflicting, the court refused to disturb a verdict, in which it was found that a delay of *five months*, in presenting a bill drawn upon Rio de Janeiro, was not unreasonable. In giving the opinion of the court, Tindal, C. J., said: "There is no definite time prescribed by the law of England, within which such presentment for acceptance must

[1] Crawford *v.* Berry, 6 Gill & J. (Md.) 63, 70; Brooks *v.* Elgin, 6 Gill (Md.), 254, 260.

[2] Mullick *v.* Radakissen, 9 Moore P. C. 46.

[3] Mellish *v.* Rawdon, 9 Bing. 416, 421; *ante*, § 1031.

take place. In some countries, as in France, the times within which a foreign bill, payable at sight, or at any certain time after, must be presented for acceptance to the drawee, are fixed by positive law, according to the place where, and the place on which the bill is drawn. Thus, for instance, where it is drawn from the continent of Europe, or the isles of Europe, and payable within the European possessions of France, such presentment for acceptance must be made within six months from the date, in default of which, the holder can have no remedy against the drawer or indorsers.[1] But there is no such law in England; and, in the absence of any such positive regulation, or of any general usage or course of trade, no other rule, as it appears to us, can be laid down as the limit within which the bill must be forwarded to its destination, than that it must take place within a reasonable time, under all the circumstances of the case, and that there must be no unreasonable or improper delay. Whether there has been, in any particular case, reasonable diligence used, or whether unreasonable delay has occurred, is a mixed question of law and fact, to be decided by the jury, acting under the direction of the judge, upon the particular circumstances of each case." [2]

§ 1217. PRECEDENT OF AN INSTRUCTION IN SUCH A CASE. — The jury are to determine, on the evidence before them, whether there had been an unreasonable delay on the part of the plaintiff, the holder of the bill, in sending it forward for acceptance, or in putting it into circulation. In order to arrive at the proper determination of this question, the jury are to take into their consideration the situation and interests, not of the drawer only, or of the holder only, but the situation and interests of both; and to say whether, under all the circumstances, the delay in this case, was unreasonable or not.[3]

[1] Citing Code de Commerce, liv. 1, tit. 8, § 11.

[2] Mellish *v.* Rawdon, 9 Bing. 416, 422.

[3] This instruction, with some slight verbal changes, was given by Tindal, C. J., in Mellish *v.* Rawdon, 9 Bing. 416, and, after advisement, was approved by the whole court. The principle upon which this case was decided had been declared in the Common Pleas as early as 1795, in the case of Muilman *v.* D'Eguino, 2 H. Bl. 565. In this last case Mr. Justice Buller conceived that, "if, instead of putting the bill into circulation, the

§ **1218. In presenting Sight Drafts for Payment.** — The rule as to bills of exchange drawn payable at sight, is that they must be presented for payment within a *reasonable time*.[1] It has been said in one case,[2] and held in others,[3] that what is a reasonable time for the presentment of such a draft is a *question of fact;* but the better opinion, supported by the decisions of the best courts, and by the opinions of the most approved writers on negotiable paper, is that, where the facts are clear and uncontradicted, the *question* is one *of law*, to be decided by the court.[4] This view is to be preferred, because it results in giving the mercantile community definite rules by which to govern their actions, instead of remitting the question to the uncertain discretion of juries.

§ **1219. This Rule, how Applied.** — In the application of this principle, it has been held, as a matter of law, that, where a bank has received a sight draft for collection, drawn upon a party or another bank, having a place of business in the same city in which the collecting bank is situated, the collecting bank does not use due diligence if it fail to present the draft to the payee for payment *before the close of the following day;*[5] and it has been held that a custom among banks, of doing business among themselves through a clearing house, does not alter the rule that a

holder were to lock it up for any length of time, * * * he was guilty of laches." This expression, thought Tindal, C. J., in the case first cited, "when properly construed, only leaves the rule above laid down as uncertain and undefined in its application as it was before." Mellish *v.* Rawdon, 9 Bing. 423. Compare Schute *v.* Robins, Mood. & Malk. 133.

[1] Salisbury *v.* Renick, 44 Mo. 554; Phœnix Ins. Co. *v.* Allen, 11 Mich. 501, 511.

[2] Fugitt *v.* Nixon, 44 Mo. 295, opinion by Wagner, J.

[3] Mohawk Bank *v.* Broderick, 13 Wend. (N. Y.) 137; Phœnix Ins. Co. *v.* Allen, 11 Mich. 501, 511.

[4] Prescott Bank *v.* Caverly, 7 Gray (Mass.), 217; Aymar *v.* Beers, 7 Cow. (N. Y.) 705; *s. c.* 17 Am. Dec. 538; Mohawk Bank *v.* Broderick, 10 Wend. (N. Y.) 304; Gough *v.* Staats, 13 Wend. (N. Y.) 549; Dyas *v.* Hanson, 14 Mo. App. 363; Byles on Bills, 163; Edwards on Bills, § 546; Dan. Neg. Instr., § 466. But while it is error to submit this question to the jury, yet if the jury decide it rightly, there will be no ground for reversing the judgment. Dyas *v.* Hanson, *supra; ante*, § 1020.

[5] Dyas *v.* Hanson, 14 Mo. App. 363, 370.

check must be presented to the bank on which it is drawn at least during banking hours on the next succeeding day.[1] And although there has been some difference of opinion as to whether the same measure of diligence is required in the presentment of sight bills of exchange as in the presentment of bank checks, the better opinion seems to be that there is no sound reason for a distinction. "The fact that one instrument is drawn upon a bank and the other upon an individual, can make no difference in principle concerning the duty of the holder; what will be due diligence in the one case will be due diligence in the other." [2]

§ 1220. In presenting a Demand Note, or a Note in which Time of Payment is not fixed. — A bill or note may be transferred as well after, as before it is due.[3] The difference is said to be that if it is transferred after due, as there is no time fixed for payment, the indorser undertakes that it will be paid on demand, which means that it will be paid within a *reasonable time* after demand of payment is made; and what is a reasonable time is a *question of fact* for the jury under all the circumstances of the case.[4] It has been so held, where the note was drawn and dated in New York, on the 4th of August, 1857, by a person living in Pennsylvania, and was presented about the 12th of September following. The court held that, under the circumstances, whether the delay of presentment for between five and six weeks was reasonable or not, ought to have been submitted to the jury. The court conceded the general rule that, where all the facts are entirely undisputed, what is a reasonable time is a question of law, but added: "In a case like the present, involving various considerations, and particularly the laws of a sister State, it appears to us that this question should have been sub-

[1] Rosenblatt *v.* Haberman, 8 Mo. App. 486. See also Alexander *v.* Burchfield, 1 Carr. & M. 75; *s. c.* 7 Man. & G. 1061.

[2] Smith *v.* Janes, 20 Wend. (N. Y.) 192; *s. c* 32 Am. Dec. 527, per Bronson, J. See also St. John *v.* Homans, 8 Mo. 382, 385; Harker *v.* Anderson, 21 Wend. (N. Y.) 372.

[3] Story on Bills, §§ 220, 223.

[4] Union Bank *v.* Ezell, 10 Humph. (Tenn.) 385.

mitted to the jury under proper instructions of the court." [1] The question whether demand has been made upon the maker within a *reasonable time*, so as to *charge an indorser*, is reasoned upon the same principles. It is said, that it has never been attempted to fix the time with any degree of precision, except in reference to the circumstances of each particular case; which circumstances go merely to show the *intention* of the parties in respect to the time of payment, and amount therefore to no more than evidence of their agreement. This being a question of intent, and the intent not being expressed on the face of the instrument, it is a question, like other questions of intent, to be determined by a jury under all the circumstances surrounding the transaction.[2]

§ **1221. When a Demand Note is Overdue.** — In England "a note payable on demand is not considered as overdue without some evidence of payment having been demanded and refused; although it be several years old, and no interest has been paid on it." [3] "It has been a question," says Chancellor Kent, "when a note payable on demand is to be deemed a note out of time, so as to subject the indorsee, upon a subsequent negotiation of it, to the operation of the rule," — meaning the rule which lets in proof of *equities* between the original parties, where the note is negotiated after it becomes due. And he proceeds to state that, "when the facts and circumstances are

[1] Barbour *v.* Fullerton, 36 Pa. St. 105, opinion by Read, J. The court added: "The distinction between the two classes of cases is often a nice one, and is carefully marked by Chief Justice Shaw in Wyman *v.* Adams, 12 Cush. (Mass.) 210."

[2] Tomlinson Carriage Co. *v.* Kinsella, 31 Conn. 269, 273. In England the very sensible conclusion has been reached that the word "*demand*," in such a note, is synonymous with "*request*" and that the promise is therefore a promise to pay when requested to do so. Brooks *v.* Mitchell, 9 Mees. & W. 15; Barough *v.* White, 4 Barn. & Cress. 325. But the American cases seem to hold that the undertaking of an indorser of such a note is that he will be bound, provided the payee, without success, uses due diligence to collect the same within a *reasonable time*. Castle *v.* Candee, 16 Conn. 224; Lockwood *v.* Crawford, 18 Conn. 361; Culver *v.* Parish, 21 Conn. 408.

[3] Byles on Bills (7th ed.), 145, 179, 180; Chitty on Bills (10th ed.), 155; Brooks *v.* Mitchell, 9 Mees. & W. 15, and American note.

ascertained, the reasonableness of time is a matter of law, and every case will depend upon its special circumstances."[1] American cases are found which proceed upon the ground that it is a question which is to be *decided by the court*.[2] A statute of Massachusetts[3] put the matter at rest in that State, by enacting that a demand made at the expiration of sixty days from the date of the note, without grace, is deemed to be made within a *reasonable time*.[4]

§ **1222. Reasonable Hours for Presentment of Commercial Paper.** — Moreover, it seems that what are to be deemed *reasonable hours*, within which a bill of exchange or other commercial instrument may be presented for payment, is a question of law for the court. Accordingly, it has been held that, where the bill is made payable at a particular bank, the holder impliedly agrees to ascertain the usual hours within which such banker does business, and to present it within those hours; and hence a presentment *after the close of banking hours*, when the house is shut and the clerks are gone, is not a sufficient presentment to charge the drawer.[5] The rule in regard to presentment at the office of a banker is established with reference to a well known rule of trade that a presentment out of the hours of business is not sufficient;[6] but the English courts do not apply this rule in the case of the presentment at other places than at banking houses; nor in such cases do they require that the presentment should be made *within business hours*.[7] Where the bill was presented at a house in London, where it was made payable, at *8 o'clock in the evening* of the day when it fell due, it was held that the presentment was sufficient to charge the drawer, although at that hour the house was shut up and no person answered to the bell;[8]

[1] 3 Kent. Com. 120, 121.

[2] Thurston *v.* M'Kown, 6 Mass. 428; Wethey *v.* Andrews, 3 Hill (N. Y.), 582; Agawan Bk. *v.* Strever, 18 N. Y. 502; *s. c.* 16 Barb. (N. Y.) 82.

[3] Mass. Act of April 6th, 1839 (Laws Mass. 1839, p. 56, chap. 121).

[4] See Rice *v.* Wesson, 11 Met. (Mass.) 400; Sacket *v.* Loomis, 4 Gray (Mass.), 148.

[5] Parker *v.* Gordon, 7 East, 385; Elford *v.* Teed, 1 Maule & S. 28.

[6] Wilkins *v.* Jadis, 2 Barn. & Adolph. 188.

[7] Jameson *v.* Swinton, 2 Taunt. 224; Barclay *v.* Bailey, 2 Camp. 527.

[8] Barclay *v.* Bailey, 2 Camp. 527.

though it was conceded that a presentment *at midnight* would be unreasonable.[1] But, although the presentment be made at a bank and *after banking hours*, yet if a person has been stationed there for the purpose of returning an answer to the person making the presentment, and an answer that the bank has "no orders" is returned, the presentment will be as good as though made within banking hours; since the purpose of presenting it has been subserved.[2]

§ 1223. Reasonable Notice of Dishonor of Commercial Paper: View that this is a Question of Fact. — Most of the analogies,[3] which relate to the question whether what is reasonable time is for the decision of the judge or of the jury, would remit this question to the jury as a question of fact; and while the rule that it is to be decided as a question of law is undoubtedly more beneficial to commerce than the rule which would remit it to the varying opinions of jurors, yet it is said that the former is not an inflexible rule. There are many cases where it will be a fair question for the jury or the trier of the facts, whether the holder or the notary exercised reasonable business diligence in endeavoring to find out the proper address of the indorser when a non-resident.[4] An examination of the cases shows that the courts are in the frequent habit of putting this question to juries under proper instructions.[5]

[1] Wilkins *v.* Jadiz, *supra*. Or *between 6 and 7 in the evening*, when no one but a girl was left to take care of the counting house. Morgan *v.* Davison, 1 Stark. 114.

[2] Garnett *v.* Woodcock, 6 Maule & S. 44; *s. c.* 1 Stark. 475.

[3] *Post*, § 1530, *et seq.*

[4] Bank of Commerce *v.* Chambers, 14 Mo. App. 152, 154.

[5] In Barbishire *v.* Parker, 6 East, 2, Lord Ellenborough, C. J., considering the question of reasonable notice as compounded of law and fact, left the whole question to the jury; advising them that it was not necessary, in his opinion, for a person to leave all other business and attend solely to one transaction; but they were to consider whether, upon the whole, reasonable dispatch had been used by the plaintiffs in communicating notice of the dishonor of the bill to the drawer. A rule for a new trial was made absolute, and two of the judges expressed the opinion that the question was a question of law; but the decision seems not to have turned upon that point.

§ 1224. View of Lord Mansfield and his Associates that it is a Question of Law. — It was laid down by Lord Mansfield, who may be justly called the father of the English law of commercial paper, that what is reasonable notice to an indorser of non-payment by the maker of a promissory note, or to the drawer in case of a bill of exchange, is a question of law, which for the sake of certainty and uniformity in commercial transactions, should be decided by the court. "It is of great consequence," said that eminent judge, "that this question should be settled. Certainty and diligence are of the utmost importance in mercantile transactions. It is extremely clear that the holder of a bill, when dishonored by the acceptor, must give reasonable notice to the drawer or indorser. What is reasonable notice is partly a question of fact, and partly a question of law. It may depend, in some measure on facts; such as the distance at which the parties live from each other, the course of the posts, etc. But wherever a rule can be laid down with respect to this reasonableness, that should be decided by the court and adhered to by every one, for the sake of certainty." Ashurst, J., in the same case said: "It is of dangerous consequence to lay it down as a general rule that the jury should judge of the reasonableness of time. It ought to be settled as a question of law. If the jury were to determine this question in all cases, it would be productive of endless uncertainty." Buller, J., added the following opinion: "The numerous cases on this subject reflect great discredit on the courts of Westminster. They do infinite mischief in the mercantile world, and this evil can only be remedied by doing what the court wished to do in the case of *Medcalf* v. *Hall*,[1] by considering the reasonableness of time as a question of law, and not of fact. Whether the post goes out this or that day, at what time, etc., are matters of fact; but when those facts are established, it then becomes a question of law on those facts, what notice shall be reasonable." [2] The rule thus laid down seems finally to have been established as a rule of the common law of England,[3]

[1] Trin. Term, 22 Geo. 3, B. R. 3; Doug. 113.

[2] Tindal v. Brown, 1 T. R. 167.

[3] Hirschfield v. Smith, Harr. & Ruth. 284, 288, per Erle, C. J.

and is now codified by statute in England in the Bills of Exchange Act, 1882.[1]

§ 1225. **This View generally adopted in America.** — This view has been established by the best judicial opinion in this country.[2] It may be formulated in the statement that the question of due diligence in giving notice of protest to the drawer of a bill of exchange, is, for commercial reasons, *a question of law, where the facts are undisputed*.[3] The meaning is that, upon a given state of facts the court may rule conclusively that the notice was insufficient.[4] It is a mere variation in the expression of this rule to say that the *sufficiency* of demand and notice of non-payment, to charge the indorser of a promissory note or the drawer of a bill of exchange, is a question of law for the court,[5] or to say that it is error to submit to a jury the question whether the protest of a dishonored negotiable instrument, and notice to the drawer or indorser, were *regular* or *legal*.[6] As the facts will not be specially found except in those jurisdictions where special verdicts are in practice, or where special interrogatories are submitted to juries, it will, under the operation of this rule, be the office of the court to instruct the jury that certain facts in evidence do or do not, in law, amount to sufficient notice of non-payment to charge the indorser; [7] and the cases are very numerous where,

[1] 45 and 46 Vict., chap. 61, § 49, subsec. 12.

[2] Brenzer *v.* Weightman, 7 Watts & S. (Pa.) 264; Bank of Columbia *v.* Lawrence, 1 Pet. (U. S.) 578, 583; Sanderson *v.* Reinstadler, 31 Mo. 483; Stanley *v.* Bank of Mobile, 23 Ala. 652, 657; Ricketts *v.* Pendleton, 14 Md. 321 330. "The sufficiency of service [of notice to charge an indorser], upon facts shown, is a question of law; and any rule which leaves it indefinite must always leave parties in doubt concerning their legal rights and liabilities." Nevins *v.* Bank of Lansingburg, 10 Mich. 547, 550, 551, per Campbell, J.

[3] Carroll *v.* Upton, 3 N. Y. 272. Compare Hunt *v.* Maybee, 7 N. Y. 266.

[4] Etting *v.* Schulkill Bank, 2 Pa. St. 355; Sherer *v.* Easton Bank, 33 Pa. St. 134, 141.

[5] Ricketts *v.* Pendleton, 14 Md. 321, 330.

[6] Watson *v.* Tarpley, 18 How. (U. S.) 517. See also Bank of Columbia *v.* Lawrence, 1 Pet. (U. S.) 578; Dickins *v.* Beale, 10 *Id.* 572; Rhett *v.* Poe, 2 How. (U. S.) 457; Camden *v.* Doremus, 3 *Id.* 515; Harris *v.* Robinson, 4 *Id.* 336; Lambert *v.* Ghiselin, 9 *Id.* 552; and see the English decisions cited in Rhett *v.* Poe, *supra*.

[7] Sherer *v.* Easton Bank, *supra*.

upon conceded facts or upon hypothetical instructions, the courts have decided this question as one of law. It was well said that "any rule adopted must be in some respects an arbitrary one," and the courts proceed upon the idea that it is better to apply an uniform rule in commercial transactions, than to leave each case to the shifting discretion of juries.[1]

§ 1226. No Reversal if the Jury Decide it Rightly. — But, on a principle already stated,[2] no prejudicial error will accrue to the indorser from leaving this question to the jury, where they decide it rightly. It was so held, where it was shown that a notice, accompanied by a protest of a note for non-payment, was left at the office of an indorser, who was an attorney at law and who kept no clerk, in the afternoon of the day on which, by law, it was required to be given. Here the *law presumed* that the indorser received the notice, and it was hence sufficient to charge him as matter of law; and the decision of the jury that it did so charge him was therefore correct in point of law, and the intermediate steps by which that decision was reached became immaterial. It was a case of error without injury, which does not authorize a reversal.[3]

§ 1227. This Rule, how applied in England. — In the application of this rule, to state the English cases as they have been collected and stated by the late Judge Taylor in his work on evidence, [4] the *reasonable time* within which such notice must be given means, "according as the parties live in the same or in different places, either that the letter containing notice should be so posted that, in due course of delivery, it would arrive on the day following that on which the writer has received intelligence of dishonor;[5] or that such letter should be posted before the departure of the mail on the day following receipt of intelligence;[6] or, if there be no post on that day,[7] or if it start at an unreasonable hour in

[1] Townsend *v.* Lorain Bank, 2 Oh. St. 345; Dale *v.* Golds, 5 Barb. (N. Y.) 490; Reamer *v.* Downer, 23 Wend. (N. Y.) 626; Brenzer *v.* Wightman, 7 Watts & S. (Pa.) 266; Bank of Columbia *v.* Lawrence, 1 Pet. (U. S.) 583.

[2] *Ante*, § 1020.

[3] Stanley *v.* Bank of Mobile, 26 Ala. 652.

[4] 1 Tayl Ev. (8th Eng. ed.) § 30.

[5] Stocken *v.* Collin, 7 Mees. & W. 515; Smith *v.* Mullett, 2 Camp. 208, per Lord Ellenborough; Hilton *v.* Fairclough, *Id.* 633, per Lawrence, J.; Rowe *v.* Tipper, 13 Com. Bench, 249, 256, per Maule, J.

[6] Williams *v.* Smith, 2 Barn. & Ald. 496. Compare Shelton *v.* Braithwaite, 7 Mees. & W. 436.

[7] Geill *v.* Jeremy, Mood. & M. 61, per Lord Tenterden.

the morning,[1] — then the writer shall have an additional day. If, too, the bill be presented through a banker, one day more is allowed for giving notice of dishonor, than if it were presented by the party himself.[2] At one time a doubt seems to have been entertained whether, in the event of there being several indorsers to a bill, the holder would have a separate day allowed him for giving notice to each; but it is now expressly decided that he has in general but one day to give notice to all the parties against whom he intends to enforce his remedy, though each of the indorsers in turn has *his* day,[3] and though the holder may avail himself of a notice duly given by any other party to the bill.[4] Again, the holder of a cheque, or of a bill or note payable on demand, must, in general, present the instrument for payment on or before the day following that on which it was received.[5] But, in these cases, the term 'reasonable time' may sometimes receive a different construction, regard being had to the nature of the instrument, the usage of trade, and the particular facts.[6] This last rule applies, not only as between the parties to a cheque,[7] but as between banker and customer, unless circumstances exist from which a contract or duty on the part of the banker to present at an earlier, or to defer presentation to a later period, can be inferred."[8] But the rule does not apply to cases where the action is brought by the holder of a banker's cheque against the drawer, unless, during the delay, the fund has been lost, as by the failure of the banker,[9] — the rule being that, as between the drawer of a cheque and

[1] Hawkes *v.* Salter, 4 Bing. 715; *s. c.* 1 Moore & P. 750; Bray *v.* Hadwen, 5 Maule & S. 68; Wright *v.* Shawcross, 2 Barn. & Ald. 501, note.

[2] Alexander *v.* Burchfield, 7 Man. & G. 1061, 1066; Haynes *v.* Birks, 3 Bos. & P. 599; Scott *v.* Lifford, 9 East, 347; *s. c.* at *nisi prius*, 1 Camp. 246; Langdale *v.* Trimmer, 15 East, 291. See also the recent English statute, 45 and 46 Vict., chap. 61, sec. 49, sub-sec. 13.

[3] Rowe *v.* Tipper, 13 Com. Bench, 249; Dobree *v.* Eastwood, 3 Car. & P. 250. See, however, Gladwell *v.* Turner, 39 L. J. Exch. 31; *s. c.* L. R. 5 Exch. 59.

[4] Chapman *v.* Keane, 3 Ad & El. 193; *s. c.* 4 Nev. & M. 607.

[5] Rickford *v.* Ridge, 2 Camp. 537; Boddington *v.* Schlencker, 4 Barn. & Ad. 752; Moule *v.* Brown, 4 Bing. N. C. 266. See Bailey *v.* Bodenham, 16 Com. B. (N. S.) 288; *s. c.* 33 L. J. (C. P.) 252.

[6] Statute 45 & 46 Vict., chap. 61, § 45, sub-sec. 2; § 74, sub-sec. 2; § 86, sub-sec. 2.

[7] Hopkins *v.* Ware, L. R. 4 Exch. 268.

[8] Hare *v.* Henty, 30 L. J. (C. P.) 302; *s. c.* 10 Com. Bench (N. S.), 65. See Prideaux *v.* Criddle, L. R. 4 Q. B. 455; *s. c.* 38 L. J. (Q. B.) 232; *s. c.*, 10 Best & Sm. 515.

[9] Robinson *v.* Hawksford, 9 Ad. & El. (N. S.) 52; Serle *v.* Norton, 2 Mood. & Rob. 401; and see note *Id.* 404; Laws *v.* Rand, 27 L. J. (C. P.) 76; *s. c.* 3 Com. Bench (N. S.), 442. See

the holder, any time less than the period of the statute of limitations is unreasonable for presentment for payment, unless some loss is occasioned to the drawer by the delay.

§ 1228. Further Illustrated. — The holder of a bill of exchange, on the day after it became due, called at the office of the drawer, and, on being told that he was engaged, wrote on a scrap of paper and sent to him the following notice: "B.'s acceptance to J., 500 £., due 12th Jan. is unpaid: payment to R. & Co. is requested before 4 o'clock." The clerk of J., who took in the notice, said that "it should be attended to." Upon these facts appearing, the court directed a verdict for the plaintiff against the indorser, reserving leave to the defendant to move to enter a verdict for him. It was held that this direction was right.[1]

§ 1229. Another Illustration. — It has been held error, in an action upon a bill of exchange for non-acceptance and non-payment, to instruct the jury "that the plaintiff was not entitled to recover on the count in the declaration on the protest of the bill for non-acceptance, unless due and regular notice was proved of the protest of the bill for non-payment, though the jury might be satisfied from the proof, that the bill had been regularly protested for non-acceptance, and due notice thereof given to the defendant; that, to entitle the plaintiff to recover, notwithstanding the proof of protest for non-acceptance and due notice

also Alexander *v.* Burchfield, 7 Man. & Gr. 1061; Heywood *v.* Pickering, L. R. 9 Q. B. 428; *s. c.* 43 L. J. (Q. B.) 145.

[1] Paul *v.* Joel, 3 Hurl. & N. 455, 460; qualifying Solarte *v.* Palmer, 7 Bing. 530, and following Bailey *v.* Porter, 14 Mees. & W. 440, an authority in point. The peculiarity of this decision is that, while the question was *decided* as a question of law, it was held by the judges proper to leave it to the jury. Chief Baron Pollock said: "It would have been proper to leave it to the jury to consider whether, under all the circumstances, the defendant had not reasonable information that the bill had been presented and dishonored, and that he was called upon to pay it." *Ibid.*, 460. Mr. Baron Martin concluded his opinion by saying: "It is said that is a question for a jury." *Ibid.*, 461. Baron Bramwell concluded his opinion by saying: "I hold, therefore, that, in this particular case, there was evidence for a jury, according to the law as laid down in Solarte *v.* Palmer (5 Moore & P. 475; 7 Bing. 540), that the notice so given conveyed an intimation that the bill had been presented and was dishonored. And I am prepared to go further, and say that in every case where the demand of payment is made on a drawer or indorser by the holder of a bill on a proper day, it ought to be left to the jury to say whether, under the circumstances, there was sufficient notice of dishonor." *Ibid.*, 463.

thereof, the plaintiff must prove protest for non-payment and due notice thereof, to the defendant; and that the jury were the judges of the testimony, and could give to the witnesses such credit as they thought them entitled to, looking to all the circumstances of the case."[1]

§ 1230. PRECEDENT OF AN INSTRUCTION ON THIS POINT. — "If the jury find from the evidence that the notice of protest and non-payment of the note in question was left by the notary on a desk in a second story of the building occupied by defendant Boernstein, and that the business office of said defendant was in the third story of said building, then the jury ought to find a verdict for said defendant Boernstein, unless they further find from the evidence that defendant actually received said notice.[2] - - - - Unless the jury find from the evidence that notice of the non-payment of the note in question was delivered to the defendant Boernstein personally, or to some person in his employ, at his usual place of business, within a reasonable time after the same note became due, then they will find for the said defendant Boernstein."[3]

§ 1231. ANOTHER PRECEDENT: INDORSER COMPETENT TO GIVE NOTICE TO PRIOR INDORSER. — "That an indorser of a promissory note is a competent person to give notice to any prior indorser of a demand, and the dishonor of payment of a promissory note."[4]

§ 1232. ANOTHER PRECEDENT: VARIANCE IN DESCRIPTION IN NOTICE OF DISHONOR. — "In the notice of dishonor of a promissory note, an unintentional variance in the description of the note will not vitiate the notice, if, under all the circumstances of the case, the notice is not misleading and identifies the note with reasonable certainty."[5]

§ 1233. Whether the Circumstances of a Particular Case are Sufficient to Dispense with Demand and Notice. — Whether the circumstances of a particular case are sufficient to dispense with demand of payment, and notice to the drawer or indorser of non-payment, is said to be always a *question of law* addressed to the judgment of the court. If the facts on which this question

[1] Watson *v.* Tarpley, 18 How. (U. S.) 517.

[2] Approved in Kleinman *v.* Boernstein, 32 Mo. 314.

[3] *Ibid.*

[4] Townsend *v.* Chas. H. Heer Dry Goods Co., 85 Mo. 503, 508.

[5] Townsend *v.* Chas. H. Heer Dry Goods Co., 85 Mo. 503, 507.

arises be admitted, or are not denied, or are undeniable, then it is said to be exclusively a matter of law, to be pronounced upon by the court; but if the facts be traversed, or the proof be equivocal or contradictory, then it is said that the question should be submitted to the jury upon hypothetical instructions, by which the court declares the inferences of law which arise upon such states of fact as the jury may find.[1]

§ 1234. Effect of Insolvent Inserting the Bill in his Schedule. — Contrary, it would seem, to the foregoing conceptions, it has been held that, where the drawer of a bill of exchange afterwards becomes insolvent, surrenders his property to his creditors under a statute, and inserts the bill in his schedule of assets, this is evidence to go to a jury upon the fact of notice, and the sufficiency of the evidence is a question for them to decide, and is not subject to review or error.[2]

§ 1235. Waiver of Notice to Indorser. — Whether the question whether an indorser has waived his right to notice of the dishonor of the bill, is a question of law or of fact, seems, like many other questions relating to the law of *waiver*,[3] to depend upon the nature of the evidence which is adduced to support the contention that there has been a waiver. In the first place, it is to be observed that the law conclusively ascribes to certain acts, by the indorser of a note or the drawer of a bill, the effect of a waiver of the right to such notice. That a *subsequent promise to pay* the note by an indorser, who has full knowledge of all the facts, amounts to a complete waiver of the want of due notice,

[1] Grear *v.* McDonald, 9 Gill (Md.), 350, 359; following Cathell *v.* Goodwin, 1 Harr. & G. (Md.) 470.

[2] Hyde *v.* Stone, 20 How. (U. S.) 170, 175. In the opinion of the court by Mr. Justice Campbell, it is said: "A plaintiff may prove, by admissions of a defendant, that all the steps necessary to charge him as an indorser or drawer of a bill of exchange have been taken. Proof of a direct or conditional promise to pay after a bill becomes due, or of a partial payment, or of an offer of a composition, or of an acknowledgment of his liability to pay the bill, has been held to be competent evidence to go to a jury, of a regular notice of the dishonor of the bill, and to warrant a jury in presuming that a regular notice had been given. Thornton *v.* Wynn, 12 Wheat. (U. S.) 183; Rogers *v.* Stevens, 2 T. R. 713; Patterson *v.* Beecher, 6 J. B. Moore, 319; Campbell *v.* Webster, 2 Man. G. & Sc. 253; Union Bank *v.* Grimshaw, 15 La. 321. The effect of such evidence in the particular case must be determined by the jury, and their decision cannot be reviewed by an appellate court."

[3] *Post*, § 1435, *et seq.*

is settled as a matter of law.[1] So, of a *subsequent part payment* of the note by the indorser, with knowledge of the precedent facts. While some of the cases assert that it is evidence from which a jury may infer that demand was duly made and notice given, many others declare it to be a waiver of notice itself.[2] So, a *subsequent promise*, with full knowledge of the facts, although not founded on any new consideration, is deemed to hold the indorser to his liability, on the principle of *waiver*.[3] But it must be shown by the plaintiff, affirmatively and clearly, that the drawer or indorser knew, when he made the subsequent promise, that he had not received regular notice. This is a fact to be proved, and it is not to be inferred, from the mere fact of a subsequent promise, that regular notice had been given, or was intended to be waived.[4] So, if the indorser agree to extend the time of payment beyond the maturity of the note, such an agreement amounts to a guaranty that he will hold himself bound at the expiration of that time, and is in law a waiver in advance of his right to notice.[5] So, where the holder of a negotiable note, by an agreement with the maker, and for a valuable consideration, extended the time for its payment, and afterwards indorsed the same to a third person, without giving him notice of the agreement for such extension, it was held that he was liable to the indorsee without demand of payment upon the maker, protest, or notice; since, to hold otherwise would be to allow him, by his secret agreement, to perpetrate a fraud upon the indorsee. In other words, the law, upon such facts, conclusively ascribes a waiver of his right of notice.[6] On the other hand, it has been held that, whether certain *conversations* amounted to a waiver of the right of demand and notice,

[1] Sherer *v.* Easton Bank, 33 Pa. St. 134, 141, per Strong, J.

[2] Levy *v.* Peters, 9 Serg. & R. (Pa.) 125, 128; Reed *v.* Wilkinson, MS., opinion of Mr. Justice Washington at Circuit (cited in Whart. Dig. 87); Vaughan *v.* Fuller, 2 Strange, 1246; Sherer *v.* Easton Bank, 33 Pa. St. 134, 142.

[3] Duryee *v.* Dennison, 5 Johns. (N. Y.) 248; Trimble *v.* Thorne, 16 Johns. (N. Y.) 151; Miller *v.* Hackley, 5 Johns. (N. Y.) 375, 383; Crain *v.* Colwell, 8 Johns. (N. Y.) 384; Agan *v.* McManus, 11 Johns. (N. Y.) 180; Donaldson *v.* Means, 4 Dall. (U. S.) 109; Rogers *v.* Stephens, 2 T. R. 713, Hospes *v.* Alder, 6 East, 16, n.; Lundie *v.* Robertson, 7 East, 231; Anson *v.* Bailey, Bul. N. P. 276; Whittaker *v.* Morris, Esp. Dig. 58; Wilkes *v.* Jacks, Peake N. P. Cas. 203; Porter *v.* Rayworth, 13 East, 417; Haddock *v.* Bury, MS. (cited 7 East, 236). Compare Forster *v.* Jurdison, 11 East, 104.

[4] Trimble *v.* Thorne, 16 Johns. (N. Y.) 152.

[5] Ridgway *v.* Dey, 13 Pa. St. 208, 211.

[6] Williams *v.* Brobst, 10 Watts (Pa.), 111.

is a question of fact for a jury;[1] and it was held proper to refuse to instruct the jury that, if the indorser, after knowing the fact of his discharge from liability by reason of the failure to make demand and give notice, said "that he meant to pay the note, but should take his own time for it, and would not put himself in the power of the bank," rendered him liable to pay the note.[2] Referring to this case, a modern writer of reputation expresses the view that, whether or not distinct words used would amount to a waiver, is a question of law; although he concedes that, if intermixed with others about which the testimony is clear and concurrent, it would make a question of fact for a jury.[3] Contrary to much that is said above, it was held in Massachusetts that the statement by an indorser who had received no notice of non-payment, upon being asked what he was going to do about the note, that "the note will be paid," was not equivalent to a waiver of notice, — the court being of opinion that the expression fell short of a promise by him, either to pay the note or to see it paid.[4]

§ 1236. WHETHER NOTICE OF PROTEST PROBABLY REACHED THE INDORSER. — Although the certificate of notice in a protest of a notary may be so drawn as not to be evidence to charge the indorser, yet it has been held that the court may, under circumstances, instruct the jury that they may connect with it the other evidence on the part of the plaintiff, and that, if they believe from the evidence that the notice was left in such a way that in all probability it reached the defendant, it was sufficient to charge him: "It was for the jury to say, from the whole proof thus taken together, whether the facts would justify the conclusion that the defendant had received the notice left at his office."[5] This holding is based upon a conception which is not supported by the current of authority. The rule established by judicial authority generally is that the fact whether notice was received is immaterial; since it is not a question of actual notice, but a question of diligence in giving notice.[6]

§ **1237. "Second of Exchange, First Unpaid."** — The meaning of these words in a bill of exchange has been held, under

[1] See *ante*, § 1105, *et seq.*

[2] Union Bank *v.* Magruder, 7 Peters (U. S.), 287, 290.

[3] 2 Dan. Neg. Instr., § 1100.

[4] Creamer *v.* Perry, 17 Pick. (Mass.) 332, 335.

[5] Stanley *v.* Bank of Mobile, 23 Ala. 652, 657. Compare Rives *v.* Parmley, 18 Ala. 261; Caster *v.* Thomason, 19 Ala. 721.

[6] *Ante*, §§ 1223-1225.

certain circumstances, a question of law for the court, and not of fact for the jury.[1]

§ 1238. Refusal to Pay or Accept. — But the refusal to pay or accept commercial paper is, of course, a question of fact; and, where this is in doubt or dispute, the court errs in giving an instruction which assumes that there was such a refusal.[2]

§ 1239. Whether the Holder took it in Good Faith and without Notice of Prior Equities. — On grounds of public policy, with the view of protecting those who deal in commercial paper and of upholding the character of these instruments of commerce, the courts in England and in this country have, after some conflicting decisions, united in the conclusion that, whoever purchases a negotiable security from the holder before maturity, gets a good title thereto, discharged of any equities which may have existed between the original parties to the instrument, in the absence of knowledge on the part of the purchaser of circumstances affecting the title of the holder, provided the purchaser acts in good faith. It is not sufficient to destroy his title that there were circumstances sufficient to put a prudent man upon inquiry, or that he may have been negligent in failing to avail himself of his means of knowledge. The test of his liability is not negligence or diligence, but it is good faith or bad faith; although the fact of negligence may, under circumstances, be regarded as evidence tending to show bad faith.[3] It is obvious that, in cases which call for the application of this rule, the question whether the purchaser of the paper had notice of prior equities will, if the evidence is conflicting, be a question of fact

[1] Bank of Pittsburg *v.* Neal, 22 How. (U. S.) 96, 108. Compare Andrews *v.* Pond, 13 Pet. (U. S.) 5; Fowler *v.* Brantley, 14 Pet. (U. S.) 318; Goodman *v.* Simonds, 20 How. (U. S.) 343. See *ante*, § 1075, *et seq.*

[2] Brooks *v.* Elgin, 6 Gill & J. (Md.) 254, 259; Weeton *v.* Hodd, 26 Eng. L. & Eq. 278.

[3] Gill *v.* Cubit, 3 Barn. & Cres. 466; *s. c.* 10 Eng. C. L. 154; Goodman *v.* Harvey, 4 Ad. & El. 870; Swift *v.* Tyson, 16 Pet. (U. S.) 1; Goodman *v.* Simonds, 20 How. (U. S.) 343; Pringle *v.* Phillips, 5 Sandf. S. C. (N. Y.) 157 (where the decisions are ably reviewed); Hamilton *v.* Marks, 63 Mo. 178; Edwards *v.* Thomas, 66 Mo. 483; Mason *v.* Bank of Commerce, 16 Mo. App. 275. Compare Roth *v.* Colvin, 32 Vt. 125.

for the jury; and, upon a principle elsewhere stated, that *fraud*[1] and *intent*[2] are in general questions of fact, it will also follow that the question whether the purchaser acquired title to the paper in good faith, within the meaning of the rule, will generally be a question of fact for the jury. It is said, in a case in Vermont, that "the questions, whether the holder of current negotiable paper has taken it with or without notice of defenses between prior parties, — whether he has exercised good faith in the transaction, or has been guilty of negligence or a want of proper caution, — are always questions of fact to be submitted to and determined by the jury. All the circumstances attending the transaction, the condition of the several other parties, and all other facts that bear upon such an issue, are only evidence for the jury to weigh in deciding it;"[3] and it was held that, in respect of such an inquiry, a *referee* stands in the place of a jury.[4]

§ 1240. WHETHER THE PLAINTIFF HAS ASSIGNED THE NOTE SUED ON TO ANOTHER FOR THE BENEFIT OF HIS CREDITORS. — In an action upon a promissory note, it has been held that an answer averring that plaintiff has assigned the note to another for the benefit of his creditors, raises an issue in the nature of a dilatory plea, which, if found true, would not result even in an abatement of the action, but would furnish ground for an order of court requiring the additional party to be made plaintiff, on pain of a dismissal without prejudice; that the issue thus raised is *triable by the court*, and not by the jury; and that the *onus probandi* is on the party making the objection. It was added that, where no other defense is set up, and the court finds for the plaintiff on such an issue, the court should render judgment on the merits, without the intervention of a jury.[5]

§ **1241. Whether Note an Extension of Time or Collateral Security.** — This question is closely allied to the question of *payment*, which is discussed in a future chapter.[6] Where a new note is given to the holder of an old note part due, upon which an

[1] *Post*, § 1933, *et seq.*
[2] *Post*, § 1333, *et seq.*
[3] Roth *v.* Colvin, 32 Vt. 125, 133.
[4] *Ibid.*
[5] Vanbuskirk *v.* Levy, 3 Met. (Ky.) 133. Compare, as to the nature of such a defense, Carpenter *v.* Miles, 17 B. Mon. (Ky.) 602.
[6] See especially §§ 1254, 1255, 1257.

indorser or *surety* is liable, the question may arise whether the giving of the new note operated to extend the time of payment of the debt, and thereby to *discharge the indorser or surety;* and it has been held that the question should be submitted to a jury, to determine whether there was an agreement to extend the time of payment on the dishonored note, or whether the new note was given and received as *collateral security* to the old one.[1] The importance of the rule is found in the other rule of law that the receipt of a bill or note having a time to run, from the party primarily liable on a bill or note then overdue, does not discharge an indorser on the bill or note overdue, unless there is an agreement, express or implied, that the new bill or draft is in payment of the former, or an extension of the time of payment of the former, in favor of some party who is liable thereon prior to such indorser.[2] Where it has been expressly agreed that the new note is received as collateral security to the overdue note, the right of immediate action upon the overdue note is not suspended, and the indorser or surety is not discharged.[3]

§ **1242. Whether Notes are Renewals of Former Notes.** — Where it was claimed that certain notes were *renewals* of former notes, and those again of others, in a *continuous series*, all for the same debt, it was held proper to submit the question to the jury as a *question of fact.* And it was held that the question was, whether or not they were renewals, and not what the parties *intended* or *considered.* A *renewal* was *defined* in the instructions, approved on appeal, to be "a new security given for a debt due, or falling due, — in fact, substituting one security for another, whether it is the same debt or not;" and the court added: "If the securities now held, are the notes or securities given for the same debt, they are renewals;" and it was held that this was a correct and comprehensive view of the law.[4]

[1] Taylor *v.* Allen, 36 Barb. (N. Y.) 294.

[2] Taylor *v.* Allen, *supra.*

[3] Myers *v.* Welles, 5 Hill (N. Y.), 463; Fellows *v.* Prentiss, 3 Denio (N. Y.), 512; Hart *v.* Hudson, 6 Duer (N. Y.), 294; Huffman *v.* Hulbert, 13 Wend. (N. Y.) 375; McLane *v.* Lafayette Bank, 3 McLean (U. S.), 589.

[4] Appeal of the Bank of Commerce, 44 Pa. St. 423, 430.

§ 1243. How the Jury Instructed in such a Case. — In such a case the following instruction was given to the jury, and was held as liberal as the plaintiffs could desire: "That it is not necessary, in order to one note being a renewal of a former one, that it should be of the same amount, or time to run, or made or indorsed by the same parties; nor that the note given in renewal should be given, or bear date upon the day of the maturity of the former note; and that it need not appear that the identical proceeds of the new note were actually applied to take up the note for which it was a renewal. That a new note may be a renewal of a former one, although the new note passes through the regular course of discount in a bank; in other words, that, because a note is discounted, it does not necessarily follow that it is not a renewal of a former note; and that, if the jury believe that the several series of notes testified to by William H. Maurice, formed one continuous transaction in the loan of money by the bank to Maurice, of which loan the notes in question are the evidence, the verdict must be for the plaintiffs, notwithstanding any new note, in any one or more of the series, may have been discounted prior or subsequent to the maturity of the preceding note. You are to determine whether the notes now held are securities for the same debt." [1]

§ 1244. Instruction as to the Effect of an Indorsement in Blank in an Action by the Assignee. — "The jury are instructed that, where a note has been indorsed in blank, the holder of the same may fill the blank with the name of the indorsee; that the indorsement of the note is said to be in blank when the name of the indorser is simply written on the back of the note, leaving a blank over it for the insertion of the name of the indorsee, or of any subsequent holder; and that in such a case, while the indorsement continues blank, the note may be passed by mere delivery, and the indorsee or other holder is understood to have full authority personally to demand payment of it, or make it payable, at his pleasure, to himself or to another person." [2]

§ 1245. Instruction as to Duty of Indorsee of Check to make Effort to Collect Same before Suing Drawer. — "Unless the jury believe from the evidence that the plaintiffs, when they became the indorsees of the check in the declaration mentioned, used due diligence to collect the same by presentation for payment at the bank, and if

[1] Appeal of the Bank of Commerce, 44 Pa. St. 423, 430.

[2] Approved in Palmer *v.* Marshall, 60 Ill. 292.

dishonored, gave immediate notice thereof to the defendant, then they will find for the defendant; and the fact that the effects of the bank were removed from the banking house, at the time they obtained the check, would not excuse them from the duty of presentation of the check for payment, nor from giving notice of its dishonor, unless it was notoriously known that the effects had been removed; then such presentation was not necessary.[1]

[1] Approved in Ford *v.* McClung, 5 W. Va. 158.

CHAPTER XL

PAYMENT: ACCORD AND SATISFACTION.

SECTION

1250. Accord and Satisfaction a Question of Fact.
1251. Payment a Question of Fact.
1252. View that it is a mixed Question of Law and Fact.
1253. View that it is a Question of Law.
1254. Purpose for which a Note is Delivered and Accepted.
1255. Payment or Purchase of a Note.
1256. Character in which a Person to whom Money is Paid Receives and Holds it.
1257. Order Delivered as Payment or for Collection.
1258. As between Landlord and Tenant.
1259. Another Illustration.
1260. What will repel the Presumption of Payment from Lapse of Time.
1261. Whether a Payment was Voluntary.
1262. Instruction as to Conditional Payment of Debt by Draft, in Action to Recover for Goods sold, on Account of which Sale Draft was Given.
1263. Precedent of an Instruction as to Payment of a Bond in an Action thereon.

§ 1250. Accord and Satisfaction a Question of Fact. — To constitute an accord and satisfaction, that which is received by the creditor must be accepted by him in satisfaction; he must *intend* to accept it as a satisfaction. Whether there was such an acceptance is a question of fact for a jury;[1] and the conclusion reached by the jury in such a case, upon conflicting testimony, sustained in the trial court, will not be disturbed in an appellate tribunal.[2]

[1] Frick *v.* Algeier, 87 Ind. 255; Hardman *v.* Bellhouse, 9 Mees. & W. 596; Hall *v.* Flockton, 16 Ad. & El. (N. S.) 1039; Jones *v.* Johnson, 3 Watts & S. (Pa.) 276; Hart *v.* Baller, 15 Serg & R. (Pa.) 162; Brenner *v.* Herr, 8 Pa. St. 106; Stone *v.* Miller, 16 Pa. St. 450; Hearn *v.* Kiehl, 38 Pa. St. 147; State Bank *v.* Littlejohn, 1 Dev. & B. (N. C.) 563; Maze *v.* Miller, 1 Wash. (U. S.) 328; Western Union Tel. Co. *v.* Buchanan, 35 Ind. 429, 442; *s. c.* 9 Am. Rep. 744.

[2] Frick *v.* Algeier, 87 Ind. 255.

§ **1251. Payment a Question of Fact.** — Whether a debt has or has not been paid, is generally a question of fact for the jury,[1] since it is generally a question of *intent*.[2] Thus, whether a judgment entered by a wife against her husband has been paid, is a question of fact for the jury, although the wife died seven years afterwards, her estate was not administered upon, and a *scire facias* to sue out execution was not issued on the judgment until twelve years after the death of the wife.[3] Where a debt is to be paid in kind — as for instance, rent in cotton — and the debtor becomes liable to the creditor *on another account*, and goods of the particular kind are delivered by the debtor to the creditor, it will be a question for a jury to determine to which debt it was intended by the parties that it should be applied.[4]

§ **1252. View that it is a Mixed Question of Law and Fact.** — Payment has been said to be a mixed question of law and fact. Accordingly, it is not proper for the court to submit such a question to the determination of a jury, in a case in equity.[5] But a sounder view is that, upon a *feigned issue* to ascertain whether a judgment has been paid or not, the question of payment is exclusively for the jury.[6]

§ **1253. View that it is a Question of Law.** — All this has been regarded as compatible with the idea that it is competent for the judge to say, as a matter of law, whether a given state of evidence, assuming it to be true, amounts to proof of payment; the rule being that the legal sufficiency of the evidence, in other words, the conclusion of law to be drawn from the evidence, is, in general, a question for the court.[7] It has therefore been held proper for the court to decline to instruct the jury that, if they

[1] Barnes *v.* Brown, 69 N. C. 439; Germania Ins. Co. *v.* Davenport (Pa.), 9 Atl. Rep. 517; Union Bank *v.* Smizer, 1 Sneed (Tenn.), 501.

[2] *Post*, § 1333.

[3] Hess *v.* Frankenfield, 106 Pa. St. 440.

[4] Phillips *v.* McGuire, 73 Ga. 517. Compare Pritchard *v.* Comer, 71 Ga. 18.

[5] Adams *v.* Helm, 55 Mo. 468.

[6] Horner *v.* Hower, 49 Pa. St. 475.

[7] Frost *v.* Martin, 29 N. H. 307; *post*, § 2242, *et seq.*

believe that a payment, which the evidence shows to have been made, was not in law a payment of the note, etc., the plaintiff might recover.[1] But the only ground on which this instruction could have been properly refused was, that it was not aptly framed, so as to bring the question to the minds of the jurors. There is no *rule of law* as to what is or what is not payment. Payment is simply the doing of what a man has agreed to do. It is, therefore, a pure question of fact; and where a man has agreed to pay, and tenders what he understands to be performance of his agreement, and the other party accepts it, it is a naked question of fact and intent, whether it was accepted as performance. In every such case the ultimate point of inquiry does not touch a rule of law, but stops at a conclusion of fact.

§ 1254. Purpose for which a Note is Delivered and Accepted. — This has been held necessarily a question of fact for a jury.[2] It has been held, under circumstances, that, whether a note was given and accepted in *satisfaction* of a judgment, that is, in absolute payment of it, or was merely given for the purpose of fixing the amount due and as an additional or *collateral security*, is a *question of fact* for a jury.[3] So, it has been held that the question whether a note, given for the settlement of a suit against a third person, is an extinguishment of the original claim, or collateral to it, is a question of fact.[4] The taking of a note of an individual partner for a partnership debt, where it is agreed to be taken as payment, extinguishes the *partnership debt;* and the question whether the note is taken in payment of the debt, or as collateral security only, is, in an action of *assumpsit* against the partnership, a question of fact for the jury.[5] Under circumstances, it has been held a question of fact whether a sum of money was paid in satisfaction and discharge *pro tanto* of a note, to take immediate effect as payment, or was merely advanced to and deposited with the party by way of security, to be applied in payment of the note, only in case the whole amount

[1] *Ibid.*
[2] Sellers *v.* Jones, 22 Pa. St. 423.
[3] Schilling *v.* Durst, 42 Pa. St. 126.
[4] Wilson *v.* Hanson, 20 N. H. 375.
[5] Bonnell *v.* Chamberlin, 26 Conn. 487.

of the debt should not be obtained out of the property, by a mortgage by which the note was secured, — the question depending upon the intention of the parties.[1] And, in general, it may be said that the question whether a note or bond is given and accepted in satisfaction of the original debt, is for the jury; and it is error for the court to decide it as a matter of law.[2] This is merely a branch of the rule that, when a matter is to be determined according to the *intention* of parties, it is for the jury to determine what their intention was.[3] So, where a person is indebted to a bank, and gives his promissory notes for the amount of the debt, the mere acceptance of the notes by the bank will not necessarily operate as a satisfaction of the debt; and whether or not there was an agreement at the time to receive them in satisfaction, or whether the circumstances attending the transaction warranted such an inference, are questions of fact for a jury.[4] So, where a firm, consisting of three persons, was sued upon an account, for which it appeared that two of the firm had executed to the plaintiff their note, and the suit was dismissed as to these two, and stood against the third partner alone, — it was held that it was a question of fact for the jury whether the note of the other two was received by the plaintiff in extinguishment and satisfaction of the debt of the three. If it were, the third partner would be discharged from the debt; otherwise not.[5] So, payment and satisfaction of an account or a note may be made by the delivery an acceptance of an account against a stranger; and the question whether payment was intended is a question of fact for the jury.[6] Proof of the acceptance of a promissory note or bill of a third person, if it appear to be the voluntary act and choice of the creditor, and not a measure forced upon him by necessity, when nothing else could be obtained, will support a defense of pay-

[1] Dean *v.* Toppin, 130 Mass. 517.

[2] Stone *v.* Miller, 16 Pa. St. 450, 456; Jones *v.* Johnston, 3 Watts & S. (Pa.), 276; Wallace *v.* Fairman, 4 Watts (Pa.), 379; Hart *v.* Boller, 15 Serg. & R. (Pa.) 162.

[3] *Post*, § 1333, *et seq.*

[4] Lyman *v.* Bank of U. S., 12 How. (U. S.) 225, 243.

[5] Keerl *v.* Bridgers, 10 Smedes & M. (Miss.) 612.

[6] Willard *v.* Germer, 1 Sandf. S. C. (N. Y.) 50.

ment;[1] but whether it will amount to payment is a question of fact for a jury.[2]

§ 1255. Payment or Purchase of a Note. — The question, under many states of fact, will be properly a question for the jury, whether a transaction by which a note passed from one party to another was a purchase of the note by the transferee, such as did not extinguish it, or a payment such as did.[3] It frequently becomes a material inquiry, where a third person takes up a note which has matured in bank or elsewhere, whether he does it in payment of the note or merely to purchase it; and this is a *question of fact*, for a jury, depending upon the *intention* of the holder and the person thus taking it up.[4]

§ 1256. Character in which a Person to whom Money is paid receives and holds it. — The character in which a person to whom money is paid receives it, is a *question of fact*, unless the law annexes a definite character to him under the circumstances, as in the case of a public officer receiving and dealing with public moneys. This seems to have found an illustration in a case in Maine, where money was paid to the person who held the place of agent of a school district, the same being sufficient to pay the school teacher what was due him, provided the school teacher had qualified himself to receive it and had become entitled to it, by obtaining a certificate of his qualification as a teacher, as required by the governing statute. Here it was held that, although the school teacher had performed his duty acceptably, yet it was the pleasure of the town, under the statute, to withhold from him his salary until he had procured the statutory certificate, and that he could not maintain an action against the town therefor; yet if the town elected not to refuse to pay him his wages for this reason, but paid the money to the person who held the place of agent of the district, and it was so received by the latter, it

[1] 2 Greenl. Ev., § 523; Union Bank *v.* Smiser, 1 Sneed (Tenn.), 501, 514.

[2] *Ibid*; Johnson *v.* Weed, 9 Johns. (N. Y.) 310.

[3] Comstock *v.* Savage, 27 Conn. 184.

[4] Runyon *v.* Clark, 4 Jones L. (N. C.) 52. Compare Sherwood *v.* Collier, 3 Dev. L. (N. C.) 380.

would be the property of the instructor, and he might maintain an action against the agent to recover it; and whether the agent received the money of the town for the use of the teacher would be a question of fact rather than of law, — the inquiry being in what character and for what purpose he received it.[1]

§ 1257. Order delivered as Payment or for Collection. — So, it is *for a jury to decide* whether an order on a third person was taken for collection merely, by a creditor of the person by whom it was delivered, or as payment when the amount thereof should be collected. In other words, whether or not such an order was accepted by a creditor from his debtor in satisfaction of the debt and in discharge of his debtor, should be left to the jury.[2]

§ 1258. As between Landlord and Tenant. — A tenant being indebted to his landlord for rent, the agent of the landlord, without the authority or knowledge of the landlord, took a bill of exchange from the tenant for the rent, and paid over the amount of the rent to the landlord in his settlement of account. The bill was afterwards dishonored whilst in the hands of a third party, and the rent was not paid by the tenant, whereupon the landlord distrained. It was held to be a *question for the jury*, whether the bill was discounted for the tenant, or whether the money was loaned to the tenant by the agent, or whether it was advanced by the agent to the landlord; and that if the bill was discounted for, or the money was loaned to the tenant, the landlord was not entitled to distrain; otherwise he was.[3] - - - - So, in another case where, on the rent becoming due, the agent of both tenant and landlord paid the amount of the rent to the landlord, without any authority from either party, and the tenant afterwards failed to pay the rent, and the landlord distrained, — it was a question for the jury whether the payment was made by the agent on behalf of the tenant, or by way of advance to the landlord.[4] - - - - In a case in New York, the lessee of a farm, on the day after $65.00 had become due and payable for an installment of rent, entered into a written contract with his lessor for the surrender of his unexpired term, in consideration of which, and other stipulations, the lessor agreed to pay at a subsequent day, and

[1] Dore *v.* Billings, 26 Me. 56.

[2] Stephens *v.* Thornton, 26 Ill. 323.

[3] Parrott *v.* Anderson, 14 Eng. L. & Eq. 371.

[4] Griffiths *v.* Chichester, 14 Eng. L. & Eq. 372, note.

actually did pay, $550.00. In an action to recover the $65.00 of rent due when this agreement was made, it was held: 1. That the contract did not operate as a release or extinguishment of the rent which had become due. 2. That, from the contract and a receipt thereon indorsed, of the subsequent payment of the $550.00, no legal presumption arose, either that the rent had been previously paid, or that the amount was allowed when the receipt was executed. 3. That these facts were properly *submitted to the jury*, with instructions that it was a question of fact for them to determine whether, considered in connection with all the evidence in the case, they did not warrant a presumption of the payment of the rent.[1]

§ 1259. ANOTHER ILLUSTRATION. — In a suit on a recognizance, in the Orphans' Court of Pennsylvania, by an heir who took one of three purparts at the appraisement, executed in favor of the Commonwealth, for the payment to the other heirs of their proportional shares in the purpart, it was held permissible for the recognizor, the defendant, under a plea of "payment with leave," to show that one of the purparts not taken at the appraisement, was sold by a trustee under order of the Orphans' Court, that all the balance of the proceeds, after payment of the debts of the intestate, was paid to the plaintiff, and that the defendant in the suit never made any objection; and the fact whether or not it was received in payment, depending upon a question of *intent*, should have been *submitted to the jury*.[2]

§ 1260. What will repel the Presumption of payment from Lapse of Time. — It has been held that, what will repel the artificial presumption of payment arising from the lapse of a great length of time, is a *question of law*, and that it is error to submit it to a jury.[3] Contrary to this, and on sounder grounds, it has been held that the question whether the presumption of payment has been repelled, is a *question of fact* for a jury;[4] and the sound rule seems to be that, notwithstanding the legal presumption of payment arising from the lapse of time, the question of payment remains a pure question of fact for the jury, and any evidence

[1] Sperry *v.* Miller, 16 N. Y. 407.
[2] Kidd *v.* Com., 16 Pa. St. 426.
[3] Woodbury *v.* Taylor, 3 Jones L. (N. C.) 504.
[4] Grantham *v.* Canaan, 38 N. H. 268; McQuesney *v.* Heister, 33 Pa. St. 435; Joy *v.* Adams, 26 Me. 330, 333.

tending to satisfy them that no payment has actually been made, is competent and admissible.[1] This is in accordance with what is said by Dr. Greenleaf: "In all these cases, the presumption of payment may be repelled by any evidence of the situation of the parties, or other circumstance, tending to satisfy the jury that the debt is still due."[2] There is possibly room for a distinction, in respect of this question, between the presumption of payment which the jury are authorized to draw from a great lapse of time less than *twenty years*, and the presumption which the law draws where the lapse of time is greater than twenty years. In the North Carolina case first cited, the lapse of time was less than twenty years, but a statute of that State had cut down the time which raises this protection against stale demands, from twenty to ten years, and the demand had been in existence for more than that length of time.[3] In a case in Pennsylvania, more than twenty years had elapsed since the creation of the obligation. It was held that, whether the facts were sufficient to rebut the presumption was a question for the court and not for the jury. "The presumption," said Strong, J., "is one drawn by the law itself from a given state of facts, and whether it exists or not, is necessarily *for the court*."[4]

§ **1261. Whether a Payment was Voluntary.** —Where a party sues to recover money which he has paid to a sheriff under execution, and the state of the case is such that he can recover it back if it was paid under compulsion, but not if it was paid voluntarily, the question whether the payment was voluntary will, of course, be a question of fact *for the jury*.[5]

§ 1262. Precedent of an Instruction as to Conditional Payment of Debt by Draft, in Action to recover for Goods Sold, on Account of which Sale, Draft was Given. — "If the jury believe from

[1] Grantham *v.* Canaan, 38 N. H. 268.

[2] 1 Greenl. Ev., § 39. See also Cowan & Hill's important note to 1 Phil. Ev., p. 676, note 193, where many cases are collected.

[3] Woodbury *v.* Taylor, 3 Jones L. (N. C.) 504.

[4] Reed *v.* Reed, 46 Pa. St. 239, 243. The learned judge cited Delany *v.* Robinson, 2 Whart. (Pa.) 503, as an authority for the proposition.

[5] Ewing *v.* Peck, 26 Ala. 413.

the evidence, that the plaintiff sold to the defendant corn, they will find for the plaintiff, unless they believe further, from the evidence, that the defendant was paid for the same.[1] - - - - If the jury believe from the evidence, that the defendant gave a draft or drafts to the plaintiff, or to any one for him, in part or full payment for said corn, and that said draft or drafts were accepted by the plaintiff upon the condition that he could use it or them to pay his debts, then they will find for plaintiff, unless they believe the plaintiff did or could have used said draft or drafts in the payment of his debts; if they further believe that said draft or drafts have been returned or offered to be returned to defendant, and that plaintiff did not receive any money on such draft or drafts." [2]

§ 1263. PRECEDENT OF AN INSTRUCTION AS TO PAYMENT OF A BOND IN AN ACTION THEREON. — "If the jury believe from the evidence, that the plaintiff and defendant accounted together as to the indebtedness, evidenced by the bond sued on, and so accounted freely and without concealment or fraud by either, and that, as a result, the bond was so paid and discharged as that the defendant was then entitled to said bond, — then it is not material to inquire into the consideration so paid and accepted in the discharge thereof; but if they believe from the evidence, that the transaction was not so executed, final and conclusive, that the defendant was then and there entitled of right to said bond, then all pretended payments claimed which are shown to have been paid in Confederate money, or other illegal or unlawful currency, are null and void, and should be totally disregarded by the jury." [3]

[1] Approved in Hodgen *v.* Latham, 33 Ill. 346.

[2] *Ibid.*

[3] Approved in Washington *v.* Burnett, 4 W. Va. 85.

CHAPTER XLI.

STATUTE OF LIMITATIONS: BANKRUPTCY: NEW PROMISE AND PART PAYMENT TO REVIVE BARRED DEBT.

SECTION

1267. Promise to revive Debt Discharged by Bankruptcy.
1268. Promise to revive Debt Barred by Limitation.
1269. Submitted to Jury on what Evidence.
1270. What Indebtedness the New Promise refers to.
1271. Part Payment to take a Debt out of the Statute of Limitations.
1272. Right of Creditor to apply the Payment.
1273. Which Debt Intended.
1274. Instruction as to Revival of Debt Discharged by Bankruptcy.
1275. Defendant's Instruction as to New Promise where Debt is Barred by Statute of Limitations.
1276. A Similar Instruction under a Statute Requiring the Promise to be in Writing.

§ 1267. Promise to revive Debt Discharged by Bankruptcy. — Where an oral promise is relied upon to revive a debt which is discharged by *bankruptcy*, the question whether such a promise is proved will generally be a *question of fact* for the jury;[1] but where the words relied on to take the case out of the statute of limitations amount in law to an express promise, the meaning of the words will not be referred to the jury, but the court may instruct them as to their legal effect,—[2] as where the new promise or acknowledgment is *in writing*, indorsed on the instrument which is the evidence of the precedent indebtedness.[3] In a very elaborate judgment upon this subject in Maryland, the tenth proposition ruled by the court was: "What kind of promise or acknowledgment is sufficient to take a case out of the act of

[1] Bennett *v.* Everett, 3 R. I. 152, 155; United Society *v.* Winkley, 7 Gray (Mass.), 460.

[2] Evans *v.* Carey, 29 Ala. 99.

[3] Beasley *v.* Evans, 35 Miss. 192, 196; Morrell *v.* Frith, 3 Mees. & W. 403. Compare Curzon *v.* Edmondson, 6 Mees. & W. 295, where it was held that whether a writing amounts to an acknowledgment of title within a statute is a question for the judge and not for the jury to decide.

limitations, is for the court to decide; and the evidence offered to prove such promise or acknowledgment is proper to be submitted to the jury, as in other cases, under the direction of the court." [1] A better statement of the rule could not be drawn. It is merely a statement of the general rule in regard to the existence and interpretation of promises, which is that, whether the promise to pay the barred debt was made, is a question of fact for the jury to determine, but what is the construction and effect of the promise, if made, is a question of law to be decided by the court; [2] which means that, where there is any dispute as to the facts which go to prove the making of the new promise, the question must be submitted to the jury, upon hypothetical instructions, framed so as to apply the law to a state of facts which the evidence tends to prove. But where there is no dispute as to the facts, that is, as to the character of the promise and the circumstances under which it was made, and the circumstances are such that different inferences of fact could not fairly be drawn from them, then the court is to declare, as matter of law, whether the promise operated to revive the barred debt.[3]

[1] Oliver *v.* Gray, 1 Harr. & G. (Md.) 204, 219.

[2] Clark *v.* Sigourney, 17 Conn. 511; *ante*, §§ 1105, 1106.

[3] This, somewhat expanded by the author, is the doctrine of Clarke *v.* Dutcher, 9 Cow. (N. Y.) 674, 679; Hancock *v.* Bliss, 7 Wend. (N. Y.) 267, and Miller *v.* Lancaster, 4 Me. 159. Compare Burghaus *v.* Calhoun, 6 Watts (Pa.), 219, where it is laid down that, "to avoid the uncertainty and insensible encroachments on the statute that would ensue, did we attempt to shape our course as to this statute by former decisions, we may require the acknowledgment of the demand, as a debt of legal obligation, to be so distinct and palpable in its extent and form, as to preclude hesitation." It has been said: "This promise [to pay a debt discharged by bankruptcy] need not be to the holder of the debt, but it must refer to the debt without question. No particular form of words need be used to constitute this promise. Any words, or perhaps signs or acts, which signify a present willingness to pay the debt, and which are intended to convey that idea to the hearer, are sufficient The natural import of the words used must be a contract to discharge by payment the moral obligation that remains, whatever the debt discharged by the certificate. A bare acknowledgment of the justness of the debt, of its present existence as a debt formerly contracted and now unpaid, is not sufficient. Such statements as these will remove the bar of the statute of limitations; for from these the law will

§ **1268. Promise to revive Debt Barred by Limitation.** — Whether an instrument purporting to be an acknowledgment of a debt is sufficient to take it out of the bar of the statute of limitations, is a *question for the court;* but whether the debt sued for is the one thus acknowledged, is a *question for the jury.* [1]

§ **1269. Submitted to Jury on what Evidence.** — But every kind of evidence conducing to show a recognition of the claim or claims in suit, as still subsisting, and the debt as one of the debts referred to and spoken of by the defendant in his acknowledgment or promise, should be submitted to the jury.[2] Thus, where two independent claims were held by the plaintiff against the defendant — one on an account, and the other on a

imply a promise to pay. Not so, as relates to the bar of the bankruptcy certificate. The bankrupt must make the promise, and not leave it to the law to imply it. In this sense the promise must be express. It must also be unqualified and unconditional, or else the party seeking to avail himself of it must show the condition performed." Bennett *v.* Everett, 3 R. I. 152, 155. See also Fleming *v.* Lullman, 11 Mo. App. 104; Graham *v.* Hunt, 8 B. Mon. (Ky.) 7; Stewart *v.* Reckless, 24 N. J. L. 427; Field's Estate, 2 Rawle (Pa.), 351, 356; Dusenbury *v.* Hoyt, 53 N. Y. 521; Reith *v.* Lullman, 11 Mo. App. 254; Cambridge Sav. Inst. *v.* Littlefield, 6 Cush. (Mass.) 213; Allen *v.* Ferguson, 18 Wall. (U. S.) 13; Egbert *v.* McMichael, 9 B. Mon. (Ky.) 45; Fleming *v.* Hayne, 1 Stark. 370; Mosely *v.* Caldwell, 59 Tenn. 208; Shockey *v.* Mills, 71 Ind. 288, 292; Randidge *v.* Lyman, 124 Mass. 361; Underwood *v.* Eastman, 18 N. H. 582, 585; Bank *v.* Boykin, 9 Ala. 320, 322; Huckabee *v.* May, 14 Ala. 263; Wynne *v.* Raikes, 5 East, 515; Soulden *v.* Van Rensselaer, 9 Wend. (N. Y.) 297; Besford *v.* Saunders, 2 H. Bl. 116; Edson *v.* Fuller, 22 N. H. 183; Haines *v.* Stauffer, 33 Pa. St. 541; McKinley *v.* O'Keson, 5 Pa. St. 369; Comfort *v.* Eisenbeis, 11 Pa. St. 13; Way *v.* Sperry, 6 Cush. (Mass.) 238; Cogburn *v.* Spence, 15 Ala. 549; Herndon *v.* Givens, 19 Ala. 313.

[1] Mastin *v.* Branham, 86 Mo. 643, 648; Warlick *v.* Peterson, 58 Mo. 408; Dickinson *v.* Lott, 29 Tex. 173, 179; Kimball *v.* Estate of Baxter, 27 Vt. 623, 632; Dorr *v.* Swartwout, 1 Blatchf. (U. S.) 179, 184. Under the Missouri statute (R. S. Mo., § 3248), such an acknowledgment must be in writing and signed by the party making it; and in order to be effective it must be either in the form of an express promise to pay, or of an acknowledgment of an actual, subsisting debt on which the law would imply a promise. Boyd *v.* Hurlbut, 41 Mo. 264; Chambers *v.* Rubey, 47 Mo. 99; Mastin *v.* Branham, *supra.* See, on the subject generally, Smith *v.* Eastman, 3 Cush. (Mass.) 355; Bell *v.* Morrison, 1 Pet. (U. S.) 351, 362.

[2] Cook *v.* Martin, 29 Conn. 63

note, — a statement of which, on a single piece of paper, was presented to the defendant soon after they fell due, and admitted by him as so presented, and, five years afterwards, the defendant made a general acknowledgment of indebtedness to the plaintiff, and promised to pay him what he owed him, and a suit was thereafter brought on the note and account, to which the defendant pleaded the statute of limitations, and in which the plaintiff offered evidence of the new promise, — it was held, that the evidence was not to be rejected on the ground that the promise was too general and indefinite, but that the question of its application was for the jury.[1]

§ 1270. What Indebtedness the New Promise Refers to. — The question what particular indebtedness is referred to by the new promise, is obviously a question of fact for a jury.[2]

§ 1271. Part Payment to take a Debt out of the Statute of Limitations. — The rule under this head seems to be that a part payment which will take a debt out of the operation of the statute of limitations must be made under circumstances such as will warrant a finding, as a question of fact, that the debtor intended to recognize the debt in question as a subsisting debt, and one which he was willing to pay.[3] Therefore, the mere endorsement, by the creditor, of a credit upon the note, without the

[1] Cook *v.* Martin, 29 Conn. 63.

[2] Whitney *v.* Bigelow, 4 Pick. (Mass.) 110, 112; Buckingham *v.* Smith, 23 Conn. 453; Cook *v.* Martin, 29 Conn. 63. In Baillie *v.* Inchiquin, 1 Esp. 435, Lord Kenyon, ruled at *nisi prius*, that, where a debt is established against a defendant who relies on the statute of limitations, if the plaintiff gives any general evidence of acknowledgment, it shall be taken to apply to the debt in question; and that it lies on the defendant to explain the promise so made and to show that it applies to some other demand. Compare Whitney *v.* Bigelow, 4 Pick. (Mass.) 110. Per *contra*, in Buckingham *v.* Smith, 23 Conn. 453, it was ruled that the burden was on the plaintiff to show that the promise related to notes in suit.

[3] Miller *v.* Talcott, 46 Barb. (N. Y.) 168, 172. Compare Bloodgood *v.* Bruen, 8 N. Y. 362; Shoemaker *v.* Benedict, 11 N. Y., 176; Peck *v.* N. Y. &c. Steamship Co., 5 Bosw. (N. Y.) 226. See Bridgeton *v.* Jones, 34 Mo. 411; Callaway Co. Court *v.* Craig, 35 Mo. 395; Block *v.* Dormon, 51 Mo. 31; Vernon Co. *v.* Stewart, 64 Mo. 408; Shannon *v.* Austin, 67 Mo. 485.

privity of the debtor, is not evidence of part payment for this purpose.[1]

§ **1272. Right of Creditor to apply the Payment.** — But this rule is subject to the exception that, where there are several debts having different periods of limitation, and the debtor makes part payments without specifying to which item of indebtedness they are to be applied, the creditor may apply them to any item which he may choose, and the application so made will save the bar of the statute.[2] This conclusion, though sanctioned by many authorities, is not supported by any underlying basis of sense. The theory upon which part payment takes the case out of the statute is, as already seen,[3] that it is a *recognition* by the debtor of the obligatory force of *the particular debt;* but a payment not made with reference to any particular debt is not in fact a recognition of the obligatory force of any particular debt. This rule is a good illustration of the results which are reached by judges when proceeding according to purely technical modes of reasoning — which in many cases are no reasoning at all. This conclusion involves the solecism that, while statutes of limitation are favored by the courts because they are statutes of repose (and this is the doctrine of all courts), yet a creditor may, by his mere volition, keep alive a particular indebtedness, although the debtor may regard it as barred.

§ **1273. Which Debt Intended.** — Where there are two debts, one of which is barred by limitation, and there is a part payment not specifically appropriated by the debtor or creditor, it is a question for the jury whether the payment was made generally on account of what might be due from the debtor at the time, or on a particular account.[4]

[1] Phillips *v.* Mahan, 52 Mo. 197; Loemer *v.* Hang, 20 Mo. App. 163; Goddard *v.* Williamson, 72 Mo. 131.

[2] Jackson *v.* Burke, 1 Dill. C. C. (U. S.) 311; Wills *v.* Fowkes, 5 Bing. N. C. 455; Harrison *v.* Davies, 23 La. Ann. 216; Ramsay *v.* Warner, 97 Mass. 8; Peck *v.* N. Y. &c. Steamship Co., 5 Bosw. (N. Y.) 226; Davis *v.* Amey, 2 Grant Cas. (Pa.) 412; Whipple *v.* Blackington, 97 Mass. 476; Beck *v.* Haas, 30 Mo. App. ; Williams *v.* Griffith, 5 Mees. & W. 300.

[3] *Ante*, § 1271.

[4] Walker *v.* Butler, 6 El. & Bl. 506; *s. c.* 37 Eng. L. & Eq. 13.

§ 1274. Instruction as to Revival of Debt Discharged by Bankruptcy. — "The promise by which a discharged debt is reviewed, must be clear, distinct and unequivocal. There must be an expression by the defendant of a clear intention to bind himself to the payment of the debt. The new promise must be distinct, unambiguous and certain. The expression of an intention to pay the debt is not sufficient. There must be a promise before the debtor is bound. An intention is but the purpose a man forms in his own mind; a promise is an express undertaking or agreement to carry that purpose into effect, and must be express, in contradistinction to a promise implied from an acknowledgment of the justness or existence of the debt." [1]

§ 1275. Defendant's Instruction as to New Promise where Debt is Barred by Statute of Limitations.— "The court instructs the jury that the instrument, dated June 18, 1866, which has been received in evidence, was barred by the statute of limitations before this suit was brought, and no recovery can be had upon the same, unless the defendant, within six years before the bringing of this suit, made a new promise; and the burden of proof of that rests upon the plaintiff, and not upon the defendant. The plaintiff must recover, if at all, upon the preponderance of testimony. If the plaintiff claims the right to recover upon a new promise alleged to have been made by the defendant, and the testimony upon that point is so conflicting that the jury cannot determine whether such a promise was made or not, they must find for the defendant." [2]

§ 1276. A Similar Instruction Under a Statute Requiring the Promise to be in Writing. — "The jury, in order to take the case out of the statute of limitations and entitle the plaintiff to recover, must find from the testimony that the defendant has, within the last ten years before the commencement of this action, made his promise in writing to pay said note, or that he has actually paid some portion of the principal or interest thereon within the time aforesaid." [3]

[1] Approved in Shockey *v.* Mills, 71 Ind. 292; citing Blumenstiel Law and Practice in Bankruptcy, pp. 551, 552; Bump Bankruptcy, (9th ed.) p. 748.

[2] Substantially as approved in Parker *v.* Hawley, 4 Colo. 336.

[3] Approved in Bridgeton *v.* Jones, 34 Mo. 472.

CHAPTER XLII.

INSURANCE.

ARTICLE I. — FIRE INSURANCE.
ARTICLE II. — LIFE AND ACCIDENT INSURANCE.
ARTICLE III. — MARINE INSURANCE.

ARTICLE I. — FIRE INSURANCE.

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§ 1279. Authority of an Insurance Company to do Business. — The question whether a foreign insurance company has authority to do business in the State would ordinarily depend upon the power of the company to exhibit the certificate, or other evidence of authority, required by the statute. Where, however, the company affirmatively assumed proof of the existence of the certificate required by the statute, for several years, but omitted proof of it for a particular year, it was held that it was not error to submit to the jury the question whether it had authority.[1]

§ 1280. Insurable Interest. — In an action on a policy of fire insurance, issued to another party and *assigned* to the plaintiff, it has been held proper to submit to the jury the question whether the plaintiff had an insurable interest in the policy.[2]

§ 1281. Authority of Insurance Agents to Waive Conditions. — Where, in an action on a policy of life insurance, it appeared that, following an application of the insured for a policy, there was a declaration, signed by the applicant, but which was not made a part of the policy, stating that he agreed that the insurance proposed should not be binding until the premium, which was payable partly in cash and partly by note, should be received by the defendants, or their accredited agent, — it was held that *parol evidence* was admissible, for the purpose of showing a waiver of such prepayment, to the effect, that the defendant's agent verbally agreed that the policy of insurance should take effect immediately upon the approval of the applica-

[1] American Ins. Co. *v.* Smith, 19 Mo. App. 627.

[2] Mitchell *v.* Home Ins. Co., 32 Ia. 422, 426.

tion, and that the premium note might be made, and the cash premium paid at some future time, at the convenience of the parties, provided that such agreement was made known to and acquiesced in by the defendants. And where, in such an action, the plaintiff claimed that the defendant's general agent for procuring applications for insurance had authority to make such agreement, which the defendants denied, it was held that, whether or not the agent had such authority was properly *submitted to the jury*.[1] So, where a fire insurance company claimed that their agent, who procured the insurance, was such for certain definite purposes only, and that he had no authority to fill out applications for parties applying for insurance, but it nevertheless appeared that they had recognized him in other policies as their agent, and there was no written evidence of the extent of his authority, it was held proper to submit the question to the jury.[2]

§ 1282. A Series of Instructions on this Subject. — "A principal is liable for the acts of his agent, done within the scope of his employment. A general agent, notwithstanding private instructions, may, within the limits of his agency, bind his principal, unless the person dealing with the agent knew of the instructions. A particular agent (by which is meant one authorized to do one or more special things) binds his principal only so far as he pursues his authority. The rule is, as to the public, that the authority of a general agent may be regarded by them as measured by the usual extent of his general employment; but as to acts of particular or special agents, the rule is different; a principal may well say to one who dealt with an agent for a particular purpose (special agent): 'It was your business first to ascertain for yourself the character and extent of his agency.' - - - - By accepting the policy sued on, plaintiffs are bound to know of the terms and restrictions therein contained. - - - - The nature and extent or limitations on the authority of McKinney (the agent), you are to find, from all the evidence before you, taken together and carefully compared. If, from the evidence, you are satisfied that he (McKinney) had the authority to act as the general agent of the de-

[1] Sheldon *v.* Connecticut M. F. Ins. Co., 25 Conn. 207. Compare Plumb *v.* Cattaraugus &c. Co., 18 N. Y. 392; Rowley *v.* Empire Ins. Co., 36 N. Y. 550.

[2] Hough *v.* City Fire Ins. Co., 29 Conn. 10.

fendant company, and that, within the scope of such agency, he was authorized to receive notice of additional insurance in other companies, and did, in fact, receive such notice, then such notice was notice to the defendant. - - - - If, from the evidence, you find that McKinney's agency was only to procure risks and take premiums, and then deliver policies, his agency would, in that event, be a particular, as contradistinguished from a general, agency; and, in that case, his authority would not extend to waiving any of the terms of the policy. - - - - It is the duty of a holder of a policy of insurance to inform the company or its agent of any change of the status of the thing or risk; in like manner, it is his duty, within a reasonable time, to duly notify the company in which the first policy was taken out, of any additional security by additional insurance, in order that said company may inquire into the solvency and standing of the companies, which, in case of loss, must share such loss. - - - - Where it is in evidence that the insured obtained further insurance in other companies, contrary to the stipulations of policy sued on, such policy is vitiated. - - - - By the terms of the policy sued on, consent in writing on the policy itself is requisite; but if such consent in writing were in fact given by the defendant company, or by some agent who had the authority to give such written consent, and if plaintiffs, after obtaining additional insurance in other companies, they having previously notified the agent who, according to the terms of his agency, was charged with the duty of receiving such notice, — then such written consent is binding upon the company; but the burden of proof is upon plaintiffs, and plaintiffs must satisfy the jury by proof that McKinney did give the written consent, after he was informed of the amount of additional insurance, and the company in which such additional insurance was so obtained; and furthermore, plaintiffs must prove that McKinney had the authority to give such consent. No presumption of such authority arises, but such an authority must be proved by plaintiffs." [1]

§ 1283. Statements in Application Construed by the Court. The answers to questions in the application for a policy of fire insurance are to be interpreted by the court, in conformity with the general principle that the interpretation of written instruments belongs to the court, and not to the jury. So held, where the answers to a question as to the "relative situation of other

[1] Approved in Ins. Co. *v.* Lyons, 38 Texas, 256, 257, 258.

buildings" specified two buildings "with fifty feet." It was held that this meant *within* fifty feet, and that the answer was sufficient, although one of the specified buildings was within two feet.[1]

§ 1284. Materiality of Misrepresentation or Concealment is for Jury. — Whether a misrepresentation or concealment by the assured, in a policy of fire insurance, of the true nature and extent of his interest in the property insured, or any other fact upon which information is required by the underwriter prior to issuing the policy, will avoid the policy, depends upon its materiality in respect of the risk undertaken; and, according to the weight of authority, this question of materiality is for the jury.[2] On the contrary, it has been recently ruled in Massachusetts that, if a contract of insurance is sought to be avoided on the ground that it was induced by false and fraudulent representations, the question of the materiality of the representations is for the court, and not for the jury.[3] This is simply an application of the rule that the construction of an oral, as well as of a written contract, is for the court where the terms of the contract are established.[4] This, it is reasoned, is quite distinct from the question whether facts concealed or misrepresented increase the risk,

[1] Allen *v.* Charleston Mutual Fire Ins. Co., 5 Gray (Mass.), 384.

[2] Mutual Insurance Co. *v.* Deale, 18 Md. 27, 50; Franklin Ins. Co. *v.* Coates, 14 Md. 285, 298; 2 Duer on Ins. 889, § 31; Clark *v.* Union Mut. Fire Ins. Co., 40 N. H., 333, 338; Boardman *v.* New Hampshire &c. Ins. Co., 20 N. H. 551; Daniels *v.* Hudson River Ins. Co., 12 Cush. (Mass.) 416, 426; Elliott *v.* Hamilton Mut. Ins. Co., 13 Gray (Mass.), 139, 144; Flinn *v.* Headlam, 9 Barn. & Cres. 693; Hull *v.* Cooper, 14 East, 479; Mackay *v.* Rhinelander, 1 Johns. Cas. (N. Y.) 408; Williams *v.* Delafield, 2 Caines (N. Y.) 329; Farmers &c. Ins. Co. *v.* Snyder, 16 Wend. (N. Y.) 481; Curry *v.* Com. Ins. Co., 10 Pick. (Mass.) 535, 540; Lindsey *v.* Union Mutual Ins. Co., 3 R. I. 157; Columbia Ins. Co. *v.* Lawrence, 10 Pet. (U. S.) 503, 516; Sexton *v.* Montgomery County Mut. Ins. Co., 9 Barb. (N. Y.) 191, 202; Masters *v.* Madison Co. Mut. Ins. Co., 11 Barb. (N. Y.) 625, 633; Gates *v.* Madison County Mut. Ins. Co., 2 N. Y. 43; Keeler *v.* Niagara Fire Ins. Co., 16 Wis. 523, 540; Schenck *v.* Mercer County M. F. Ins. Co., 24 N. J. Law, 447.

[3] Penn. &c. Ins. Co. *v.* Crane, 134 Mass. 56.

[4] As held in Short *v.* Woodward, 13 Gray (Mass.), 86; Globe Works *v.* Wright, 106 Mass. 207; *ante*, §§ 1065, 1106.

which, in cases of fire insurance, is for the jury.[1] Contrary to the holding in the Massachusetts court above given, it was ruled in Maine, where a seller of spectacles falsely represented to the purchaser that "the spectacles were a new invention, that they were brilliants, and that he had never sold them to any one else in Portland," — that it was a question for the jury, and not for the court, to determine whether this was a representation of material facts.[2]

§ 1285. How in Case of Warranties. — This rule has been applied in some cases where the statements would seem to have been warranties,[3] and some confusion has sprung up in consequence. But the sounder opinion is that, where it is agreed that the representations are warranties, the insurer is entitled to an exact compliance with them, without regard to their materialty, — in which case the question of their materialty cannot, of course, be submitted to a jury.[4] More fully stated, where a policy of insurance against loss by fire declares in express terms the survey, or description of the premises, referred to therein, to be "a part of the policy" and "warranties," — such description is to be construed as a warranty, and not as a representation. The rule as to a warranty is that, if broken, it defeats the policy; the insurer may insist upon its exact truth, according to its tenor. In a case where the truth of the description is warranted, it is error to submit to the jury the question whether the particulars in which, at the time of issuing the policy, the premises did not correspond with the description, increased the risk or not.[5]

§ 1286. What if it is Doubtful whether the Words import Representations or Warranties. — If it be *doubtful*, from the words of a policy, whether certain statements, made by the ap-

[1] Lindenau *v.* Desborough, 8 Barn. & Cres. 586; Huguenin *v.* Rayley, 6 Taunt. 186.

[2] Sharp *v.* Ponce, 74 Me. 470. Compare Teague *v.* Irwin, 127 Mass. 217.

[3] Sexton *v.* Montgomery County M. Ins. Co., 9 Barb. (N. Y.) 191.

[4] Gates *v.* Madison County M. Ins. Co., 2 N. Y. 43, per Jones, J.

[5] Le Roy *v.* Market F. Ins. Co., 39 N. Y. 90.

plicant relative to the subject of the insurance, are to be regarded as warranties or as representations merely, they will be regarded as representations.[1] A statement in an application for insurance is to be considered a representation rather than a warranty, unless it is *clearly* made a warranty by the terms of the policy, or by some direct reference thereto.[2] Where the statements in the policy characterize the statements in the application and survey as representations, that they are such is hardly a matter of doubt.[3] Where the evidence left it doubtful whether the survey, although it declared that the statements therein were warranties, was delivered by the plaintiff for the purpose of procuring the policy, or was received by the agent as a private memorandum only, and whether the policy had not been delivered prior to the execution and date of the survey, — it was held that the defendant was not entitled to a peremptory charge that the conditions of the survey and policy had been violated, and that the plaintiff could not recover; but the question should have been submitted to the jury under proper instructions.[4]

§ 1287. Where Truth of Statements are Vouched for, so far as Known and Material. — Where the language did not amount to a warranty that each answer was true, but only that the answers were "a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property to be insured, — so far as the same are known to the applicant, and are material to the risk," — it was held that the knowledge of the applicant and the materiality of the facts stated, were both questions which were properly submitted to the jury.[5]

[1] Garcelon *v.* Hampden F. Ins. Co., 50 Me. 580, 583; Wilson *v.* Conway F. Ins. Co., 4 R. I. 143; Le Roy *v.* Park F. Ins. Co., 39 N. Y. 56.

[2] Garcelon *v.* Hampden F. Ins. Co., 50 Me. 580, 583; Daniels *v.* Hudson River Ins. Co., 12 Cush. (Mass.) 416.

[3] Garcelon *v.* Hampden F. Ins. Co., 50 Me. 580, 583; Houghton *v.* Manufacturers &c. Ins. Co., 8 Met. (Mass.) 114.

[4] Le Roy *v.* Park F. Ins. Co., 39 N. Y. 56.

[5] Garcelon *v.* Hampden Fire Ins. Co., 50 Me. 580. So held in a similar application in Elliot *v.* Hamilton &c. Ins. Co., 13 Gray (Mass.), 139. Compare Lindsey *v.* Union Mut. Fire Ins. Co., 3 R. I. 157.

§ 1288. What if Statements not Responsive to any Inquiry. — In reference to statements in the application or survey which are not responsive to any interrogatory therein, the burden of proof is on the insurance company to show their materiality and falsity; and these are to be determined by the jury.[1]

§ 1289. INSTRUCTIONS AS TO WHAT MISREPRESENTATIONS OR FRAUDULENT STATEMENTS WILL AVOID POLICY, AND WHAT WILL NOT. — "An untrue or fraudulent statement, or denial, made by the applicant, of a fact material to the risk, to induce the issuance of a policy, will prevent the policy from taking effect as a valid contract, unless the insurer has in some way waived or estopped himself from relying upon such misstatement to avoid the policy. - - - - If an insurance company issues a policy upon a greater risk than an ordinary one, with a full knowledge of all the facts, it cannot escape the binding obligation of its contract by pleading such fact. - - - - If you find that James A. Miller made an untrue or fraudulent statement of a fact material to the risk, in the application for the policy, then you should find for the defendant, unless you further find that the defendant was informed of and knew the truth in regard to such fact, and, after knowing such fact fully, received the application, the premium money and notes, and issued the policy; in which case you should find for the plaintiff. - - - - A full knowledge of the truth of the alleged misstatements of Miller in the application, communicated to Thornton and Case (agents), or either, was a communication to the company." [2] - - - - "Even if the jury shall believe from the evidence that, at the time the insurance was applied for by the plaintiffs, or their agent, of the defendant, the plaintiffs or their agent, represented that a watchman was kept and would be kept upon said premises insured, and that no watchman was then or afterwards kept thereon, yet, unless the jury believe that the said representation was one of the causes why the defendant took the risk, and without such

[1] Garcelon *v.* Hampden Ins. Co., 50 Me. 580, 583; Daniels *v.* Hudson River F. Ins. Co., 12 Cush. (Mass.) 417.

[2] Approved in Miller *v.* Mutual Ben. Life Ins. Co., 31 Iowa, 216, 222, 223; citing Rowley *v.* Insurance Co., 36 N. Y. 550; Masters *v.* Insurance Co., 11 Barb. (N. Y.) 624; Sexton *v.* Ins. Co., 9 Barb. (N. Y.) 191; McEwen *v.* Ins. Co., 5 Hill (N. Y.), 101; Rowley *v.* Ins. Co., 3 Keys (N. Y.), 557; Anson *v.* Ins. Co., 23 Ia. 84. *Contra*, Vose *v.* Ins. Co., 6 Cush. (Mass.) 42; Smith *v.* Ins. Co., 24 Pa. St. 320; Mitchell *v.* Ins. Co., 51 Pa. St. 402; Lowell *v.* Ins. Co., 8 Cush. (Mass.) 127; Forbes *v.* Ins. Co., 9 Cush. (Mass.) 470; Lee *v.* Ins. Co., 3 Gray (Mass.), 583.

watchman being then kept and continuing to be kept, the said defendant would not have taken the risk or issued the policy; then, the fact that no watchman was kept proves no defense in this action."[1]

§ 1290. Whether a Change of Circumstances increases the Risk. — It is a familiar rule in the law of fire insurance that any change in the condition of the property insured, which substantially increases the risk, avoids the policy; but whether such a change has taken place is always a question of fact for a jury.[2] Whether the company, in defending an action on a policy, relies upon the falsity of the particular representation, or on the failure to comply with an executory stipulation, it is upon them to prove it; and it is a question of fact for the jury in either aspect.[3] Thus, where the policy required that notice should be given to the company of any alterations which tend to increase the risk, within twenty days, or that the insurance should become void, and alterations were made and no notice given, it was held a question of fact for the jury whether such alterations did tend to increase the risk.[4] So, where the subject of the insurance was a dwelling-house in a suburban place, and, after the insurance and before the loss, it was removed bodily to a position 200 feet away, without, it seems, being brought into proximity to any other buildings or combustible materials, it was held that the court could not say, as matter of law, that the removal increased the risk, but that whether it did or not was a question for the jury.[5]

[1] Approved in Bersche *v.* Globe Mutual Fire Ins. Co., 31 Mo. 546, 551.

[2] Gamwell *v.* Merchants &c. Ins. Co., 12 Cush. (Mass.) 167; Clark *v.* Insurance Co., 40 N. H. 333, 339; Le Roy *v.* Park F. Ins. Co., 39 N. Y. 56; Grant *v.* Howard Ins. Co., 5 Hill (N. Y.), 10; Townsend *v.* Northwestern Ins. Co., 18 N. Y. 168; North British &c. Ins. Co. *v.* Steiger, 13 Bradw. (Ill.) 482; Schmidt *v.* Ins. Co., 41 Ill. 295; New Eng. Ins. Co. *v.* Wetmore, 32 Ill. 221; Wood on Fire Ins. 814; Smith *v.* Mechanic's &c. Ins. Co., 32 N. Y. 399; Shepherd *v.* Union M. F. Ins. Co., 38 N. H. 232, 240.

[3] Daniels *v.* Hudson River &c. Ins. Co., 12 Cush. (Mass.) 416, 426. Compare Bilbrough *v.* Metropolis Ins. Co., 5 Duer (N. Y.), 587.

[4] Schneck *v.* Mercer County M. F. Ins. Co., 24 N. J. Law, 447.

[5] Griswold *v.* American Central Insurance Co., 1 Mo. App. 97; *s. c.* affirmed, 70 Mo. 654.

§ 1291. Defendant's Instruction as to what Alteration will Avoid the Policy. — "If any alteration in the building insured was made by plaintiff, or under his direction, or with his knowledge or consent, after insurance made with defendant, whereby said building was exposed to greater risk or hazard from fire than when insured, the policy became void, unless plaintiff has proved to the satisfaction of the jury that an additional premium and deposit, after such alteration, was settled with and paid to defendant or agent before the fire happened." [1] "It is no defense to a recovery in the suit that the plaintiffs, or any of them, either at the time of obtaining the policy sued on, represented the value of the buildings on said premises greater than their real value, or after the loss represented the value of the property insured, or the extent and amount of the loss, greater than it really was, unless the same was done knowingly and willfully by plaintiffs, and with a fraudulent design." [2]

§ 1292. A Similar Instruction Drawn from the Plaintiff's Standpoint. — "The jury are instructed that no alteration or repairs, made on premises insured by plaintiff, would avoid his policy, nor can his recovery be defeated by means of alterations or repairs, — unless the same were such as to increase the risk or hazard from fire to the injured premises. If the jury find from the evidence that defendant made the policy sued on, and the property insured was destroyed by fire, as stated in petition, and plaintiff complied with the agreements and conditions in the policy to be complied with on his part, they will find for the plaintiff. - - - - The jury are instructed that the policy sued on could not be made void, nor can the recovery of plaintiff be defeated by the erection of any building immediately adjacent or adjoining premises insured, unless such erection materially increased the risk or hazard of fire." [3]

§ 1293. Whether Prospective Warranty or Clause of Forfeiture Violated. — But where the provision in the policy is that the premises shall not be used to carry on certain enumerated employments, or for the storage or keeping of certain enumerated chattels, without a special provision to that effect, this is a

[1] Approved in Kern *v.* South St. Louis Mut. Ins. Co., 40 Mo. 19, 22.

[2] Approved in Bersche *v.* Globe Mut. Fire Ins. Co., 51 Mo. 546, 550.

[3] Approved in Kern *v.* South St. Louis Mut. Ins. Co., 40 Mo. 22; citing Gardner *v.* Piscataquis Mut. F. Ins. Co., 38 Me. 439; Curry *v.* Commonwealth Ins. Co., 10 Pick. (Mass.) 535; Francis *v.* Sommerville Mut. Ins. Co., 25 N. J. L. 78.

prospective warranty, the breach of which avoids the policy and prevents any claim for indemnity for a loss, though it appears that the fire arose from some cause quite unconnected with the prohibited employment or article.[1] In such a case there is, of course, no question for the jury as to the materiality of the warranty, though there may be a question as to whether there has been a breach. Thus, where a policy of insurance stipulated that "the work of carpenters, roofers, tinsmiths, gas-fitters, plumbers and other mechanics, in building, altering or repairing any building or buildings covered by this policy, will cause a forfeiture of all claim under this policy, without the written consent of this company indorsed thereon; — it was held, upon a certain state of evidence, to be a question of fact for the jury whether or not there had been such an alteration in the building as it was the intention of the parties to stipulate against.[2]

§ 1294. Instruction that Temporary Vacation of Premises does not avoid Policy. — "If a man insures his dwelling house and lives therein at the time, and contracts not to let the building become vacant and unoccupied, he cannot, as a matter of fact, vacate it absolutely, leave it in that condition, and recover on the policy in case of loss. But if he goes off temporarily, on business or matters for his own benefit or otherwise, — temporarily merely, with the intention of coming back to his place and there living, and with no intention of abandoning the place, — the contract will not be vitiated by that kind of a transaction; and had the tenant in this case gone away on temporary business before he surrendered up the premises to this Mrs. Norton, and had the fire occurred while the tenant occupied it, there would be no question but that the company would be responsible for the loss, if the going away was merely temporary, with the intention of coming back and making it the home of the tenant. I think in this case, gentlemen, if you are satisfied by a fair preponderance of the evidence, or are clearly convinced, that Mrs. Norton put her things into that building with the intention of making it her home and her residence as a matter of fact, —

[1] Mead *v.* Northwestern Ins. Co., 7 N. Y. 530; Westfall *v.* Hudson River F. Ins. Co., 12 N. Y. 289, 293.

[2] Mack *v.* Rochester German Ins. Co., 35 Hun (N. Y.), 75, 78. As to such conditions in policies, compare Franklin Ins. Co. *v.* Chicago Ice Co., 36 Md. 102; Rann *v.* Home Ins. Co., 59 N. Y. 387.

did not live in it in person before the fire, but, after placing those things in, she went away on mere temporary business with the intention in her mind to come back and live there, — that the premises would not be unoccupied and vacant within the meaning of this policy, and that the company would be responsible for the loss. She must, of course, have placed her goods in that building with the intention in her mind to make it her residence — to make it her home, and must have gone away on business — temporarily gone away, simply for a temporary purpose, not permanently, — not with the idea of abandoning the place. If she went away temporarily, to be gone a few weeks or a few days, on business of her own, with the intention of coming back and living there, I do not think the policy is vitiated; and I think the plaintiff in this cause, who sues as assignee of the policy, can recover, if you so find."[1]

§ 1295. Reasonable Time for the Occupation of Insured Premises by a Tenant. — Where, in the survey upon which a policy of fire insurance is granted, the question occurs, "How

[1] The above, which was evidently an oral charge, taken down by a stenographer, was approved in Shackleton *v.* Sun Fire Office, 55 Mich. 290, 291. Cooley, C. J., said: "We have concluded, after some hesitation, that the instruction should be sustained. There is no doubt, if the insured had actually begun living in the house before her departure on business, the temporary absence would not have affected the policy; in contemplation of law, her occupation of the house would have been continuous. Stupetski *v.* Transatlantic Fire Ins. Co., 43 Mich. 373; Cummins *v.* Agricultural Ins. Co., 67 N. Y. 260; Herrmann *v.* Merchants' Ins. Co., 81 N. Y. 184; Phœnix Ins. Co. *v.* Tucker, 92 Ill. 64; Dennison *v.* Phœnix Ins. Co., 52 Iowa, 457. The only question, then, is whether the fact that for the few days she remained at home before starting on the business trip, she did not sleep in the house or take her meals there, should make any difference. Under the circumstances we think not. The insured had taken possession of the house, as the jury must have found, for the purpose of permanent occupancy. She had moved in her household furniture and other goods, and was cleaning and doing other work preliminary to living there in person. Nothing, apparently, was wanting to complete personal possession, except that she lodged and took her meals at her father's a few rods off. Those facts were not conclusive against her occupancy. It could not be justly claimed, we think, that if a family, for the purposes of cleaning and interior decoration, were thus to sleep and take meals at a neighbor's, while busy in the house in working hours, they would in doing so vacate the house. But the case of such a family would be analogous to that of the party insured in this case." Wustum *v.* Ins. Co., 15 Wis. 138; Ashworth *v.* Ins. Co., 112 Mass. 422; Carrigan *v.* Ins. Co., 122 Mass. 298; Herrmann *v.* Ins. Co., 85 N. Y. 162, distinguished.

are the several stories occupied?" to which the answer is given, "Unoccupied, but to be occupied by a tenant," the meaning of this is held to be that the premises are to be occupied by a tenant *within a reasonable time;* and what will be a reasonable time will be a question of fact for the jury, — although it is agreed that the statements in the survey are warranties.[1]

§ **1296. Reasonable Time for giving Notice of Loss.** — Where an insurance policy contained a clause requiring the assured to give notice of the loss "*forthwith*," whether notice was given forthwith, within the meaning of the instrument is, contrary to the general rule touching the exposition of written instruments, a *question of fact* for the jury.[2] The process of reasoning by which this conclusion is reached is simple enough. The courts hold that such a condition should be *construed liberally* in favor of the insured, and that he complies with it when he gives notice with due diligence, within a reasonable time, and without unnecessary delay, under all the circumstances of the case.[3] While the question whether a party has used due diligence or not in giving such notice has sometimes been held to be a question of law, especially where the facts and circumstances were admitted, established, or, conceded by the pleadings, —[4] other courts have ruled that, upon a jury trial, where the facts are in issue, it should be left, to the jury to determine what is a reasonable time as a question of fact.[5]

[1] Hough *v.* City Fire Ins. Co., 29 Conn. 11, 24.

[2] Donahue *v.* Windsor County &c. Ins. Co., 56 Vt. 374.

[3] St. Louis Ins. Co. *v.* Kyle, 11 Mo. 278; Inman *v.* Western Fire Ins. Co., 12 Wend. (N. Y.) 452; Peoria &c. Ins. Co. *v.* Lewis, 18 Ill. 553; Niagara Fire Ins. Co. *v.* Scammon, 100 Ill. 644; *s. c.* 11 Ins. L. J. 614; Phillips *v.* Protection Ins. Co., 14 Mo. 220; Edwards *v.* Baltimore Ins. Co., 3 Gill (Md.), 176. Upon the more general question whether *reasonable time* is a question of law or of fact, see *post*, § 1530, *et seq.*

[4] Columbian Ins. Co. *v.* Lawrence, 10 Pet. (U. S.) 507.

[5] Donahue *v.* Windsor County &c Ins. Co., 56 Vt. 374, 380. It is said that the courts of Vermont have always adopted this rule in all questions of doubt, depending upon a general inference from a multiplicity of particular facts, and where the law has fixed no rule, — such as questions of due diligence, reasonable time, probable cause, etc. *Ibid.* 380, *per* Taft, J.: citing Sessions *v.* Newport, 23 Vt. 9. In a case in Connecticut it is said: "Extreme cases either way may be

§ **1297. Sufficiency of Preliminary Proofs of Loss.** — It has been held that the question of the preliminary proofs of loss is *for the jury*, in the sense that the documents are to be laid before them for *identification*, leaving it to the judge to say whether they make a *prima facie* case;[1] and that the jury must determine from the evidence the *degree of particularity* in the account of the loss sent to the insurance company, and whether it was as specific as the nature of the case admitted of.[2]

§ 1298. Defendant's Instruction as to Fraudulent Proofs of Loss. — "The jury are instructed that, if they believe from the evidence, that the policy sued on contained a provision that all fraud, or attempt at fraud, by false swearing or otherwise, shall cause a forfeiture of all claims under the policy, and that, if they further believe from the evidence that plaintiffs have fraudulently offered to defendant proofs of loss under the policy, containing material statements in regard to their loss under said policy, which the plaintiffs knew to be false at the time the same were offered, they will find for defendant."[3]

§ **1299. Waiver of Preliminary Proofs of Loss.** — Where the production by the assured of preliminary proofs of loss is required by the policy, this is a condition precedent to his right of action, unless waived by the insurer, expressly or impliedly; and where the evidence is conflicting as to whether there has been a waiver, of course the question is *for the jury*.[4] But it has

easily determined. Between them there is a wide belt of debatable ground, and cases falling within it are governed so much by the peculiar circumstances of each case, that it is much better to determine the matter as a question of fact." Lockwood *v.* Ins. Co., 47 Conn. 553.

[1] Klein *v.* Franklin Ins. Co., 13 Pa. St. 247.

[2] Franklin Fire Ins. Co. *v.* Updegraff, 43 Pa. St. 350.

[3] Approved in Schulter *v.* Merchant's Mut. Ins. Co., 62 Mo. 237.

[4] Phœnix Ins. Co. *v.* Munday, 5 Coldw. (Tenn.) 547, 551; Drake *v.* Farmers' Union Ins. Co., 3 Grant Cas. (Pa.) 325; Franklin Ins. Co. *v.* Updegraff, 43 Pa. St. 350. Compare the case of Ward *v.* The Law Property Assurance & Trust Society, 37 Eng. Law & Eq. 47, where the policy assured the plaintiff against the criminal defaults of a commercial traveler whom he employed, and provided that it should be void if the claimant should neglect or omit, for six days after making a discovery or receiving notice that a liability of the traveler had been incurred, to forward a written statement of particulars, — the question turning on the interpretation of the policy, and not upon evidence of waiver.

been held that, where all the facts and circumstances relating to the subject are admitted, the defendant has the right to require the court to instruct the jury whether the evidence is sufficient to establish a waiver or not.[1] Where the agent of the company had agreed with the assured to ascertain the amount of their loss from their books, and, in the answer sent by the company in reply to the statement of the loss, refusing payment "on account of circumstances connected with the insurance," and there was no objection to the statement sent, the *evidence of waiver* was sufficient to justify a submission to the jury.[2]

§ **1300. Waiver of Limitation of Time within which Action to be Brought.** — Where the policy contains a limitation as to the time within which an action can be brought thereon, this, it is held, can be waived; and where there is evidence tending to show a waiver, the question becomes a *question of fact* for the jury.[3]

§ **1301. Waiver of a Condition against Transfer of Policy.** — So, where, under a policy which, by its terms, becomes void upon a sale or transfer of the property assured, without consent of the company indorsed on the policy, and a change in the title has taken place without any transfer regularly made, but the party in interest has continued to pay premiums for a number of years, it will be a *question for the jury* whether the state of the policy was not known to the company, there being evidence entitling them to draw such an inference. Consequently it was a question for the jury whether they had not waived the forfeiture, which had taken place by the alienation of the property without an assignment of the policy.[4]

[1] Spring Garden M. Ins. Co. *v.* Evans, 9 Md. 1, 20.

[2] Franklin Ins. Co. *v.* Updegraff, 43 Pa. St. 350.

[3] Coursin *v.* Pennsylvania Ins. Co., 46 Pa. St. 323, 330. Compare Ripley *v.* Ætna Ins. Co., 30 N. Y. 136, where it is held that such a waiver to be operative must be supported by an agreement founded on a valuable consideration, or that the act relied on as a waiver must be such as to estop the company from insisting on performance of the contract or forfeiture of the contract.

[4] Buckley *v.* Garrett, 47 Pa. St. 205.

§ 1302. Whether a Fishing-Scow is a "Building." — In an action on a policy of fire insurance, one of the questions was whether the fishing-scow, which was the subject of the insurance, was included in the word "building" in the policy of insurance, so as to be thereby affected by all the terms and conditions of the policy relating to buildings. The defendant contended that it was so included, and that therefore, it being unoccupied, both at the time it was insured and at the time it was burned, the plaintiff could not, under the terms of the policy, recover. It was held that it was error to exclude evidence tendered by the defendant for the purpose of showing that scows of the kind and character of the one insured were used and occupied as buildings by the persons owning them; that in the fishing season, such persons used them as residences and places of business, and that when the fishing season was over, they used them as residences on land; that this particular scow was so used; and that, in the same locality, other scows were so used. It was further held that, upon such evidence and the surrounding circumstances, it would have been proper to submit the question to the jury, whether or not the parties to the contract intended that all the limitations and conditions thereof should apply to the scow as a building.[1]

§ 1303. Whether a Certain Business is a "Manufactory." — Where a policy upon a stock of merchandise provided that a manufacturing establishment or workshop should be considered as hazardous and extra hazardous, and that the policy should be void if, during its term, the risk should be increased by the occupation of the premises for more hazardous purposes than were permitted in the policy, and it appeared that one of the upper stories of the building was rented to persons who carried on therein the business of putting together the frames of chairs which had been elsewhere made, — it was held, but apparently without much consideration, that the judge ought to have submitted the question to the jury whether this was a manufactory or not, within the meaning of the policy.[2]

§ 1304. Failure to Mention Specific Articles of Merchandise. — An insurance on "merchandise," such as is usually kept in country stores, is not void because hardware, china, glass, looking-glass, etc., are not specifically mentioned in the

[1] Enos *v.* Sun Ins. Co., 67 Cal. 621.

[2] Appleby *v.* Firemen's Fund Ins. Co., 45 Barb. (N. Y.) 454, 457.

application, if the articles are such as are usually kept in country stores; and whether they are such is a *question of fact* for the jury.[1]

§ **1305. Identity of the Articles Destroyed.** — As already seen[2] where the *ambiguity* is on the face of the instrument — that is where it is a *patent ambiguity* — it is for the judge to explain it; but an ambiguity in the contract arising out of extrinsic evidence, which is necessary to be heard in dealing with the subject of the contract, must be *solved by the jury*. It was so held where there was a doubt as to the house in which the goods insured were situated — whether they were situated in the house which was burned, or in another and adjacent house, which fact could not be determined by the language of the policy. In such a case it was said by Strong, J.: "There is some ambiguity, therefore, in the policy, arising from extrinsic evidence. The construction of written papers is undoubtedly for the court, and it is a question of law. Even if there be an ambiguity on the face of a written or printed document, it is for the judge to explain it. But if the ambiguity arise from extrinsic evidence, as it does in this case, it must be solved by the jury.[3] It is for the court to decide what the instrument means; but the application of the meaning must be a question of fact, when it is rendered doubtful by parol evidence what was the identical subject respecting which the parties contracted. For this reason we hold there was error in the charge of the court. It should have been submitted to the jury to find, not the meaning of the written application, but whether the subject of it was goods in the Kephart House, or goods in the Western House, retained by the plaintiff after his sale of the other to Kephart."[4] It is obvious that the question whether the policy applies to *particular articles* will be a *question of fact* for the jury,[5] on the general principle that questions of *identity* are for the jury,[6] and by analogy to the

[1] Franklin Fire Ins. Co. *v.* Updegraff, 43 Pa. St. 350.

[2] *Ante*, § 1083.

[3] Citing Smith *v.* Thompson, 8 C. B. 44.

[4] Beatty *v.* Lycoming County Ins. Co., 52 Pa. St. 456.

[5] Home Ins. Co. *v.* Favorite, 46 Ill. 263, 270.

[6] *Post*, § 1150, *et seq.*

rule that the question what land is embraced in the descriptive calls of a deed is for a jury.[1] It is for the jury to determine, as a *question of fact* from the evidence, whether the merchandise insured was destroyed in the "building" described in the policy; but if a building contain *several store rooms*, and there be any uncertainty as to whether all the rooms were included, it is fatal to the insurers; for the language of the policy is theirs, and is to be construed most strongly against them.[2] Where the insurance company had given permission to the assured to "enlarge the building" in which the merchandise insured was then contained (the same in which it was subsequently burned), and, in the permission, had mentioned the goods as insured in the building, requiring that no goods should be kept in the second story after the completion of the addition, — this was held such evidence that the store-rooms of the assured were in the building described in the policy, as to justify a submission of the question to the jury.[3]

§ **1306. Mutual Insurance — Data for Correct Assessment.** — In an action to recover an assessment upon a deposit note, given to a mutual fire insurance company, the question whether the books of the company furnish sufficient data for the making of a correct assessment, is a *question of fact* for the jury.[4]

§ 1307. Plaintiff's Instructions as to Renewal of Policy by Oral Contract. — "If you find from the evidence that the parties agreed that the insurance should be renewed without a payment of premium, and their minds met and they fully understood the terms of such renewal in all respects, and nothing remained to be done thereafter except to make out the renewal receipt on the part of the company, and the payment of the premium by the plaintiff, notwithstanding this was a verbal agreement, it was nevertheless a valid contract for the renewal of the policy, and the defendant is liable for the loss to the amount of the insurance. - - - - If you find that, previous to January 15, 1882, the defendant company had issued a policy of insurance upon the building

[1] *Post*, § 1461, *et seq.*

[2] Franklin F. Ins. Co. *v.* Updegraff, 43 Pa. St. 350.

[3] *Ibid.*

[4] Marblehead M. F. Ins. Co. *v.* Underwood, 2 Gray (Mass.), 210, 214.

and stock in question, which would expire on that date, and that, about the time of its expiration, the agent of the company, for and in its behalf agreed with the plaintiff, or his authorized agent, to renew said policy, and that he, the agent of the company, would attend to it right away; and that their minds met as to the terms of such agreement; and that there was nothing further to be done between the parties, except that the agent of the defendant should make out and deliver to the plaintiff or his agent the renewal receipt or evidence of renewal, and that the plaintiff or his agent should then, or at some subsequent time, pay the premium, — then I instruct you that such an agreement would bind the defendant company to renew the policy, and they could only avoid liability upon such contract by tendering the renewal and demanding the premium, and the failure of the plaintiff to pay the same, or by giving the plaintiff or his agent notice that the defendant company had refused to carry the risk; and such tender of the renewal and demand of the premium, or the giving of the notice, as before stated, in order to relieve the defendant from liability, must be done before the loss accrued and before they knew of the loss." [1]

§ 1308. Instructions on the Theory of a Waiver of the Right of Forfeiture by Promising to Rebuild.— "If the jury believe from the evidence that the defendant gave to plaintiffs the notice of their intention to rebuild the premises destroyed by fire, given in evidence by plaintiffs, and that, at the time of giving said notice, the defendant knew that no watchman had been kept upon said premises from the time of the issuing of said policy to the time of the happening of the loss, then the jury may infer that the defendants waived their right to interpose that fact as a defense to the right of plaintiffs to recover under the policy, and the burden of pooof is on the defendant to satisfy the jury that, at the time of giving such notice, the defendant was ignorant of that fact. - - - - Although the jury may believe that, at the time of making the application for the policy sued on by plaintiffs, or their agents, it was represented by them or their agents, that a watchman was and would be kept in charge of the premises insured, and that that matter was regarded by the agents of defendant as material to the risk — that is, without such representations the risk would not have been taken, or a higher rate of premium would have been charged therefor; and that the building was damaged or lost by fire, and at the time there was no watchman in charge of the premises;

[1] Approved in King *v.* Hekla Fire Ins. Co., 58 Wis. 514, 515.

and that the defendant, by its authorized officers and agents, knew these facts, and with such knowledge the defendant alone or in conjunction with other companies, agreed to make good the loss by rebuilding the premises, and notified plaintiffs thereof, and failed or refused to rebuild, and made no objections to making good the loss on the ground that no watchman was in charge of the premises at the time of the fire, until after the institution of this suit; from these circumstances the jury are authorized to infer that defendant waived the matter, and in such case it constitutes no defense to this suit."[1]

Article II. — Life Insurance.

Section

1310. Whether Policy Authorized by Statute.
1311. Whether the Insured answered falsely in his Application that he had no Family Physician.
1312. Whether a Death was from Drowning or from Natural Causes.
1313. Plaintiff's Instructions as to Insurable Interest of Grandson in Life of Grandfather.
1314. Habitual Intemperance.
1315. Defendant's Instruction as to Effect of Material False Representation by the Assured.
1316. Defendant's Instruction as to what Constitutes a Waiver of Right to Avoid Policy by Reason of False Statements in Application.

§ 1310. Whether Policy Authorized by Statute. — It is, of course, a question of legal *interpretation*, whether a policy of life insurance comes within the purview of a statute which authorizes the issuing of such policies, or whether it is a mere *wager policy*.[2]

§ 1311. Whether the Insured Answered Falsely in his Application that he had no Family Physician. — It is customary, in the printed questions and answers, in applications for policies of life insurance, to require the applicant to give the name and residence of his family physician, if he has one. Where, in an action upon a policy of life insurance, the right of recovery is contested, on the ground that the insured gave a false answer to this question, it will ordinarily be a *question of fact* for the jury

[1] Approved in Bersche *v.* Globe Mut. Fire Ins. Co., 31 Mo. 550, 551.

[2] Valton *v.* National &c. Life Assurance Society, 22 Barb. (N. Y.) 10, 38.

whether the insured had a family physician or not.[1] Who is to be deemed a family physician, within the meaning of such a question, is, it seems, a *question of law*; but whether the assured had such a physician is, of course, a question of fact. A family physician is defined to be the physician who usually attends and is consulted by the members of a family in the capacity of a physician; and where, in such an application, the usual medical attendant is inquired for, the one who has been accus'omed to attend, and not one who has occasionally attended, should be mentioned.[2]

§ 1312. Whether a Death was from Drowning or from Natural Causes. — In an English case, H. effected with the defendants a policy of assurance, whereby they agreed that, if he should sustain any injury caused by accident or violence, within the meaning of that policy and the conditions thereto, and should die from the effects of such injury within three calendar months from the happening thereof, then the funds and property of the defendants should be subject and liable to pay the sum thereby assured. The policy contained a proviso that no claim should be made in respect of any injury, unless the same should be caused by some outward and visible means, of which satisfactory proof could be furnished to the directors. On a Saturday afternoon, H. went from London to Brighton by railroad, having a ticket which entitled him to return by it on the following Monday. About seven o'clock on Monday evening, he left his lodgings, having expressed his intention to bathe before he returned to London. His clothes were found on the steps of a bathing machine, and about six weeks afterwards a body was washed ashore on the Essex coast, which his brother and some acquaintances deposed at the inquest was his body, but which the jury found to be the body of a person unknown. It was held, in the Court of Exchequer Chamber: 1. That, assuming that H. died from drowning, that was a death by "accident"

[1] Reid *v.* Piedmont &c. Ins. Co., 58 Mo. 421, 424; Gibson *v.* American &c. Life Ins. Co., 37 N. Y. 580.

[2] Reid *v.* Piedmont &c. Life Ins. Co., 58 Mo. 421, 424. Consult also May on Insurance, § 304, and cases there cited.

within the meaning of the policy. 2. That it was a question for the jury whether H. died from the action of the water or from natural causes. The judges reasoned that the probability, upon such a state of facts, was greater that he died from drowning than from natural causes, which was sufficient to turn the balance and *take the case to the jury*.[1]

§ 1313. PLAINTIFF'S INSTRUCTION AS TO INSURABLE INTEREST OF GRANDSON IN LIFE OF GRANDFATHER. — "I instruct you that a grandson with whom a grandfather resides, has an insurable interest in the life of the grandfather; and a policy of insurance taken out by the grandfather in favor of the grandson, in the absence of fraud, is valid and binding on the company issuing it."[2]

§ 1314. Habitual Intemperance. — The question whether a person whose life was insured was habitually intemperate, within the meaning of a clause avoiding the policy on this ground, has been held a *question for the jury* on conflicting or doubtful evidence.[3] In such a case, where the insured had actually had an attack of *delirium tremens*, it was held proper to instruct the jury that, if the habits of the insured "in the usual, ordinary, and every-day routine of his life were temperate," the representations made, as to his habits being temperate, were not untrue, within the meaning of the policy, although he may have had an attack of *delirium tremens* from an exceptional over-indulgence. The court reason that it could not have been contemplated, from

[1] Trew *v.* Railway Passengers Assurance Co., 6 Hurl. & N. 838.

[2] Approved in Elkhart Mutual Aid Asso. *v.* Haughton, 103 Ind. 286, 290. The court discuss the question at length and review the following decisions: Provident Life Ins. Co. *v.* Baum, 29 Ind. 236; Franklin Life Ins. Co. *v.* Hazzard, 41 Ind. 116; *s. c.* 13 Am. Rep. 313; Franklin Life Ins. Co. *v.* Sefton, 53 Ind. 380; Continental Life Ins. Co. *v.* Volger, 89 Ind. 572; *s. c.* 46 Am. Rep. 185; Guardian Mutual Life Ins. Co. *v.* Hogan, 80 Ill. 35; *s. c.* 22 Am. Rep. 180; Campbell *v.* New Eng. Mut. Life Ins. Co., 98 Mass. 381; Stevens *v.* Warren, 101 Mass. 564; Olmsted *v.* Keyes, 85 N. Y. 593; Fairchild *v.* Northeast. Mut. Life Asso., 51 Vt. 613; Clark *v.* Allen, 11 R. I. 439; *s. c.* 23 Am. Rep. 496; Loomis *v.* Eagle &c. Ins. Co., 6 Gray (Mass.), 396; Lemon *v.* Phœnix Ins. Co., 38 Conn. 294; Conn. Mut. Life Ins. Co. *v.* Schaefer, 94 U. S. 457; Ætna Life Ins. Co. *v.* France, 94 U. S. 561.

[3] Northwestern Life Ins. Co. *v.* Muskegon Bank, 122 U. S. 501.

the language used in the policy, that it should have become void in consequence of an occasional excess by the insured, but only where such excess, by frequent repetitions, had become a habit.[1]

§ 1315. Defendant's Instruction as to Effect of Material False Representation by the Assured. — "A misrepresentation or false statement, made in his application for insurance, by a person whose life is insured, respecting a material fact, avoids the policy issued upon that application, and this, whether the misrepresentation was made innocently or designedly. If, therefore, the jury believe from the evidence that George Schwarzbach, in his application for the policy or certificate here sued on, stated that he had no serious illness, or stated that he had not had, during the last seven years, any disease or severe sickness, and that either of those statements was false in any respect, deemed by the jury material, — then, whether the said Schwarzbach intended to deceive or not, the said policy or certificate is void, and the jury should find for the defendant; unless they further believe that the avoidance of the policy or certificate has been waived by the defendant, in the manner elsewhere explained."[2]

§ 1316. Defendant's Instruction as to What Constitutes a Waiver of Right to Avoid Policy by Reason of False Statements in Application. — "There can be no waiver of the avoidance of a policy by reason of material false statements or misrepresentations in the application, unless the acts relied upon as showing the waiver were done with full knowledge of the facts. While, therefore, the receipt of premiums or assessments, with full knowledge, on the part of the defendant, of facts working a forfeiture of the policy, might constitute a waiver of such forfeiture, yet the receipt of such premiums or assessments, in ignorance of such facts, would not constitute a waiver. If, then, the jury believe from the evidence that the policy or certificate sued on was forfeited or avoided, by reason of false statements respecting material facts made by George Schwarzbach in his application, and that the defendant, when it accepted assessments from him, did not know that such statements were false, — then the acceptance of such assessments would not constitute a waiver of such forfeiture or avoidance.[3]

[1] Insurance Co. *v.* Foley, 105 U. S. 350, 354; reaffirmed in Northwestern Life Ins. Co. *v.* Muskegon Bank, 122 U. S. 501, 512.

[2] Approved in Schwarzbach *v.* Ohio Valley Protective Union, 25 W. Va. 622, 640, 641.

[3] Approved in Schwarzbach *v.* Ohio Valley Protective Union, 25 W. Va. 640.

Article III. — Marine Insurance.

Section

1318. Whether Evidence overcomes Presumption of Seaworthiness.
1319. Whether Circumstances raise Presumption of Unseaworthiness.
1320. Time within which a Voyage should be Performed.
1321. Termination of the Voyage.
1322. Facts which will justify an Abandonment.
1323. Reasonable Time for Abandoning a Cargo to the Underwriters.
1324. Reasonable Time for Ascertaining whether Recovery and Repair Possible.
1325. Whether Seizure of Vessel was an Act of War.
1326. Barratry: Misconduct in Doing an Act Prohibited by Statute.
1327. A Charge to a Jury where the Defense was Barratry.
1328. Instructions as to what Constitutes Partial and what Total Loss.

§ 1318. Whether Evidence Overcomes Presumption of Seaworthiness. — In an action upon a policy of marine insurance, the plaintiff goes to the jury with a *presumption of law* in his favor that the vessel was seaworthy, and whether the evidence is sufficient to remove this presumption is a *question for the jury*, and not for the court.[1]

§ 1319. Whether Circumstances raise Presumption of Unseaworthiness. — Where the inability of a ship to perform its voyage becomes evident soon after leaving port, and it founders without stress of weather, or other adequate cause of injury, the presumption is that this inability existed before setting sail, and that it was due to some latent defect which rendered the vessel unseaworthy.[2] In such cases "the law will intend a want of seaworthiness, because no visible or rational cause, other than a latent and inherent defect in the vessel, can be assigned for the loss; and insurers do not insure against latent defects."[3] This pre-

[1] Field *v.* Ins. Co., 3 Md. 245, 250.

[2] Walsh *v.* Washington M. Ins. Co., 32 N. Y. 427, 436; Talcott *v.* Commercial Ins. Co., 2 Johns. (N. Y.) 124; Barnewall *v.* Church, 1 Caines (N. Y.), 217; Paddock *v.* Franklin Ins. Co., 11 Pick. (Mass.) 227, 237; Watson *v.* Clarke, 1 Dow (Parl. Rep.), 336; Gartside *v.* Orphans' Benefit Ins. Co., 62 Mo. 322, 325; Marcy *v.* Sun Mut. Ins. Co., 11 La. Ann. 749; Marcy *v.* Sun Mut. Ins. Co., 14 *Id.* 264; Parker *v.* Union Ins. Co., 15 *Id.* 688.

[3] Patrick *v.* Hallett, 3 Johns. Cas. (N. Y.) 76; Walsh *v.* Washington Ins. Co., 32 N. Y. 427, 437.

sumption does not belong to the class of presumptions which are termed presumptions of law. It is not in the nature of a *presumptio juris et de jure*. It is a mere *presumption of fact*, which shifts the *onus probandi*, and which prevails only where it is unrepelled by countervailing proof. But, even to this extent, no presumption of unseaworthiness arises, except from facts which exclude the rational inference of a loss attributable to the perils of the seas.[1] But where it satisfactorily appears that the vessel was seaworthy on leaving port, and that it encountered marine perils which might well disable a staunch and well manned ship, no such presumption can be invoked, for the purpose of overturning a verdict and absolving the insurers from liability.[2] When, therefore, a ship sinks in port, very soon after commencing her voyage, without having met with any extraordinary gale of wind or other disturbing element, this fact is a circumstance from which the jury are authorized to find that it is unseaworthy, or, as the Louisiana cases term it, *not portworthy;* and whether it is so or not, in an action on a marine policy, where unseaworthiness is set up as a defense, is a *question of fact* for a jury.[3]

§ **1320. Time within which a Voyage should be Performed.** In an action upon a policy of marine insurance, the time within which a voyage should be performed is a *question of fact* for the jury.[4]

§ **1321. Termination of the Voyage.** — It is obvious that, where a particular place is stated in the policy as the termination of the voyage, the identification of the place and the question whether the ship had arrived at that place, are *questions of fact*. So held where the voyage was described, "from Swan River to

[1] Walsh *v.* Washington Ins. Co., 32 N. Y. 427, 436.

[2] Walsh *v.* Washington Ins. Co., *supra;* 1 Marsh. Ins. 158, 159; 1 Arn. Ins. 662, § 245; Sherwood *v.* Ruggles, 2 Sandf. S. C. (N. Y.) 55; Patrick *v.* Hallett, 1 Johns. (N. Y.) 241; *s. c.* 3 Johns. Cas. (N. Y.) 76; Miller *v.* Russell, 1 Bay (S. C.), 309; Parker *v.* Potts, 3 Dow (Parl. Rep.), 23; Burges *v.* Wickham, 10 Jur. (N. S.) 32.

[3] Gartside *v.* Orphans' Benefit Ins. Co., 62 Mo. 322, 326.

[4] Charleston Ins. Co. *v.* Corner, 2 Gill (Md.), 410, 426; *post*, § 1562.

Mauritius, and for thirty days after arrival," and, according to custom, the ship anchored at what was known as Bell Buoy, which was a buoy in the main ocean a few miles from the harbor itself, and, after having remained there for fourteen days awaiting money to pay a bottomry bond, was wrecked. It was held a question for the jury whether she had arrived at Mauritius. More strictly, the question was whether she had arrived at the place at which ships of her character ordinarily anchor, when Mauritius is the termination of the voyage.[1]

§ **1322. Facts which will Justify an Abandonment.** — In an action on a policy of marine insurance, the facts which will justify an abandonment are *for the jury*.[2]

§ **1323. Reasonable Time for Abandoning a Cargo to the Underwriters.** — In a case of marine insurance, where the vessel was stranded and the cargo partly destroyed, it was held that the owners must make their election to abandon the cargo to the underwriters within a *reasonable time;* and Lord Ellenborough conceived that it was the *province of the judge* to direct the jury as to what would be a reasonable time under the circumstances,[3] though it is doubtful whether it would be so held at the present time.

§ **1324. Reasonable Time for Ascertaining whether Recovery and Repair possible.** —Where a vessel has been wrecked or sunk, and the policy of insurance recites that, " in no case whatever shall the assured have the right to abandon, until it shall be ascertained that the recovery and repair of the said schooner are impracticable," — the court should *expound to the jury the meaning of the clause;* and it is not error to refuse an instruction which is merely drawn in the language of the clause itself, because that is tantamount to submitting its meaning to the jury. The meaning was held to be that the owner was not bound to wait until it was demonstrated beyond any contingency that

[1] Lindsay *v.* Janson, 4 Hurl. & N. 699.

[2] Delaware Ins. Co *v.* Winter, 38 Pa. St. 176, 187.

[3] Anderson *v.* Royal Exchange Assurance Co., 7 East, 38.

the vessel could not possibly be got off and repaired; else his right to abandon could never arise until the vessel had actually gone to pieces; for, until that time, some fortunate and unexpected event might deliver her from peril. The recovery and repair of the vessel would be ascertained to be impracticable, when, in the opinion of judicious men, acquainted with the subject, there was no reasonable probability that she could be got off and repaired; and if the owner was not bound to wait until it was absolutely certain that the vessel could not be got off and repaired, then he was entitled to abandon.[1] From this it would seem to follow that the question is one for a jury, under proper instructions from the court as to the meaning of the language of the policy.

§ 1325. Whether Seizure of Vessel was an Act of War. — In an action on a policy of marine insurance, where the evidence showed that the insured vessel, while lying at a wharf in the port of Norfolk, Virginia, for repairs, was, on the twenty-first day of April, 1861, seized by a large body of men, professing to act by authority of the State of Virginia, filled with stones, towed out into the channel, amidst the cheers of the populace, and sunk at the mouth of the channel, to prevent the ingress or egress of vessels of war; and that it was a time of such confusion and excitement that no relief could be had from the courts, and that the vessel was lost, — it was held, upon these facts, taken in connection with the history of the times, which the court would notice judicially, that it should have been left to the jury as a *question of fact*, whether the seizure of the vessel was an act of war, on the part of those then engaged in hostilities with the United States, or in aiding or carrying out existing or contemplated acts of war by the State of Virginia, or whether it was the act of a mob simply.[2]

§ 1326. Barratry: Misconduct in Doing an Act Prohibited by Statute. — Where the master of a vessel, in order to increase

[1] Norton *v.* Lexington &c. Ins. Co., 17 Ill. 236, 249.

[2] Swinnerton *v.* Columbian Ins. Co., 37 N. Y. 174.

the head of steam while racing with another vessel, brought a barrel of turpentine from the hold to the furnace, whereby the vessel was set on fire and destroyed, and there was an act of Congress providing that turpentine must be secured upon steamboats in metallic safes, or in apartments lined with metal, at a secure distance from any fire, — it was held that the question whether the wrongful act of the master, in thus using the turpentine, was *misconduct*, within the meaning of the rule of law that a policy of insurance will not protect a party against his own misconduct, was a *question of law* for the court, and not a question of fact for the jury; for, though, ordinarily, questions of care, diligence and skill are to be decided by a jury, it is otherwise where the law defines the very act to be done under given circumstances. In such a case the jury have only to decide whether the acts required or forbidden by the law have been done.[1]

§ 1327. A Charge to a Jury where the Defense was Barratry. — "The second defense is barratry, which may be said to comprehend not only every species of fraud and knavery committed by the master or pilot, with the intention of benefiting himself at the expense of the owners of the boat, but every willful act on his part of known illegality, whereby the owners are in fact injured. It consists of some fraudulent act intended to injure them, or of a willful violation of known positive law, in the navigation or management of the vessel, from which the loss resulted. [The court here read the rules and the act of Congress as recited in the statement of this case, and continued]: These rules are intended to avoid collisions between boats ascending and descending the river, and they prescribe the course to be pursued by the pilots. They are made to be observed, and are binding as law upon the pilots, subject, however, to any emergencies by which it may become necessary to depart from them, to escape or avoid immediate danger from collision or other perils. It is claimed that the pilot willfully violated these rules of navigation, established under a law of Congress, by failing to give the signals required by the rules, and by omitting to stop when the boats had come within a distance of eight hundred yards. These rules are in evidence, and the pilots are bound to obey them, unless some emergency in the course of navigation occurs, justifying a departure

[1] Citizens Ins. Co. *v.* Marsh, 41 Pa. St. 387, 393; *post*, §1672.

from them, to avoid a collision or other danger. The rules require that, when the boats have approached within one mile, the pilot of the ascending boat shall sound the whistle to notify the pilot of the descending boat on which side to pass; and that, if the signals are not answered and understood by the time boats have approached to the distance of eight hundred yards, he shall stop his boat until the signals are corrected and understood. Now, if the pilot of the America, on approaching the United States, when they had approached within the mile, knew or believed that they had come within the mile, and chose to omit to give the signal required by the rule; or if, when he knew or believed that they had approached within the eight hundred yards, without satisfactory signals, he did not stop, although he knew that the rules required that he should stop, but chose to risk the violation of the rule, and the result of such violation of the rule was the loss, that would constitute such misconduct of the pilot as to prevent a recovery, though he did not actually intend an injury to the owners. He is not at liberty to prefer his own judgment to the rule required by law, unless there be some emergency requiring a departure from the rule. But he must deliberately, or voluntarily and knowingly violate the rule, in order to constitute such misconduct as to prevent a recovery. The rules are made to be observed by pilots; they are intended for the safety of the public and for the protection of the owners. Whether they are the best that can be made or not, while in force they must be observed, and a willful disregard of them is misconduct; and if a loss is caused thereby to the owners, it is a loss by barratry, which is excepted from this policy. But, in establishing this defense, the burden of the proof is on the defendants. They must make it appear, by a fair preponderance of evidence, that the pilot of the America did violate the rules knowingly, and that the loss was the consequence. - - - - Mere error of fact or of law is not sufficient to establish a defense on this ground. The pilot must know his duty, and decline to do it. If he supposed that the distance was a mile when he gave the first signal, and intended to comply with the rule by the signal which he gave, the fact that he may have been mistaken in his estimate of the distance is not misconduct which is a defense. So, if when the boats approached to the distance of eight hundred yards, the pilot of the America knew it, or believed it, and knew that the signals had not been answered or properly understood, and yet failed to stop or back his boat according to the law, that would be such misconduct as would be a defense against a suit for a loss caused by it. But if, by reason of the darkness of the night, or other causes not under his control, he was mistaken as to the fact of their

approach to the distance of eight hundred yards, until they had approached much nearer, such mistake would not be misconduct to defeat a recovery. - - - - The pilot is not to set up his judgment against the rules, unless there arises an emergency in which he should honestly believe that it was necessary to depart from the rule to avoid a collision or avoid danger. But if he, in good faith, endeavored to comply with the rules of navigation and to avoid a collision, though he may have erred in his estimate of distances, and though he may have been mistaken as to the interpretation of the rules, he cannot be held to be guilty of such misconduct as to constitute a defense. - - - - You will limit your inquiry on this subject to the conduct of the pilot in charge of the America, as the only barratry which can defeat this suit must be of the officers or crew of the boat, for the loss of which this suit is brought."[1]

§ 1328. INSTRUCTIONS AS TO WHAT CONSTITUTES PARTIAL AND WHAT TOTAL LOSS. — "The question which has been contested as to the main point in this case is, whether the amount of this loss is to be ascertained by the rules applying to what is denominated a total loss, or by the rules applying to a partial loss. A total loss may be actual or constructive. A constructive total loss is where the loss is not actually total, but is so great as to justify the insured in abandoning the subject of insurance or what remains of it to the insurers, and claiming a total loss. It is usual for insured parties in cases of loss, whether actual or only constructively total by abandonment, to surrender what remains of the boat to the underwriters. This is a convenient way of making certain what in many cases would otherwise be uncertain. The surrender, by abandonment of the wreck or salvage, is so convenient, and so generally adopted in such cases, that the question of an actual total loss without an abandonment arises comparatively seldom. In the present case there has been no abandonment or sale of the part saved from the boat, but it has been used in rebuilding a new boat, or in repairing the old one; and one question — perhaps I ought to say the question, for the jury to determine is, which of these two things has been done. Has a new boat been built, or an old one repaired? As there was no abandonment of the property saved, no mere constructive total loss can be claimed. But, if there was an actual total loss, the recovery may be as for a total loss without any abandonment, crediting the expenses with the value of what was saved."[2]

[1] Approved in Germania Ins. Co. *v.* Sherlock, 25 Oh. St. 33, 47, 48, 49.

[2] Approved in Globe Ins. Co. *v.* Sherlock, 25 Ohio St. 50, 65, 66.

CHAPTER XLIII.

INTENT.

SECTION

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§ **1333. General Proposition.** — Intent is always a *question for the jury*, except where it is to be gathered from the terms of

an unambiguous writing, and then, upon principles already explained,[1] it is a mere matter of interpretation, to be performed by the court. This principle has been much illustrated in what has preceded, and will be much further illustrated in chapters in this title which are to follow. Some illustrative cases will also be given in this chapter. Even where the intent with which an agreement was made or an act was done is to be gathered in part from a writing and in part from oral speech or extrinsic circumstances,[2] the well expressed conclusion is: "When the intention of the writer is to be judged of by the writing, it is a question for the court. But when the meaning is to be judged of by extrinsic facts, or when the writing forms part of a transaction, the rest of which consists of words spoken or acts done; or when, whatever its meaning, it is but a circumstance tending to establish some other fact, — it is for the jury to say, whether the language was used in the sense imputed; or what is the character of the entire transaction, of which the writing forms a part; or what is the truth of the ultimate fact which it tends to prove. In these cases the writing must go to the jury, to be considered with the other evidence.[3]

§ 1334. Exception: Presumptions of Law. — To the foregoing an exception arises in a limited class of cases, generally arising in the criminal law, where the law conclusively imputes an intent to the doing of a certain act, — as, for instance, the intent to steal, from the recent unexplained possession of stolen goods, about which judicial authority is not uniform.[4]

§ 1335. Parol Gifts. — What the terms of a parol gift or grant of a chattel were, is a *question of fact* for the jury, to be gathered from all that was said and done, and not a question of law for the court.[5] In a contest touching the *title* to a chattel, whether it was *given* or *loaned* to one of the parties, is of course

[1] *Ante*, § 1065, *et seq.*

[2] *Ante*, §§ 1083, 1086, 1098, 1113.

[3] Winter *v.* Norton, 1 Ore. 42, 45, opinion by Olney, J.

[4] *Post*, § 2534, *et seq.*

[5] Halbert *v.* Halbert, 21 Mo. 277, 283, 284.

a *question of fact* for a jury; and in such a case, the gift being by parol if it exist, the court should instruct the jury as to what in law is necessary to the parol gift of a chattel.[1] The title to goods and chattels may pass by gift *inter vivos*, where there is a delivery of the property. Mere delivery of the property will not, in general, pass title. There must be an *intention to give* accompanying the act of *delivery*, in order to consummate the gift; or the circumstances authorizing the delivery of the goods must be such as ordinarily accompany a gift, inducing the donee to believe that a gift was intended. If that be the case, the title to the goods will pass, although it may not be the secret intention of the donor to make the gift.[2] When a *son* or *daughter* marries and is about setting up a separate establishment, and the father provides the necessary outfit for housekeeping, such as proper furniture for the dwelling house, and delivers the possession to the son or daughter, without qualification or reservation made at the time, — the *presumption* arises that the transaction is a gift, prompted by natural affection for the daughter, and this presumption should prevail. But it is a presumption of fact for the jury, and not one of law for the court, and is hence liable to be rebutted by other evidence showing that the donor did not so consider it. It is said to be a presumption of fact, because such conduct is universally considered as denoting a gift of chattels.[3] Where an intestate promised to pay the plaintiff, who was his sister, after his death, a certain sum per year, for the time during which she should live with him and keep house for him, and the consideration was understood by the parties to be in part for the *services* to be rendered by her, and in part a desire to make her a *mortuary gift* from motives of affection, — it was held that it was a question for the jury what portion of the stipulated sum was to be paid in consideration of her services, and what portion as a mere *gratuity;* that she was entitled to recover the former, but not the latter; since the right to the former rested upon a good consideration, but the recovery of the latter would

[1] Respass *v.* Young, 11 Ga. 114.

[2] Betts *v.* Francis, 30 N. J. L. 152, 154.

[3] *Ibid.* 155.

contravene the policy of the statute of wills; and that the jury should have been specifically instructed to this effect.[1]

§ 1336. Landlord and Tenant — Intent to Evict. — To constitute an eviction of a tenant by his landlord, such as will create a suspension of rent, it is not necessary that there should be an actual physical expulsion from any part of the premises;[2] but any act of a permanent character, done by the landlord, or with his procurement, with a view of depriving the tenant of the enjoyment of the premises demised, or any part of them, will

[1] Frost *v.* Frost, 33 Vt. 639. In Kellogg *v.* Adams, 51 Wis. 141, there is a long series of instructions, applicable to a state of facts where a father gave a piano to his infant daughter and afterwards mortgaged it, and subsequently a contest arose with the mortgagee as to the title.

[2] Hall *v.* Burgess, 5 Barn. & Cres. 332; Upton *v.* Townend, 17 C. B. 30; *s. c.* 33 Eng. L. & Eq. 212; Morse *v.* Goddard, 13 Metc. (Mass.) 177; Pfund *v.* Herlinger, 10 Phila. 13; Royce *v.* Guggenheim, 106 Mass. 201; Skally *v.* Shute, 132 Mass. 367; Pendleton *v.* Dyett, 4 Cow. (N. Y.) 581; *s. c.* 8 Cow. (N. Y.) 727; Cohen *v.* Dupont, 1 Sandf. S. C. (N. Y.) 260, Rowbotham *v.* Pearce, 5 Houst. (Del.) 135. From these and other cases the question would seem to be, not so much whether the landlord has done acts which deprive the tenant of the beneficial enjoyment of the premises, as contemplated by the contract, and which therefore constitute a breach of contract on his part, which is tantamount to an eviction, — as whether the landlord has done such acts, inconsistent with the contract, as will justify the tenant in abandoning the premises and refusing the payment of rent: for it is conceded that, notwithstanding the unfriendly or injurious acts of the landlord, so long as the tenant remains in possession, he must continue to pay rent. See the following cases: Elliot *v.* Aiken, 45 N. H. 35; Gilhooly *v.* Washington, 4 N. Y. 217; Wilson *v.* Smith, 5 Yerg. (Tenn.) 379; Rogers *v.* Ostrom, 35 Barb. (N. Y.) 523; De Witt *v.* Pierson, 112 Mass. 8; Newby *v.* Sharpe, 8 Ch. Div. 39; Burn *v.* Phelps, 1 Stark. 94; Levitzky *v.* Canning, 33 Cal. 299; Greton *v.* Smith, 33 N. Y. 245; Grabbenhorst *v.* Nicodemus, 42 Md. 236; Scott *v.* Simons, 54 N. H. 428; Boston &c. R. Co. *v.* Ripley, 13 Allen (Mass.), 421; Jackson *v.* Eddy, 12 Mo. 209; Peck *v.* Hiler, 24 Barb. (N. Y.) 178; Lawrence *v.* French, 25 Wend. (N. Y.) 443; Leadbeter *v.* Roth, 25 Ill. 587. Compare Halligan *v.* Wade, 21 Ill. 470. It seems that anciently an eviction could only result from the judgment of a court of law in favor of the party claiming under a paramount title; but latterly the word "eviction" has come to be regarded as substantially synonymous with *ouster*. Formerly the evidence was matter of record; now it may be shown by parol. Hamilton *v.* Cutts, 4 Mass. 348; Morse *v.* Goddard, 13 Metc. (Mass.) 177. See Gore *v.* Brazier, 3 Mass. 523; Smith *v.* Shepherd, 15 Pick. (Mass.) 147; Briggs *v.* Hall, 4 Leigh (Va.), 484.

operate as such an eviction; and it is *for the jury to say* whether the act was done by the landlord, and whether it was done with the intention of depriving the tenant of the enjoyment of the premises.[1]

§ 1337. Instructions as to what Constitutes an Eviction and the Effect of the Same. — "Physical and forcible expulsion is not necessary to produce an eviction; but any act on the part of the landlord which deprives the tenant of the beneficial enjoyment of the premises, amounts to an eviction. This is so, if the act was done in violation of the rights of the tenant."[2] - - - - "The principle upon which a tenant is required to pay rent, is the beneficial enjoyment of the premises, unmolested in any way by the landlord; any if the jury believe from the evidence in this suit, that the plaintiff took possession of any part of the premises leased by her to the defendants, against their consent, then in law it is an eviction, and releases the defendants from the payment of any more rent, and they will find for the defendants. - - - - Forcible expulsion is not necessary to cause an eviction; any act done in violation of the rights of the tenant, without his consent, will amount to an eviction. If the jury believe, in this case, that the plaintiff, after making this lease, without the consent of the defendants, took possession of a part of said demised premises, — then in law, it is an eviction, and they will find for the defendants. - - - - It is an eviction to take from the tenant some part of the demised premises of which he was in possession; and if the jury in this case, believe, from the evidence, that the plaintiff, without the consent of the defendants, took possession of any material part of the demised premises, then the defendants are released from the payment of all rent, and the jury will find for the defendants. - - - - If the jury believe, from the evidence in this case, that the premises leased by the plaintiff to the defendants, or a part of the same, were enclosed by a fence, and had on the same a brick building, and that the plaintiff took possession of said building and used it as a stable, and took possession of the yard and used it as a cattle yard, without the consent of the defendants, then, in law, it is an eviction, and releases the defendants from the payment of any more rent; and

[1] Upton *v.* Townend, 17 C. B. 30; *s. c.* 33 Eng. L. & Eq. 212, 221; Henderson *v.* Mears, 1 Fost. & Fin. 636.

[2] Approved in Price *v.* Railroad Co., 34 Ill 17, 18 This case also contains a concrete instruction on the hypothesis of an eviction by the fact of a portion of the demised land being taken possession of by a railway company and its track laid thereon.

they will find for the defendants. - - - - If the jury believe, from the evidence in this suit, that the plaintiff, after leasing the premises to the defendants, leased a part of said premises to one Henry Watson, who has taken possession of the same, and built a railroad over the same, then, in law, this is an eviction, and releases the defendants from the payment of all rent, and the jury will find for defendants. - - - - Although the jury may believe, from the evidence, that the defendants have never been disturbed in, or evicted from the main building on the leased premises, and that they have had the use and enjoyment of the same, still if they further believe, from the evidence, that the plaintiff has taken possession of any material part of said demised premises, without the consent of the defendants, then the law is, that it is an eviction, and the defendants are not bound to pay any rent for the part of the said premises they used and occupied; and the jury will find for the defendants."[1]

§ 1338. Whether a Lease at Will was expanded into one from Year to Year. — Where, by an alleged lease, rent was payable annually, on the 4th of December, at a given rate in advance, and the possession taken under it was continued for a year and upwards, and the rent would seem to have been paid and accepted annually according to its terms, — it was held that, although within the letter of the statute of frauds, and therefore a lease at will only, yet it might be considered as having been expanded to a lease from year to year, and that, the question being one of *intention*, should have been *submitted to the jury* under proper instructions.[2]

§ 1339. Whether a Contract was Obtained by Duress. — Whether a contract has been obtained by duress of threats or other *duress*, is manifestly a *question of fact* for the jury, within certain limits, and is not to be decided as a question of law.[3] A qualification of the statement is that the act done, or lan-

[1] Approved in Smith *v.* Wise, 58 Ill 143, 144. Citing Wade *v.* Halligan, 16 Ill. 512; Halligan *v.* Wade, 21 Ill. 480; Anderson *v.* Chicago Marine & Fire Ins. Co., *Id.* 602; Price *v.* Pittsburg, Ft. Wayne &c. R. Co., 34 *Id.* 37; Bentley *v.* Sill, 35 *Id.* 414; Wright *v.* Lattin, 38 *Id.* 293.

[2] Dunn *v.* Rothermel, 112 Pa St. 272.

[3] Griffith *v.* Sitgreaves, 90 Pa. St. 161.

guage which the evidence tends to show was used, must be of a character which in law may amount to duress.

§ 1340. Precedent of an Instruction: What Duress will render a Contract Voidable. — "A contract made under compulsion may be avoided by the party by whom it was executed. Compulsion, however, to have this effect, must amount to what the law calls duress. Mere angry or profane words, or strong earnest language, cannot constitute such compulsion as will amount to duress, or enable a party to be relieved from his contract. There may, however, be duress by threats. Duress by threats does not exist, wherever a party has entered into a contract under the influence of a threat, but only where such threat excites, or may reasonably excite, a fear of some grievous wrong, as bodily injury or unlawful imprisonment." [1]

§ 1341. Another Precedent: Action to Recover Money Paid Under Duress. — "The rule in this class of cases is, that where a payment of money is made upon an illegal or unjust demand, when the party is advised of all the facts, it can only be considered involuntary when it is made to procure the release of the person or property of the party from detention, or when the other party is armed with apparent authority to seize upon either, and the payment is made to prevent it. But where the person making the payment can only be reached by a proceeding at law, he is bound to make his defense in the first instance, and he cannot postpone the litigation, by paying the demand in silence and afterwards suing to recover it back." [2]

§ 1342. Another Precedent: What Constitutes such Duress as will Avoid a Deed. — "To constitute duress which would avoid the deed, it is not necessary that the threats be of physical injury alone; but if the plaintiff, the wife of Tapley, was induced to execute the deed by the threats of Tapley, her husband, that he would separate from her as her husband, and not support her, it is duress and would avoid the deed. The threats must be such as she might reasonably apprehend

[1] Approved in Adams *v.* Stringer, 78 Ind. 180, 181; citing Bennett *v.* Ford, 47 Ind. 264; Bush *v.* Brown, 49 Ind. 573; Coffett *v.* Wise, 62 Ind. 451; Reynolds *v.* Copeland, 71 Ind. 422; Tucker *v.* State, 72 Ind. 242.

[2] Approved in Lieber *v.* Weiden, 17 Neb. 584; citing Mundy *v.* Whittemore, 15 Neb. 647; King *v.* Williams, 21 N. W. Rep. (Ia.) 502; Maxwell's Pl. and Pr. (3rd ed.) 104.

would be carried into execution, and the act must have been induced by the threats. It is not necessary that the threats be made at the time, or immediately before signing, if it was within such time, and the circumstances satisfy you that the threats or its influence properly continued and influenced the plaintiff." [1]

§ 1343. Whether a Husband Acted as Tenant or Servant of his Wife. — Whether a husband, carrying on a farm owned by his wife and held by her to her own use, occupying with her the dwelling house thereon, taking the crops annually, and having the general management of the premises, is tenant or servant of the wife, is a *question of fact*, on which there is no presumption of law changing the burden of proof.[2]

§ 1344. Whether an Improvement was Made for the Purposes of a Residence. — Under pre-emption laws in Pennsylvania, it has been held a *question of fact* for a jury, whether an improvement upon land was made for the purposes of a continued residence, — the question involving the intent of the improver.[3]

§ 1345. Purpose for which Written Instruments were made. — In an action upon a state of facts (which need not be set out), it was held a *question for the jury* to decide the purpose for which an *agreed statement of facts* was made, — whether with the view to a reference, or as a statement to be laid before the insurers in respect of a loss which had happened,[4] — applying the general rule that questions of intent are for a jury. So, where the trustee of an insurance company made a *note*, but not for the purpose ostensibly put forth, and there was a lawful purpose for which it might have been given, of the same charac-

[1] Approved in Tapley *v.* Tapley, 10 Minn. 458; citing 2 Greenl. Ev., § 301; 5 Denio, 157; 1 Story Eq. Jur., § 239; 1 Pars. Cont. 395.

[2] State *v.* Hayes, 59 N. H. 450. The court say: "If the contrary rule is laid down in Albin *v.* Lord (39 N. H. 196, 205), it cannot be sustained." Compare Noyes *v.* Hemphill, 58 N. H. 536; Morse *v.* Mason, 103 Mass. 560; Delano *v.* Goodwin, 48 N. H. 203; Caswell *v.* Hill, 47 N. H. 407; Houston *v.* Clark, 50 N. H. 479. Similarly, *agency* and *authority* are generally questions of fact. *Post*, § 1368, *et seq.*

[3] Jones *v.* Brownfield, 2 Pa. St. 55.

[4] Knight *v.* New England Worsted Co., 2 Cush. (Mass.) 272.

ter as that put forth, — it was held a question for a jury whether it was given for the lawful or for the unlawful and fraudulent purpose.[1] So, where a *paper* was given to the common agent of two insurance companies, on the refusal of the agent to pay a thousand dollars, admitted to be due on a policy of one of the companies, unless plaintiff would sign the paper, it was held that the jury must determine whether it was supported by a consideration as against the other company.[2]

§ **1346. Revocation of a Will.** — Revocation is a question of *intention*, and evidence is admissible to show that intention, by any act done or believed to have been done. The act done or aimed to be done, as well as the purpose at the time at which it was done, are *matters of fact* for a jury,[3] and may be established as other facts, by one credible witness, or by convincing circumstances. It is also said, without the question being reasoned, and, it is suggested, with doubtful propriety, that "what facts amount to a revocation is of course a question of law."[4] From the statement of the rule that revocation is a question of intention, — that some act must have been done clearly indicating an intention to revoke the existing will, such as cancellation, destruction, removal from the hands of the person with whom it may have been lodged, or the like, —[5] it almost

[1] Brouwer *v.* Hill, 1 Sandf. S. C. (N. Y.) 630.

[2] Western Massachusetts Ins. Co. *v.* Duffey, 2 Kan. 348.

[3] Burns *v.* Burns, 4 Serg. & R. (Pa.) 295; Smiley *v.* Gambill, 2 Head (Tenn.), 164, 168.

[4] Smiley *v.* Gambill, 2 Head (Tenn.), 164, 168.

[5] 1 Jarm. Wills (Randolph & Talcott's edition), 282; citing Marr *v.* Marr, 2 Head (Tenn.), 303; Boylan *v.* Meeker, 28 N. J. L. 274; Mundy *v.* Mundy, 15 N. J. Eq. 290; Wright *v.* Wright, 5 Ind. 389; Gains *v.* Gains, 2 A. K. Marsh. (Ky.) 190; Overall *v.* Overall, Lit. Sel. Cas. 513; Smith *v.* Clark, 34 Barb. (N. Y.) 140; Johnson *v.* Brailsford, 2 Nott & McC. (S. C.) 282; Means *v.* Moore, 3 McCord (S. C.), 282; Smith *v.* Dolby, 4 Harr. (Del.) 350; White *v.* Casten, 1 Jones L. (N. C.) 197; Barker *v.* Bell, 46 Ala. 216; Timon *v.* Claffey, 45 Barb. (N. Y.) 438; Burns *v.* Burns, 4 Serg. & R. (Pa.) 295; Clingan *v.* Mitcheltree, 31 Pa. St. 25; Brown *v.* Thorndike, 15 Pick. (Mass.) 388; Hise *v.* Fincher, 10 Ired. L. (N. C.) 139; Sumner *v.* Sumner, 7 Harr. & J. (Md.) 388; Hollingshead *v.* Sturgis, 21 La. An. 450; Belt *v.* Belt, 1 Harr. & McH. (Md.) 409; Spoonemore *v.* Cables, 66 Mo. 579.

conclusively follows that, whether there has been a revocation is a *question of fact* for a jury, under proper instructions. Where a will was found, after the death of the testator and twenty-five years after it was made, in a barrel among waste paper, torn or worn into pieces, which pieces were scattered, — it was held that the questions whether the mutilation was done by the testator or by other persons, and if by him, whether accidentally or intentionally, and for the purpose of revocation, were questions of fact for the jury,[1] — a good illustration of the general doctrine on the subject. It may be added that parol evidence of the acts and declarations of the testator is admissible to determine whether the will, which was found torn or cut, was mutilated by the testator, and, if so, with the intention of revoking it.[2]

§ **1347. Intent to take Possession under a Will.** — A devisee who takes possession under a will is estopped from denying its validity; but, on an issue of *devisavit vel non*, it is *for the jury* to say whether the acts of the devisee show an *intention* thus to take possession.[3]

§ 1348. Redemption or Purchase. — A purchaser of land at a treasurer's sale for taxes in Pennsylvania may, after the expiration of the two years prescribed by statute, consent to receive the redemption money, though he is not obliged to do so; and if he receives it as such, the transaction will be a redemption of the land, and not a purchase of it; and whether it is a redemption or a purchase is a *question of fact* for a jury.[4]

§ **1349. Purpose for which Declarations were made.** — It has been ruled in Maine that, where the title to a chattel depends upon whether a prior sale by one of the parties to a third person was absolute or conditional, the declarations of that person, made against his own interest, and before he had disposed of his title, are admissible to show the character of the sale; that a mort-

[1] Lawyer *v.* Smith, 8 Mich. 411.

[2] Patterson *v.* Hickey, 32 Ga. 156; Dan *v.* Brown, 4 Cow. (N. Y.) 483; Collagan *v.* Burns, 57 Me. 449; Harring *v.* Allen, 25 Mich. 505; Lawyer *v.* Smith, 8 Mich. 411. See also Durant *v.* Ashmore, 2 Rich. L. (S. C.) 184.

[3] Landis *v.* Landis, 1 Grant Cas. (Pa.) 249.

[4] Cox *v.* Wolcott, 27 Pa. St. 154.

gagor of chattels has such an interest in the mortgaged property that his declarations, disparaging his title, may be proved by one who claims title against him and his vendee; and that, whether the declarations of a former owner were made to prevent his creditors from attaching his property, or in good faith, is a *question entirely for the jury*.[1]

§ 1350. Whether a Conveyance was Intended for the Father or for the Son. — In a recent case in Wisconsin, a conveyance of land, in which Amos W. Cross (then fifteen years old) was named as grantee, was taken by his father, Ansel A. Cross, who paid for the land, had the deed recorded, and thereafter retained possession of the instrument until his death, twenty-four years later. The son did not know of the existence of a deed, in which he was named as grantee, until after his father's death. In an action of ejectment, upon evidence tending strongly to show that the father claimed that there was a mistake in the deed, in that he should have been named as the grantee, instead of his son; that he attempted to correct the mistake after the deed was recorded; that he took possession of the land, paid the taxes, exercised many rights of ownership, claimed the land as his property, contracted to sell it, and finally conveyed it in his own name after having had possession for more than twenty years; — it was held that it was a *question for* the jury, whether the original conveyance was intended by the parties thereto to run to the son, and, if so, whether it was delivered to and accepted by the father for benefit of the son. Such evidence was sufficient to overcome the *presumption* from the record, that the deed was duly delivered to the grantee named therein.[2]

§ 1351. Whether an Offer was by way of Compromise. — Applying the rule that *preliminary questions of fact*, which are involved in the decision whether evidence is competent, must be decided by the court,[3] it has been held that, in a proceeding be-

[1] Beedy *v.* Macomber, 47 Me. 451.

[2] Cross *v.* Barnett, 65 Wis. 431; distinguishing McPherson *v.* Featherstone, 37 Wis. 632, and Allen *v.* Allen, 58 Wis. 202; *post*, § 1452.

[3] *Ante*, chap XIII.

fore a sheriff's jury to assess damages for the taking of land for a railroad, the question whether an offer of a certain sum for the land was by way of compromise so as to prevent evidence of such offer being competent, was a question for the sheriff to decide, and not for the jury. He was to decide whether the offer was made by way of compromise or not, and to exclude or admit the evidence accordingly.[1]

§ **1352. Trust created by Declarations and Acts.** — A trust *in personal property* may be created by *parol*.[2] Whether certain declarations and acts, tending to the conclusion that such a trust was intended, did in fact create such a trust, is, in a case triable by a jury, a *question of fact* and intent, to be decided by them.[3]

§ 1353. Precedent of an Instruction under this Head. — Where the subject of an alleged trust was certain promissory notes, which were claimed by the administrator of the alleged trustor, he denying the fact of the trust, the following charge to the jury (omitting certain details of fact) was approved: "To create a trust in property of this species, it is essential that the delivery of the property to the alleged trustee be with the purpose and intent of passing the legal estate to the trustee, and vesting in him the absolute control over the property, even as against the person creating the trust, subject only to the declared purpose of the trust; and, if such an original owner reserves to himself or heirs the power to control the property, and has only vested in the alleged trustee a possession, without any intention of vesting the property in him, but simply for the purpose of constituting him her agent to do certain acts, and, at the same time, of reserving the power to dispose of the property at his or her will, with or without the concurrence of the trustee,— this would be an imperfect trust, and would not vest title in the trustee. Whether there was a perfect trust created in this case, under these instructions, is a question of fact, for you to determine from the evidence in the case. You are to say from the evidence whether Mrs. White intended to vest in Jackson the title to these notes and their proceeds, and to surrender her own control over them, upon the trust that

[1] Davis *v.* Charles River &c. R. Co., 11 Cush. (Mass.) 506.

[2] Bostwick *v.* Mahaffy, 48 Mich. 342; Calder *v.* Moran, 49 Mich. Day *v.* Roth, 18 N. Y. 448.

[3] West *v.* White, 56 Mich. 1[illegible].

Jackson should provide suitable maintenance for her during her life, and for other purposes specified, and reserving to herself no power to control them, other than the benefits of her support, and no legal title to the property. If she did, claimant has no title, — that is, the administrator would take no title, and cannot recover. If she did not, then no title vested in Jackson, and the administrator is entitled to maintain an action on the notes. If, on the other hand, you find that the title to these notes vested in Jackson as trustee, under the instructions I have given you, the complainant will not be entitled to any sum, and your verdict should be for the contestants." [1]

§ **1354. Whether a Transfer was meant as a Gift or as a Bequest for Masses.** — Upon a ground similar to that which makes the fact of a *parol trust* in chattels a question for the jury,[2] it has been ruled, under circumstances, that the question whether, by a transfer of notes, made by a dying man to a priest, at the time of executing a will which was subsequently found to be void by reason of defective execution, in which will, drawn by the priest, he had described himself as legatee, — the deceased intended to make a gift of the notes to the priest, or to transfer them to him for the purpose of paying his funeral expenses and having masses said for the repose of his soul, was a *question of fact*.[3]

§ **1355. Dedication of Land to Public Uses.** — To constitute a valid common-law dedication, there must be an *intention to dedicate*, an *act of dedication*, and an *acceptance* on the part of the public.[4] Whether the owner of the land intended to dedicate it, is, in general, a *question of fact* for the jury.[5] In passing upon this point, the jury will take into consideration the *declarations* as well as the *acts* of the owner, with the view of determining his intention; and it has been held that subsequent

[1] West *v.* White, 56 Mich. 126, 128.

[2] *Ante*, § 1352.

[3] Malone *v.* Doyle, 56 Mich. 222.

[4] Irwin *v.* Dixon, 9 How. (U. S.) 10, 30; Baraclough *v.* Johnson, 8 Ad. & El. 99, 101; Poole *v.* Huskinson, 11 Mees. & W. 827, 829; Green *v.* Chelsea, 24 Pick. (Mass.) 71, 80; Hall *v.* McLeod, 2 Metc. (Ky.) 98, 104; Carpenter *v.* Gwynn, 35 Barb. (N. Y.) 395; Oswego *v.* Oswego Canal Co., 6 N. Y. 257; Baker *v.* St. Paul, 8 Minn. 491, 494; Wilder *v.* St. Paul, 12 Minn. 192, 200.

[5] Wilder *v.* St. Paul, 12 Minn. 192, 209.

declarations and acts are admissible, as tending to explain prior intent.[1] Evidence *in pais*, to show a dedication of a street, should be submitted to a jury in all cases; but the validity and sufficiency of a *recorded plat*, under which a dedication is claimed, are to be determined by the court. So also, if the location, dimensions, and identity of a street can be ascertained from recorded plats alone, those questions may properly be decided by the court; but if they depend upon evidence of user and practical location, they should be submitted to the jury.[2] Even where a dedication is claimed under a recorded plat, the court cannot declare, from an inspection of the plat, whether or not there was a dedication, but must submit the question to the jury.[3]

§ 1356. **Acceptance of Dedication.** — On like grounds, it is held that the question whether there has been an acceptance by the public, is *one of fact* for the jury, in determining which the acts of a single individual, though unsatisfactory evidence, may be submitted to them.[4]

§ 1357. **Whether Highway created by Parol Dedication and User.** — Whether there has been a parol dedication of land for a highway, and such a user by the public as creates a public right against the owner of the fee, is, on conflicting testimony, a *question of fact* for a jury.[5] So, in Pennsylvania it is held that, whether a right of way has been acquired or not, by an uninterrupted user for twenty-one years, is a question for a jury, in an action for damages for obstructing a private way; and that, where such user is proved, they will be justified in *presuming* it adverse, unless the presumption be rebutted by proof of license or agreement.[6] Therefore, on the trial of an indictment for obstructing a highway, it was held error for the court to charge

[1] Proctor *v.* Lewiston, 25 Ill. 153.

[2] State *v.* Schwin, 65 Wis. 207.

[3] Eastland *v.* Fogo, 58 Wis. 274; citing Gardiner *v.* Tisdale, 2 Wis. 153.

[4] Wilder *v.* St. Paul, 12 Minn. 192, 211.

[5] Daniels *v.* People, 21 Ill. 439.

[6] Steffy *v.* Carpenter, 37 Pa. St. 41, 44. Compare Worrall *v.* Rhoads, 2 Whart. (Pa.) 427; Campbell *v.* Wilson, 3 East, 294, 300; Garrett *v.* Jackson, 20 Pa. St. 331; Okeson *v.* Patterson, 29 Pa. St. 22.

the jury, at the request of the State, where the evidence of the dedication was circumstantial merely, that "the evidence, if true, would authorize them to find that the street was a public road, dedicated to a public use." [1] In such a case it was said by Dixon, C. J.: "In order to constitute a dedication, it should clearly appear that the highway had been used as such by the public with the assent of the owner; and when this is shown the dedication is established. Lapse of time and long use by the public as such, are not necessary to its existence; though, in the absence of more direct proof, they are circumstances of more or less force, according to the facts of each case, tending to establish it. Acts of an unequivocal nature on the part of both the owner and the public, may establish it in a very short space of time. It is always a question of fact, to be left to the jury, deciding upon the circumstances of each particular case." [2]

§ 1358. [Continued.] Precedent of an Instruction upon this Subject. — "The jury are instructed that highways may be acquired by dedication. And in this case, if the jury believe, from the evidence, that, after the highway in controversy was located, defendants set their hedges back, leaving room for the highway, and removed their fence from said highway, and permitted the public to use the same for a highway, — these facts, if proven, may be considered by the jury in determining whether the defendants had dedicated this land to the public for a highway." [3]

§ **1359. Domicile and Residence.** — Domicile and residence are questions depending principally upon fact and intent, and therefore they are generally *questions of fact* for the jury.[4] This principle applies in cases arising in actions for *divorce*.[5] It

[1] Sultzner *v.* State, 43 Ala. 24.

[2] Conneban *v.* Ford, 9 Wis. 240, 244.

[3] Approved in Wragg *v.* Penn. Township, 94 Ill. 11, 24.

[4] Pennsylvania *v.* Ravenel, 21 How. (U. S.) 103, 110.

[5] Foss *v.* Foss, 58 N. H. 283. For an elaborate charge on the subject of domicile, see White *v.* Brown, 1 Wall. Jun. 217, 261. This charge was made by Mr. Justice Grier; and, so far as it embodied propositions applicable to the general subject of domicile, it was repeated in a charge to the jury given by the Circuit Court of the United States for the Eastern District of Pennsylvania, in the case of Pennsylvania *v.* Ravenel, 21 How. (U. S.)

has been held, under circumstances, that the question of the *residence* of a man, which arose under a *plea in abatement* in an *attachment* suit, grounded upon an affidavit charging that he had absconded or absented himself from his usual place of abode in the State, so that the ordinary process of law could not be served upon him, presented a question of fact for the jury.[1]

§ **1360. Occupancy and Abandonment under Homestead Laws.** — Under the *homestead laws* of various States, a house and land, occupied by a debtor and his family as their family homestead, is exempt from execution. The question frequently arises whether the premises are *occupied* as a home. As this is both a *question of fact and intent*, it is supposed to be, in most cases, a question for a jury.[2] As the homestead, which is thus exempted from execution, is generally acquired by occupancy, so, in general, it may be lost by a *permanent abandonment;* though it is generally held that a temporary abandonment, *animo revertendi*, will not work a forfeiture of the right. Whether there has been such an abandonment must, in most cases, be a question of fact for the jury, since it is largely involved in the question of intent; and so it has been treated.[3]

§ 1361. Precedent of an Instruction in an Action to Recover a Homestead. — "If you believe from the evidence that the premises described in the petition of the plaintiff as the homestead of himself and wife were in fact used, occupied and enjoyed by said plaintiff and his said wife as their homestead up to the death of the wife, then and in that case the plaintiff is entitled to recover, and your verdict will be for the plaintiff as to the homestead."[4]

§ 1362. Another Precedent: Abandonment of Homestead and Desertion of Wife until after her Death. — "If you believe from the

103, 110, which charge was approved by the Supreme Court, Mr. Justice Daniel dissenting.

[1] Tiller *v.* Abernathy, 37 Mo. 196.

[2] See the subject discussed in Thomp. Homest., § 240, *et seq.*

[3] Fyffe *v.* Beers, 18 Iowa, 4, 7; Locke *v.* Rowell, 47 N. H. 46; Potts *v.* Davenport, 79 Ill. 455, 459; Brennan *v.* Wallace, 25 Cal. 108; Cook *v.* McChristian, 4 Cal. 23; Shepherd *v.* Cassiday, 20 Tex. 24, 26. See Thomp. Homest., § 265 *et seq.*

[4] Approved in Hector *v.* Knox, 63 Tex. 615.

evidence that the plaintiff abandoned his wife, and left her to shift for herself, and that he failed to support his wife, and that he voluntarily and without cause left the premises used and occupied as a homestead, and that he absented himself from said house and continued said abandonment up to the death of his said wife, — then and in that event you will find your verdict in favor of the defendant." [1]

§ **1363. Whether there was an intent to arrest.** — It is said: "To constitute a legal arrest, it is not necessary that the officer should *touch* the person of the individual against whom the precept is issued. It is sufficient if, upon being in his presence, he tells him he has such precept against him, and the person says, "I submit to your authority," — or uses language expressive of such submission. But it is not every touching of the person that will constitute an arrest. It must be a touching with such an *intent*. For instance, an officer has a *ca. sa.* against a defendant, whom he meets in company, and goes up and shake hands with him, without apprising him that he has such a precept, — this would not amount to an arrest unless so intended and understood by the parties. So, if the officer meets the defendant in a public company or on the highway, and notifies him of his having the precept, and directs him to meet him at some particular place, this might be an arrest or not, as the parties intended." [2] This being so, whether there was an actual arrest will in most cases be a *question of fact* for a jury.[3]

[1] Approved in Hector *v.* Knox, 63 Texas, 615.

[2] Jones *v.* Jones, 13 Ired. L. (N. C.) 448. See also Jones *v.* Jones, 1 Jones L. (N. C.) 491. See generally, as to what words or acts constitute an arrest: Gold *v.* Bissell, 1 Wend. (N. Y.) 210, 215; Huntington *v.* Blaisdell, 2 N. H. 318; Huntington *v.* Shultz, Harp. (S. C.) 453; United States *v.* Benner, Baldw. (U. S.) 234, 239; Field *v.* Ireland, 21 Ala. 240; Emery *v.* Chesley, 18 N. H. 198; Whitehead *v.* Keyes, 3 Allen (Mass.), 495; Strout *v.* Gooch, 8 Me. 127; Courtoy *v.* Dozier, 20 Geo. 369; State *v.* Mahon, 3 Harr. (Del.) 568; Tracy *v.* Whipple, 8 Johns. (N. Y.) 379.

[3] Jones *v.* Jones, 13 Ired. L. (N. C.) 448.

CHAPTER XLIV.

AUTHORITY: AGENCY: RATIFICATION.

SECTION
1368. When Relation of Principal and Agent Exists.
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§ 1368. When Relation of Principal and Agent exists. Whether the relation of principal and agent exists is a *question of fact* for a jury.[1] While this question is not concluded by the statement of the alleged agent,[2] yet evidence tending to show

[1] Schœlkopf *v.* Leonard, 8 Colo. 159; Robinson *v.* Walton, 58 Mo. 38; Middleton *v.* Kansas City &c. R. Co., 62 Mo. 579, 581; Barrett *v.* Indianapolis &c. R. Co., 9 Mo. App. 226; Watson *v.* Hoosac Tunnel Line Co., 13 Mo. App. 263; Schlesinger *v.* Texas &c. R. Co., 13 Mo. App. 471; *s. c.* affirmed, 87 Mo. 146.

[2] Barrett *v.* Indianapolis &c. R. Co., 9 Mo. App. 226.

that he *held himself out*, with the knowledge and consent of the assumed principal, as having authority to act for him in the manner in which he did act, is sufficient to take the question to the jury.[1]

§ **1369. Character in which a Person holds Money.** — The character in which a person holds money, whether for himself or for another, or for which of two contending parties he holds it, is manifestly a *question for a jury*. This is well illustrated by an English case, where W., being indebted to the plaintiffs, and unable to pay them, agreed with the defendants that they should discount bills, to be drawn by W. and accepted by the plaintiffs, for £2,500. The plaintiffs handed the acceptances to the defendants. The defendants' manager asked the plaintiffs when they required the money. The plaintiffs said they did not want the money until the next day, but afterwards said they would take £2,000 that evening. The manager said he would not hand the check for that amount to the plaintiffs, but would give it to W.'s clerk, and that he should require W.'s order for the payment of the balance. W.'s clerk got the check for £2,000, and handed it to the plaintiffs, and the plaintiffs, on the same evening, handed to the defendants an order by W. for payment of the balance to the plaintiffs. It was held that it was a question for a jury whether, at the time of lodging the order, the defendants held the money for the plaintiffs and, not for W.[2]

§ **1370. Scope of Agent's Authority.** — The scope of an agent's authority, where such authority is conferred in writing, is a *question of law* for the court.[3] In like manner it has been held that upon ascertained facts, the question whether authority to receive *notice* is within the scope of the duties of an agent, is a question of law for the court.[4] "If the authority of an agent be by at-

[1] Watson *v.* Hoosac Tunnel Line Co., 13 Mo. App. 263.

[2] Noble *v.* National Discount Co., 5 Hurl. & N. 225. Compare Lilley *v.* Hays, 5 Ad. & El. 548; Walker *v.* Rostron, 9 Mees. & W. 411; Liversidge *v.* Broadbent, 4 Hurl. & N. 602.

[3] Nofsinger *v.* Ring, 4 Mo. App. 576.

[4] Mobile &c. R. Co. *v.* Thomas, 42 Ala. 672.

torney, or other writing, the instrument itself must in general be produced, and, since the construction of writings belongs to the court, and not to the jury, the fact and the scope of the agency are, in such cases, *questions of law*, and are properly decided by the judge." But "in all instances where the authority, whether general or special, is to be implied from the conduct of the principal, or where the medium of proof of agency is *per testes*, the *jury are to judge* of the credibility of witnesses, and of the implications to be made from their testimony."[1] Again, it is said: "In most cases, if not in all, the question of agency is a *matter of fact*, which it is the province of a jury to determine upon, under the instructions of the court; and if the testimony tends to prove that the person acting as agent had authority from his principal to do the act, then it is manifest that the court cannot exclude from the jury the act itself, without overstepping the law of its duty and assuming to determine a matter which belongs to the jury, to wit: the authority of the agent to do the act. The correct rule is this: If there is no proof whatever tending to prove the agency, the act may be excluded from the jury by the court; but if there is any evidence tending to prove the authority of the agent, then the act cannot be excluded from them, for they are the judges of the sufficiency and weight of the testimony."[2]

§ 1371. Notice of Limitation upon Agent's Authority. — Where an agent makes a contract within the apparent scope of his authority, he binds his principal, although in point of fact he may have exceeded his authority, — that is, acted contrary to his principal's instructions. In such a case, if the principal would escape liability upon the contract thus made by the agent, it is necessary for him to show that the other contracting party *knew* of the limitation upon the agent's authority; and whether

[1] London Savings Fund Soc. *v.* Hagerstown Savings Bank, 36 Pa. St. 498, 502, 503, opinion by Woodward, J.

[2] McClung's Executors *v.* Spottswood, 19 Ala. 165, 170, opinion by Dargon, C. J. To the same effect, see Krebs *v.* O'Grady, 23 Ala. 732; Thayer *v.* Boston, 19 Pick. (Mass.) 511, 516; Gilpatrick *v.* Biddeford, 51 Me. 182; Fisher *v.* Stevens, 16 Ill. 397; Hart *v.* Girard, 56 Pa. St. 23, 28.

the other contracting party had such knowledge or not, is a *question of fact* for a jury, to be submitted to them under proper instructions.[1]

§ 1372. Whether a factor Obeyed his Instructions. — A factor must strictly follow the instructions of his principal, and any departure from them will be at his own risk. If, with proper care and diligence and in good faith, he carries out the orders of his principal, and a loss nevertheless occurs, it will fall upon the principal; and whether he has obeyed or disobeyed the instructions of his principal, will be a *question of fact* for the jury;[2] unless the instructions are embraced in a written instrument of unequivocal import, in which case its meaning must be declared by the court.[3]

§ 1373. Whether Warehouseman Received Goods as Agent of the Carrier or as Agent of the Vendee. — Where the question at issue was the right of *stoppage in transitu*, it was held that the jury should have been left free to determine, upon all the evidence, whether the warehouseman, into whose hands the goods had come when the vendor attempted to exercise the right, had received the goods as the agent of the carrier or as the agent of the vendee.[4] The decision proceeds upon the well understood ground, that the delivery of the goods to the vendee or to his agent would put an end to the *transitus* and determine the right of stoppage.[5]

§ 1374. Authority to Give Notice on Behalf of a Surety to Proceed Against Principal Debtor. — So, where there was evidence that the son of a co-surety gave notice to the creditor to proceed against the principal debtor, it was not error to submit the question of his authority to give such notice, *to the jury*.[6]

[1] Gelvin *v.* Kansas City R. Co., 21 Mo. App. 273, 280.

[2] Siegerson *v.* Pomeroy, 13 Mo. 620.

[3] *Ante*, § 1065.

[4] Hoover *v.* Tibbits, 13 Wis. 79, 84.

[5] Allan *v.* Gripper, 2 Cromp. & J. 218; Mottram *v.* Heyer, 1 Denio (N. Y.), 483; Dodson *v.* Wentworth, 4 Man. & G. 1080; Sawyer *v.* Joslin, 20 Vt. 172.

[6] Klingensmith *v.* Klingensmith's Ex., 31 Pa. St. 460.

§ **1375. Whether an Agent had the implied power to borrow Money.** — Under conflicting evidence as to the scope and limits of the power of an agent appointed to build up the business of his principal in a distant city, it has been thought proper to *submit to the jury* the question whether the agent had implied power to borrow money on the credit of his principal, — the court saying: "The case was not one which could be determined by the court. It depended very much upon probabilities and inferences, and those were required to be disposed of by the jury. In both respects the case was one which could not be withheld from their consideration; and their verdict on this disputed evidence must be accepted as a legal result, even though a different determination by them might have been regarded as more consistent with the entire weight and effect of the evidence."[1]

§ **1376. Act of Street Commissioner in Making Repairs.** — In an action for damages for an injury received in consequence of a defect in the street of a city, it has been held that the acts of the street commissioner, within the scope of the trust committed to him, are *prima facie* the acts of the city; and that, whether they are within the general authority conferred upon him, is a *question for the jury*.[2] "Whether a particular act," said Shaw, C. J., "operating injuriously to an individual, was authorized by the city, by any previous delegation of power, general or special, or by any subsequent adoption and ratification of particular acts, is a question of fact, to be left to a jury, to be decided by all the evidence in the case."[3]

§ **1377. Authority of Station Agent.** — Following the general current of authority, it has been held that the question whether or not the station agent of a railway company has, as such agent, authority to bind the company by a contract to furnish cars to a shipper at his station at a particular time, is one *of fact* and not of law; and hence that it is error to reject testimony

[1] Bickford *v.* Menier, 36 Hun (N. Y.), 446, 449.

[2] Gilpatrick *v.* Biddeford, 51 Me. 132, 190.

[3] Thayer *v.* Boston, 19 Pick. (Mass.) 511, 516.

offered by the railway company to prove that its agents had not such authority, and to instruct the jury on the theory that such agents had such authority as matter of law.[1]

§ **1378. General Authority of Bank Cashier.** — The cashier of a bank is, however, an agent whose general duties are so well established by the usages of commerce, that courts take *judicial notice* of them; and it is held that the extent of the general powers of the cashier of a bank is a *question of law.*[2] In the absence of proof to the contrary, he will be *presumed* to have authority to turn out the notes and assets of the bank in payment of its indebtedness.[3] He binds the bank by his statements touching its ordinary business in hand.[4] Under circumstances, he binds the bank by giving false information to an inquirer,[5] though not where the circumstances are such that it is not his official duty to give any information,[6] as where he is not at the bank attending to his ordinary duties.[7] The law ascribes to him power to indorse negotiable paper in the ordinary business of the bank;[8]

[1] Wood *v.* Chicago &c. R. Co., 59 Iowa, 196 (Beck, J., dissenting).

[2] Farmers' Bank *v.* Troy City Bank, 1 Dougl. (Mich.) 457; Peninsular Bank *v.* Hanmer, 14 Mich. 208.

[3] Kimball *v.* Cleveland, 4 Mich. 606; Peninsular Bank *v.* Hanmer, 14 Mich. 208. The ordinary duties which the law ascribes to him were stated by Mr. Justice Wayne in United States *v.* City Bank, 21 How. (U. S.) 356, 364.

[4] Cochecho Bank *v.* Haskell, 51 N. H. 116; Merchants' Bank *v.* Rudolf, 5 Neb. 527; Grant *v.* Cropsey, 8 Neb. 205; State Bank *v.* Wilson, 1 Dev. (N. C.) 484; Hickok *v.* Farmers' &c. Bank, 35 Vt. 476.

[5] Manufacturers' Bank *v.* Scofield, 39 Vt. 590. See, *contra*, Franklin Bank *v.* Steward, 37 Me. 519.

[6] Mapes *v.* Second Nat. Bank, 80 Pa. St. 163; Swift *v.* Jewsbury, L. R. 9 Q. B. 301, 312 (reversing *s. c. sub nom.* Swift *v.* Winterbotham, L. R. 8 Q. B. 244). See also Etting *v.* Commercial Bank, 7 Rob. (La.) 459. Compare Mackay *v.* Commercial Bank, L. R. 5 P. C. 394; *s. c.* 43 L. J. (P. C.) 31; Barwick *v.* English Joint Stock Bank, L. R. 2 Exch. 259.

[7] Merchants' Bank *v.* Rudolf, 5 Neb. 527; Bullard *v.* Randall, 1 Gray (Mass.), 605; Houghton *v.* First Nat. Bank, 26 Wis. 663. But see Merchants' Bank *v.* State Bank, 10 Wall. (U. S.) 604; Pendleton *v.* Bank of Kentucky, 1 T. B. Monr. (Ky.) 171, 182.

[8] Wild *v.* Bank of Passamaquoddy, 3 Mason (U. S.), 505; Fleckner *v.* U. S. Bank, 8 Wheat. (U. S.) 338; Folger *v.* Chase, 18 Pick. (Mass.) 63; Hartford Bank *v.* Barry, 17 Mass. 93; Bank of Genessee *v.* Patchin Bank, 19 N. Y. 312; Everett *v.* United States, 6 Porter (Ala.), 166; Lafayette Bank *v.* State Bank, 4 McLean (U. S.), 208; Bank of U. S. *v.* Davis, 4 Cranch C. C. (U. S.) 533;

to sign stock certificates indorsed in blank,[1] but not to indorse strictly non-negotiable paper,[2] especially his own note;[3] to certify checks of the bank;[4] to accept bills drawn upon the bank;[5] to sell exchange belonging to the bank,[6] and to indorse the same for the purpose of passing title;[7] and to guarantee the paper so sold.[8] But he has no implied power to compromise debts due the bank,[9] nor to give an indemnity to a sheriff,[10] nor to release indorsers or sureties,[11] nor to indorse for accommodation.[12]

Elliot *v.* Abbot, 12 N. H. 549; Harper *v.* Calhoun, 7 How. (Miss.) 203; West. St. Louis Sav. Bank *v.* Shawnee Co. Bank, 95 U. S. 557; *s. c.* 5 Rep. 33; *s. c.* 2 Cent. L. J. 46; 16 Alb. L. J. 473; Merchants' Ins. Co. *v.* Chauvin, 8 Rob. (La.) 49; Robb *v.* Ross Co. Bank, 41 Barb. (N. Y.) 586; Bissell *v.* First Nat. Bank, 69 Pa. St. 415; Maxwell *v.* Planters' Bank, 10 Humph. (Tenn.) 507; State Bank *v.* Fox, 3 Blatch. (U. S.) 431; Farrar *v.* Gilman, 19 Me. 440; Crockett *v.* Young, 1 Smed. & M. (Miss.) 241; Holt *v.* Bacon, 25 Miss. 567; Cooper *v.* Curtis, 30 Me. 488; St. Louis Perpetual Ins. Co. *v.* Cohen, 9 Mo. 421; Kimball *v.* Cleveland, 4 Mich. 606; Carey *v.* McDougald, 7 Ga. 84; Houghton *v.* First Nat. Bank, 26 Wis. 663; Bank of N. Y. *v.* Bank of Ohio, 29 N. Y. 619 (overruling Bank of State *v.* Farmers' Branch, 36 Barb. (N. Y.) 332); City Bank *v.* Perkins, 29 N.Y. 554.

[1] Mathews *v.* Mass. Nat. Bank, 1 Holmes (U. S.), 396.

[2] Barrick *v.* Austin, 21 Barb. (N. Y.) 241. Compare Elliot *v.* Abbot, 12 N. H. 549.

[3] West St. Louis Sav. Bank *v.* Shawnee Co. Bank, 95 U. S. 557; *s. c.* 5 Rep. 33; 2 Cent. L. J. 46; 16 Alb. L. J. 473.

[4] Clarke Nat. Bank *v.* Bank, 52 Barb. (N. Y.) 593; Cooke *v.* State Nat. Bank, 52 N. Y. 96. See also Farmers' Bank *v.* Butchers' Bank, 16 N. Y. 125; *s. c.* 4 Duer (N. Y.), 219; 14 N. Y. 633; 28 N. Y. 425; Merchants' Bank *v.* State Bank, 10 Wall. (U. S.) 604.

[5] Farmers' &c. Bank *v.* Troy City Bank, 1 Dougl. (Mich.) 457. But see Pendleton *v.* Bank of Ky., 1 T. B. Mon. (Ky.) 171, 179.

[6] Fleckner *v.* United States Bank, 8 Wheat. (U. S.) 338, 360.

[7] Wild *v.* Bank of Passamaquoddy, 3 Mason (U. S.), 505; Farmers' &c. Bank *v.* Troy City Bank, 1 Dougl. (Mich.) 457; Robb *v.* Ross Co. Bank, 41 Barb. (N. Y.) 586; Lafayette Bank *v.* State Bank, 4 McLean (U. S.), 208; City Bank of New Haven *v.* Perkins, 4 Bosw. (N. Y.) 420.

[8] Sturges *v.* Bank of Circleville, 11 Oh. St. 153.

[9] Chemical Nat. Bank *v.* Kohner, 58 How. Pr. (N. Y.) 267; *s. c.* 8 Daly (N. Y.), 530.

[10] Watson *v.* Bennett, 12 Barb. (N. Y.) 196.

[11] Daviess Co. Sav. Asso. *v.* Sailor, 63 Mo. 24; *s. c.* 3 Cent. L. J. 488; 8 Chi. L. N. 332; Cochecho Nat. Bank *v.* Haskell, 51 N. H. 116; Payne *v.* Com. Bank, 6 Sm. & M. (Miss.) 24; Ryan *v.* Dunlap, 17 Ill. 40; Eastman *v.* Coos Bank, 1 N. H. 23. *Contra*, Bank *v.* Klingensmith, 7 Watts (Pa.), 523.

[12] Ex parte Estabrook, 2 Lowell (U. S.), 547. Compare Perkins *v.* Bradley, 24 Vt. 66.

§ 1379. **Authority of Husband to Employ Attorney for Wife.** — On the principle upon which it is held that the fact of *agency* is a question *for a jury*, it is also ruled that, where a husband employs an attorney to bring an action in his own name and that of his wife, in respect of her separate property, the question whether he had authority so to do for his wife, is to be tried in the same manner as the question of authority by any other person employing an attorney; but the jury may consider the situation and relation of the parties, in determining whether the husband acted as agent for his wife or for both, or in his own behalf alone; and this is tantamount to saying that the question is one of fact for the jury.[1]

§ 1380. **Whether the Act of a Copartner is Within the Scope of the Business.** — A copartner is the general agent of the partnership for the purpose of conducting the partnership business in the usual way.[2] Whether the act of the copartner is within the scope of the business of the partnership, or whether, in the doing of a contested act, he was conducting its business in the usual way, so as to bind the other members, is a question of fact for a jury.[3]

§ 1381. **Ratification generally a Question of Fact.** — The question whether a principal has ratified the unauthorized act of his agent, or whether a person has ratified or accepted the act of one who has assumed, without authority, to act as his agent, is generally a *question of fact* for a jury.[4] This principle has been applied to the case where a negotiable instrument has been altered subsequently to its execution and delivery. The maker may, by certain unequivocal acts done with a knowledge of the alteration, ratify the same, — as where, with such knowledge, he subsequently makes a *part payment;*[5] and whether he has, by

[1] Comfort *v.* Sprague, 31 Minn. 405.

[2] Winship *v.* Bank of U. S., 5 Pet. (U. S.) 561.

[3] Loudon Savings Fund Soc. *v.* Hagerstown Savings Bk., 36 Pa. St. 498, 505.

[4] Middleton *v.* Kansas City &c. R. Co., 62 Mo. 579; Fisher *v.* Stephens, 16 Ill. 397.

[5] Evans *v.* Foreman, 60 Mo. 449

subsequent conduct, ratified the alteration, has been said to be a question of fact for the jury.[1]

§ 1382. When a Question of Law and when of Fact. — "Where the evidence is doubtful and may admit of different interpretations, there it seems proper to submit the question for the decision of the jury. But where they can justly lead to no safe or satisfactory conclusion, a ratification ought not to be presumed."[2] In many cases the acts will be of such an unequivocal character that the question may be a mere question of law, — as where the principal, with full knowledge, accepts the fruits of the misconduct of the agent.[3] The precautions which should be borne in mind in submitting this question to the jury are well illustrated by a leading case in Maryland, in which the trial court instructed the jury that, if the consideration for the contract had been received by the agent and paid over to the principal, who retained the same, these facts were in law an adoption of the contract, and as binding on the principal as if a previous authority had been given to an agent. This instruction was held erroneous, because the jury were not required to find (1) that the defendants *knew* on what account the money was paid them, and (2) that they knew the terms of the contract on which the money was received.[4] Where the evidence which speaks upon the subject whether the principal received the fruits of the misconduct of the agent with full knowledge of all the circumstances, is *equivocal*, the question whether there has been a ratification ought to be submitted to the jury under proper instructions as to the law.[5]

§ 1383. AN ILLUSTRATION. — An illustration of the doctrine that, whether there has been a ratification is a question of fact for a jury, is, perhaps, found in a case in New York, where the defendant, who was

[1] Iron Mountain Bank *v.* Murdock, 62 Mo. 70, 77. Compare German Bank *v.* Dunn, 62 Mo. 79.

[2] Story on Agency, § 253; Commercial Bank *v.* Jones, 18 Tex. 812, 828.

[3] Crooker *v.* Appleton, 25 Me. 131, 135; Bryant *v.* Moore, 26 Me. 84.

[4] Pennsylvania &c. Co. *v.* Dandridge, 8 Gill & J. (Md.) 249, 311.

[5] Horton *v.* Townes, 6 Leigh (Va.), 47.

sued as indorser of two promissory notes, had written to the plaintiffs, agreeing to an arrangement giving further time of payment to the makers, and that no act of the plaintiffs in so doing should exonerate the defendant as indorser, and waiving notice of protest; upon which facts it was held, reversing the trial court, that the defendant was not estopped by the letter from setting up as a defense that the indorsements were forgeries, but that the letter was evidence to be submitted to the jury as to whether the defendant may have ratified and affirmed the indorsements, though not his own.[1]

§ 1384. Instruction as to Authority of Agent of an Insurance Company to Receive Notice of Additional Insurance in Action on Policy. — "That the matter of McKinney being the agent of defendants, is a question of fact for them (the jury) to determine from the testimony; and, in aid of their investigation, they are instructed that an agent may be created by long acquiescence on the part of the principal, with knowledge of his acts as agent for said principal, as well as by express appointment; and that if, by express agreement, it is so arranged between parties that one shall be advertised as the agent, but that another shall actually do the business, and this third person does transact the business, and becomes known as the agent of the principals by transacting their said business, then the said third person is their agent, and the principal is estopped from denying it as to those who have acquired rights against said principal because of the acts of said agent. - - - - A corporation cannot affirm an act of its agent in part, and disaffirm as to the residue. And the defendants herein are not to be allowed to avail themselves of the benefits of McKinney's acts, wherein they enure to their benefit, and to ignore and disaffirm the acts of said McKinney when they may operate to their prejudice, provided he has acted within the scope of such agency. - - - - When there is no evidence of the written appointment of an agent, the fact and extent of his agency must be determined by what he testifies and did, and also by the acts of the company recognizing him. If either party must suffer from the mistake of an agent, it must be the party whose agent he is. - - - - If the plaintiffs procured the written permission of the agent to get other insurance, and the agent neglected to indorse the same on the policy, or inform the company, then the plaintiffs cannot be affected by

[1] Thorn *v.* Bell, Lalor Supp. (N. Y.) 430. It should be added that the propriety of the conclusion reached by the Supreme Court in this case is very doubtful.

such neglect; if such agent had authority to give the permission, which is a fact for the jury." [1]

§ 1385. INSTRUCTION AS TO AUTHORITY OF A BROKER FOR THE PURPOSE OF SIGNING BOUGHT AND SOLD NOTES. — "The court instructs the jury that a broker for the purpose of signing bought and sold notes is the agent of each and both of the parties to the contract which he makes; but in all other respects he is and remains the agent of the party who originally employs him. If, therefore, the jury find in this case that the defendant first employed the broker, Mr. Thorne, or first set him in motion on the business involved in this controversy, they are instructed that he was and remained the agent of the defendant, so far as any agency resulted from the above facts, and that any mistakes which he may have made in conveying to plaintiffs the directions of defendants as to the manner of punching these rails, are the mistakes of defendant's own agent, and that the plaintiffs are not responsible therefor." [2]

§ 1386. INSTRUCTION AS TO WANT OF AUTHORITY OF A CANVASSING BOOK AGENT TO RECEIVE PAYMENTS FROM SUBSCRIBERS. — "If the court find that Du Plainval was a canvassing agent, obtaining subscriptions for the plaintiff for books published by him and sold by subscription, and that said Du Plainval was restricted by the terms of his employment from collecting for any books or parts of books, except such as were delivered by him — and they further find that said canvassing agent never had possession of the parts and works for which this suit is brought, and did not deliver the same to the defendant, — then it de-

[1] Approved in Insurance Co. *v.* Lyons, 38 Texas, 258, 259. In White *v.* Leighton, 15 Neb. 426, there is a series of instructions as to the liability of the proprietor of a *country store* for purchases of goods made by his manager or clerk in charge of it, on the theory of authority by being *held out* as agent.

[2] Approved in Schlesinger *v.* Texas &c. R. Co., 87 Mo. 149. In approving this instruction, the Supreme Court of Missouri, speaking through Black, J., say: "For some purposes, as the signing of the contract, the broker is regarded as the agent of both parties. He is accustomed to give the buyer a note called a sold note, and the seller a like memorandum called a bought note. Story on Agency (9th ed.), § 28; Benjamin on Sales, § 275. While he represents both parties in making the memorandum, he represents, in all other matters, the party originally employing him. Whart. Agency, § 715. The instruction seems to enunciate correct principles of law, and, taking the contract as the parties made it, it it seems that Thorne was acting as a negotiator."

clares the law to be that his employment as canvassing agent gave him no authority to collect the money for which this suit is brought, and it devolves upon the defendant to show that he had such authority.[1]

§ 1387. Instruction: Notice to Agent when Notice to Principal. — "The jury are instructed that notice to the general superintendent of a railroad company is notice to the company." [2]

[1] In Chambers *v.* Short, 79 Mo. 204, it was held that the trial court erred in refusing to give the above instruction, — the court proceeding on the authority of Butler *v.* Dorman, 68 Mo. 298.

[2] Approved in Neilon *v.* Kansas City &c. R. Co., 85 Mo. 599, 609.

CHAPTER XLV.

ALTERATION OF WRITTEN INSTRUMENTS.

SECTION

1392. Fact of Alteration.
1393. Time of the Alteration.
1394. In the Case of Negotiable Instruments.
1395. Materiality of the Alteration.
1396. Authority for Making the Alteration.
1397. By whom Made and whether Fraudulent.
1398. These Questions, how Settled.
1399. Whether an Alteration has been Made in such a Manner as to excite Suspicion and Provoke Inquiry.
1400. [Continued.] An Opposing View.
1401. [Continued.] An Instruction upon this Hypothesis.
1402. Instructions as to Effect of Material Alteration of Note after Delivery.
1403. Defendant's Instructions as to Unauthorized Alteration of a Promissory Note, in an Action on the Note by Indorsee against Maker.
1404. Instruction as to Effect of Alteration of Note by Affixing a Seal thereto in an Action on the Note.

§ **1392. Fact of Alteration.** — Whether there has been in fact an alteration in a written instrument is a *question for a jury*.[1]

§ **1393. Time of the Alteration.** — If *the jury find* there was an alteration, then it is also for them to determine whether it was made before the instrument passed from the hands of the maker or afterwards,[2] even when no explanatory evidence is offered.[3] On the one hand, it has been held that, in the ab-

[1] Paramore *v.* Lindsey, 63 Mo. 63; Belfast Nat. Bank *v.* Harriman, 68 Me. 522; Wood *v.* Steele, 6 Wall. (U. S.) 80; Cole *v.* Hills, 44 N. H. 227.

[2] Belfast Nat. Bank *v.* Harriman, 68 Me. 522

[3] Crabtree *v.* Clark, 20 Me 337. "When there are no indications of falsity upon the paper, the plaintiff is not bound to go further, and prove that it was made on the day it purports to be. Belfast Nat. Bank *v.* Harriman, *supra;* Pullen *v.* Hutchinson, 25 Me. 249.

sence of evidence speaking directly or inferentially upon the question, the law, following the general *presumption* of right acting, presumes that the alteration was made either before or at the time of the signing of the instrument.[1] On the other hand, it has been held that there is no *presumption of law* that the alteration was made either before or after delivery.[2] "If the alteration is noted in the attestation clause, as having been made before the execution of the instrument, it is sufficiently accounted for, and the instrument is relieved from suspicion; and if it appears in the same handwriting and ink with the body of the instrument, it may suffice. In other words, if nothing appear to the contrary, the alteration will be presumed to be contemporaneous with the execution of the instrument. But if any ground of suspicion is apparent upon the face of the instrument, the law presumes nothing, but leaves the question of the time when it was done, as well as that of the person by whom, and the intent with which the alteration was made, as matters of fact, to be ultimately found by the jury, upon proofs to be adduced by the party offering the instrument in evidence."[3] Restating the doctrine, the rule is said to be that, "if there be suspicious circumstances on the face of the instrument, it is for the judge trying the case to determine, from an inspection, whether it be such as to require the party offering it to explain the matter. When he submits the question, with the instrument itself and the proofs, to the jury, it is a question of fact for their determination; and their finding, as on any other question of fact, is conclusive."[4] Where there are no such circumstances of suspicion, the *presumption* in the absence of proof to the contrary, is that the apparent alteration was made before the final execution and delivery of the instrument.[5]

[1] Matthews *v.* Coalter, 9 Mo. 705; Bailey *v.* Taylor, 11 Conn. 531; Lubbering *v.* Kohlbrecher, 22 Mo. 596; Paramore *v.* Lindsey, 63 Mo. 63, 66.

[2] Ely *v.* Ely, 6 Gray (Mass.), 439, 442.

[3] 1 Greenl. Ev., § 564. This statement of doctrine by Prof. Greenleaf has been approved in the following cases: Matthews *v.* Coalter, 9 Mo. 705; Lubbering *v.* Kohlbrecher, 22 Mo. 596; Paramore *v.* Lindsey, 63 Mo. 63.

[4] Holton *v.* Kemp, 81 Mo. 661, 665.

[5] *Ibid.*; Matthews *v.* Coalter, 9 Mo. 705; Paramore *v.* Lindsey, 63 Mo. 63.

§ 1394. In the Case of Negotiable Instruments. — A holder of a promissory note, the *date* of which appears, upon inspection, to have been altered, must explain the alteration and show it to have been lawfully made, before he can recover upon it.[1] The maker of a negotiable instrument is always *presumed*, in the absence of evidence to have issued it clear of all blemishes, erasures and alterations, whether in the date or body of the instrument; and the burden of showing that it was defective when issued is upon the holder, even though the alteration be beneficial to the maker. Such evidence, it has been held, is for the jury, who are to say whether the alteration, if any, was made before or after the defendant parted with the note.[2]

§ 1395. Materiality of the Alteration. — But whether an alteration is material or not, is a *question of law* for the court.[3] A material alteration of a written instrument, made after it is signed and delivered, without the consent of an obligor therein, will discharge him from its obligation.[4] This rule holds good, although the alteration may be shown by evidence to have been in furtherance of the original intent of the parties; since, if the instrument does not express the real intent of the parties, the remedy of the obligee is to go into a court of *equity* and have it *reformed*.[5] "To tolerate an attempt to reform a security, by

[1] Simpson *v.* Stackhouse, 9 Pa. St. 186; Paine *v.* Edsell, 19 Pa. St. 178; Miller *v.* Read, 27 Pa. St. 244.

[2] Heffner *v.* Wenrich, 32 Pa. St. 423; Simpson *v.* Stackhouse, 9 Pa. St. 186. Upon the question what alterations will avoid a written obligation, see Bowers *v.* Jewell, 2 N. H. 543; Marshall *v.* Gougler, 10 Serg. & R. (Pa.) 164; Master *v.* Miller, 4 T. R. 320, 323; Getty *v.* Shearer, 20 Pa. St. 12; Miller *v.* Gilleland, 19 Pa. St. 119; Hunt *v.* Adams, 6 Mass. 519; Nevins *v.* De Grand, 15 Mass. 436; Adams *v.* Frye, 3 Met. (Mass.) 103; Zouch *v.* Clay, 1 Vent. 185; Henman *v.* Dickinson, 5 Bing. 183; Knight *v.* Clements, 8 Ad. & El. 215, 221; Bishop *v.* Chambre, Mood. & M. 116; Clifford *v.* Parker, 2 Man. & G. 910; Cariss *v.* Tattersall, *Id.* 890.

[3] Belfast Nat. Bank *v.* Harriman, 68 Me. 522; Wood *v.* Steele, 6 Wall. (U. S.) 80; Overton *v.* Matthews, 35 Ark. 147.

[4] Evans *v.* Foreman, 60 Mo. 449; Haskell *v.* Champion, 30 Mo. 136; Medlin *v.* Platte Co., 8 Mo. 235; Marshall *v.* Gougler, 10 Serg. & R. (Pa.) 164; Miller *v.* Gilleland, 19 Pa. St 119; Neff *v.* Horner, 63 Pa. St. 327; Fulmer *v.* Seitz, 68 Pa. St. 237; Kountz *v.* Kennedy, 63 Pa. St. 187.

[5] Evans *v.* Foreman, *supra*.

the rash, and it may be secret act of the creditor, would change the position of the debtor and subject him to risk and trouble which ought not to be imposed on him. It would compel him to encounter the perils of parol proof, not only to establish the fact of alteration, but to show what the instrument was; and that done, to meet the creditor's proof of *bona fides*." [1] Cases are found which support the extreme doctrine that the most trifling alteration of a written instrument cannot be made after its execution and delivery, without the consent of all parties to it; [2] and that it is not at all material whether the alteration was done innocently or fraudulently, since the effect upon the rights of the obligor is the same in either case.[3] But this rule has no just application to cases where the alteration was *immaterial*, that is, where it did not change the legal effect of the instrument, but merely added something which the law would imply; [4] and whether an alteration is or is not material, within the meaning of this qualification of the rule, is a *question of law* for the court.[5] But there is a view that the question of the materiality of the alteration can have little application to a case where the alteration has been made by a party beneficially interested in the instrument, and who has it in his custody; it being contrary to the policy of the law to permit the owner and custodian of an instrument to change it, and then, when charged with the fact, to claim that the alteration was immaterial.[6]

§ **1396. Authority for Making the Alteration.** — The question whether there was authority to alter a written instrument, as to fill up certain blanks which had been left therein at the

[1] Miller *v.* Gilleland, 19 Pa. St. 119.

[2] Moore *v.* Bickham, 4 Binn. (Pa.) 1.

[3] Warrington *v.* Early, 2 El. & Bl. 763; Gardner *v.* Walsh, 5 El. & Bl. 82 (overruling Catton *v.* Simpson, 8 Ad. & El. 136;) Chappell *v.* Spencer, 23 Barb. (N. Y.) 584; Woodworth *v.* Bank of America, 19 Johns. (N. Y.) 391; Evans *v.* Foreman, 60 Mo. 449.

[4] State *v.* Dean, 40 Mo. 464; Western Building Asso. *v.* Fitzmaurice, 7 Mo. App. 283; Hunt *v.* Adams, 6 Mass. 519; Miller *v.* Gilleland, 19 Pa. St. 119.

[5] State *v.* Dean, *supra;* Western Building Asso. *v.* Fitzmaurice, *supra.*

[6] Hord *v.* Taubman, 79 Mo. 101; First National Bank *v.* Fricke, 75 Mo. 178; Haskell *v.* Champion, 30 Mo. 136; Moore *v.* Hutchinson, 69 Mo. 429; 1 Greenl. Ev., § 565.

time of its signature, or to alter it in any manner which the evidence shows, is *matter for a jury* to determine.[1] This question frequently arises upon evidence tending to show that the instrument was drawn *in blank*, signed, and then delivered as an *escrow*. It has been ruled that if an instrument, — as for instance a *promissory note*, — is made by A. for the accommodation of B., with the understanding that C. will also join therein, a blank being left for the name of the payee, and C. refuses to join, but afterwards the instrument, thus imperfect, is delivered to a third person for value, upon a representation that the person so delivering it has authority thus to deal with it, and the name of such third person is inserted therein as payee, he cannot recover upon it as against A.[2] But it is no objection to the validity of a bill of exchange that the acceptance and indorsement were written before the bill was drawn, notwithstanding the indorsement was made by a stranger to the acceptor.[3]

§ **1397. By whom made and whether Fraudulent.** — Other questions may likewise arise which will also be for the *determination of the jury*, — as by whom the alteration was made, and whether it was fraudulent or not.[4]

§ **1398. These Questions, how Settled.** — These questions are to be settled by all the evidence in the case, the surrounding circumstances, and the nature, character and appearance of the alterations.[5]

[1] State *v.* Dean, 40 Mo. 464. See also Stahl *v.* Berger, 10 Serg. & R. (Pa.) 170; Smith *v.* Croocker, 5 Mass. 538; Wooley *v.* Constant, 4 Johns. (N. Y.) 54; Ex parte Kerwin, 8 Cow. (N. Y.) 118. Belfast Nat. Bank *v.* Harriman, 68 Me. 522.

[2] Awde *v.* Dixon, 6 Exch. 869.

[3] Schultz *v.* Astley, 2 Bing. New Cas. 544. As to what will be sufficient *evidence* to authorize the court to submit to the jury the question whether an obligor in a written instrument authorized or subsequently *ratified* an unauthorized alteration of it, made after signing and delivering it, see Lammers *v.* White Sewing Machine Co., 23 Mo. App. 471. As to the ratification of such an act by a *corporation*, see First National Bank *v.* Fricke, 75 Mo. 178.

[4] Belfast Nat. Bank *v.* Harriman, 68 Me. 522; Cole *v.* Hills, 44 N. H. 227.

[5] Belfast Nat. Bank *v.* Harriman, 68 Me. 522; Ely *v.* Ely, 6 Gray (Mass.), 439, 442.

§ **1399. Whether an Alteration has been made in such a Manner as to excite Suspicion and provoke Inquiry.** — This question becomes material in respect of the rights of an innocent purchaser for value, of a *negotiable instrument;* and here the general rule is that any alteration in the material part of a bill of exchange or promissory note, as in the date, sum, time when payable, consideration, or place of payment, will render the same invalid, as against any party thereto not consenting to such alteration, even in the hands of an *innocent holder*.[1] Nor is the application of this principle affected by the skillfulness with which the alteration is made, or by the probability that the closest observer will fail to discover it,[2] unless the case falls within an *exception* to the rule, which will now be stated. This exception is that, if a promissory note is so *negligently drawn*, as by leaving *blank spaces unfilled*, as to easily admit of a fraudulent alteration, and such an alteration is subsequently made, the loss will fall upon the original drawer, or upon one who indorsed it in that condition, and not upon an innocent purchaser;[3] unless, although the instrument was negligently drawn, the alteration is made in such a manner as to excite suspicion and put a purchaser upon inquiry, which in legal contemplation is tantamount to actual knowledge;[4] and whether the alteration, although not of a glaring nature, is of a character sufficient to excite suspicion and put a purchaser upon inquiry, has been held a *question of fact* for a jury.[5]

§ **1400. [Continued.] An Opposing View.** — Negotiable *corporate bonds*, which have been *signed in blank* by the proper officials, and thereafter fraudulently issued by the ministerial officers or agents of a corporation, will, it seems, be good in the

[1] Edwards on Bills, 95; Chitty on Bills, 182; Woodworth *v.* Bank of America, 19 Johns. (N. Y.) 391; Nazro *v.* Fuller, 24 Wend. (N. Y.) 374; Bruce *v.* Westcott, 3 Barb. (N. Y.) 374; Trigg *v.* Taylor, 27 Mo. 245.

[2] Hall *v.* Fuller, 5 Barn. & Cres. 750; Trigg *v.* Taylor, *supra*.

[3] Capital Bank *v.* Armstrong, 62 Mo. 60; (overruling Washington Savings Bank *v.* Ecky, 51 Mo. 272); Trigg *v.* Taylor, 27 Mo. 245; Young *v.* Grote, 4 Bing. 253.

[4] Capital Bank *v.* Armstrong, *supra*.

[5] Iron Mountain Bank *v.* Murdock, 62 Mo. 70; *post*, § 1708.

hands of a *bona fide* purchaser for value. And whether there be sufficient evidence on the face of the bonds to put a purchaser upon inquiry as to their genuineness, will, it has been held in a particular instance, be a *preliminary question for the court*, which the court will not submit to a jury, where their verdict for or against the rights of the purchaser, would be a verdict founded wholly upon conjecture.[1] It is said that, in an action to recover possession of such fraudulent pieces of paper, by the persons who are really entitled to have them, two facts must be established by the plaintiffs: 1. That the bonds belong to them. 2. That the circumstances under which the defendant purchased them were not such as to protect his title. The court proceeded upon the idea that constructive notice is a legal inference from established facts; that, when the facts are in controversy, or when the alleged defect or infirmity appears upon the face of an instrument in writing, and is a matter of ocular inspection, the question is one for the court; and that whether, under a conceded state of facts, the law will impute notice of such infirmities, is not a question for the jury. Incidentally, the court rule that the purchaser of negotiable securities, upon the open market and in the usual course of business, is not bound to make a close and careful examination, in order to escape the imputation of bad faith in the purchase; that the rights of the purchaser of such a security are not to be affected by what is called *constructive notice*, unless it clearly appears that the inquiry, suggested by the facts disclosed at the time of the purchase, would, if fairly pursued, result in the disclosure of the defect existing but hidden at the time; and that there must be, in the nature of the case, such a connection between the facts disclosed and the further facts to be discovered, that the former may be said to furnish a clue, — a reasonable and natural clue, — to the latter.[2]

§ 1401. [CONTINUED.] AN INSTRUCTION UPON THIS HYPOTHESIS. — "Although the jury may believe from the evidence that the note at

[1] Birdsall *v.* Russell, 29 N. Y. 220.

[2] Birdsall *v.* Russell, 29 N. Y. 220. Opinions were delivered by two judges. Two of the other judges dissented, and on the whole, the conclusion of the court seems to be extremely doubtful.

the time it was executed by the defendant, had the words, 'after the sale of fourteen mills,' and although the jury may believe from the evidence that said words had been erased; yet, if the jury further believe from the evidence that those words were put upon the paper with such light material that they could be erased without leaving any trace upon the paper which could be detected by a prudent and careful man; and if they further believe from the evidence that said words were erased from the paper without leaving any traces behind them to show that they had ever been upon the paper, and that said erasure was made without the knowledge of the plaintiff and before he purchased the same, — then the law is for the plaintiff, and the jury should so find." [1]

§ 1402. INSTRUCTION AS TO EFFECT OF MATERIAL ALTERATION OF NOTE AFTER DELIVERY. — "It is claimed by Brooks [defendant], that, after he signed a note similar in all respects to the one sued on, excepting that the written words, 'with interest at ten per cent.' were not then in the note, but that the printed words, 'with interest at ten per cent. per annum after maturity,' were in the note, and that, since he signed the note, without his knowledge or consent, the said printed words were stricken out, and the said written words inserted. If such an alteration of the note was made by any holder of the note, or made with the knowledge of any holder of the note, without the knowledge of Brooks, it would be a material alteration, and would release him from all liability on the note, and if the defendant Brooks, proves this, by a fair preponderance of the evidence, the verdict must be in his favor; and it would make no difference whether John Allen, the plaintiff, was or was not the owner of the note at the time of the alteration, if he made the alteration after Brooks signed it." [2]

§ 1403. DEFENDANT'S INSTRUCTIONS AS TO UNAUTHORIZED ALTERATION OF A PROMISSORY NOTE, IN AN ACTION ON THE NOTE BY INDORSEE AGAINST MAKER. — "The court instructs the jury that, if they believe from the evidence in the cause, that the promissory note, dated 13th September, 1873, read and shown to the jury in this case, was made by the defendant, Murdock, and indorsed by the defendant Armstrong, and delivered by him to his co-defendant, Murdock, for the purpose of enabling Murdock, the maker, to raise money thereon for his own use;

[1] Approved in Harvey *v.* Smith, 55 Ill. 225; citing Young *v.* Grote, 4 Bing. 258; 13 Eng. Com. Law 420.

[2] Approved in Brooks *v.* Allen, 62 Ind. 405.

and if they shall further believe from the evidence that, after the defendant Armstrong, had so indorsed and delivered said note to said Murdock, the words and figures, 'with interest at 10 per cent. per annum after maturity,' now appearing in said note, were written therein without the knowledge, consent or authority of the defendant Armstrong, by said Murdock, or by any agent or clerk of his, whether done in the presence of any officer or agent of plaintiff, or not, and whether with or without the knowledge of the plaintiff, the verdict should be for the defendant Armstrong, on the second count. - - - - The court instructs the jury that, if they believe from the evidence in this case, that the promissory note, dated 17th September, 1873, read and shown to the jury in this case, was made by the defendant Murdock, and indorsed by the defendant Armstrong, and delivered by him to his co-defendant Murdock, for the purpose of enabling the maker to raise money thereon for his own use; and if they shall further believe that, after the defendant Armstrong, had so indorsed and delivered said note to said Murdock, the words and figures, 'with interest at 10 per cent. per annum after maturity,' now appearing in said note, were written therein, and without the knowledge, consent or authority of the defendant Armstrong, by said Murdock, or by any agent or clerk of his, whether done in the presence of any officer or agent of the plaintiff or not, whether with or without the knowledge of the plaintiff, the verdict of the jury should be for the defendant Armstrong, on the first count. - - - - The court instructs the jury that, if they believe from the evidence that the provisions as to interest now contained in the notes read in evidence, and now sued on, were not contained in them at the time they were made by Murdock & Dickson, and indorsed and delivered by defendant Murdock, but were inserted afterwards,— then the burden of proof is not upon defendant Armstrong, to prove that said provisions were inserted without his authority; but it is upon the plaintiff to prove that they were so inserted with his authority; and that, therefore, if they believe from the evidence in the case, that said provisions were not contained in said notes at the time of their said indorsement and delivery by Armstrong to Murdock, but were inserted afterwards, — then, unless the plaintiff has further established to their satisfaction, by a preponderance of the evidence in the case, that said provisions were so inserted by the direction, or with the authority of Armstrong, they should find against the plaintiff and for the defendant Armstrong." [1]

[1] Approved in Capital Bank *v.* Armstrong, 62 Mo. 59, 62, 63, 64.

§ 1404. Defendant's Instruction as to effect of Alteration of Note by Affixing a Seal thereto, in Action on Note. — "The burden of proof is upon the plaintiff in this case, and unless the jury are satisfied, from the evidence, that the seal in question was added to the note since its execution, without the knowledge and consent of the parties thereunto, then they should find for the defendant. - - - - If the jury believe, from the evidence, that the seal to the note in question was attached thereto at the time of the commencement of this case and the execution of the same, then the jury will find for the defendant. - - - - If the jury believe, from the evidence, that the seal was attached to the note in question before the commencement of this case, by the plaintiff, without the knowledge or consent of the defendant, then the defendant is entitled to a verdict, and the jury should find accordingly. - - - - The law imposes upon the party offering a paper in evidence, the explanation of any alterations which may appear therein; and therefore if the jury believe, from the evidence, that any alteration has been made in the note in question, the burden of proof is upon the plaintiff to explain the same; and unless the jury believe, from the evidence, that such alteration has been explained by the plaintiff, the presumption of the law is that it was made by the plaintiff, and the jury should find for the defendant. It is of no consequence who attached the seal to the note in question, if it was done with the knowledge and consent of the parties to the note, before it came into the possession of the plaintiff. - - - - If the jury believe, from the evidence, that the seal was appended to the note in question after its execution, and before the commencement of this suit, by and with the consent of the parties thereunto, then the plaintiff is not entitled to recover, and the jury should find for the defendant."[1]

[1] Approved in Schwarz *v.* Herrenkind, 26 Ill. 210, 211.

CHAPTER XLVI.

POSSESSION.

SECTION
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§ 1407. Possession, when Evidence of Title. — The importance of the question considered in this chapter lies in the fact that possession is, in certain circumstances, evidence of title. The bare possession of personal property, unexplained by surrounding circumstances, raises a presumption of ownership in

the possessor;[1] and under some systems, in actions for the recovery of land, possession is *prima facie* evidence of title, and it has been said that this principle is firmly fixed in all common-law jurisprudence. It has been reasoned that, to depart from this rule in its directness and simplicity, tends to destroy its value, and that the question of possession and of the identity of the land in dispute, should be left to the jury.[2] Again, under the principles of the common law, after the lapse of a certain number of years, a *deed* of grant of title to the possessor is *presumed*.[3] Moreover, statutes of limitation exist, it is presumed, in all American jurisdictions, under which a certain length of continuous adverse possession either clothes the possessor with immunity from ouster in an action of ejectment, by analogy to the *negative prescription* of the civil law, or vests in him a title which he can transfer to another, by analogy to the *positive prescription* of that law. It is not the purpose of this work to consider these questions: they are alluded to merely for the purpose of showing the importance of the question under what circumstances possession is a question of law, and under what circumstances a question of fact.

§ 1408. Long Possession relaxes Strict Evidence of Title. — It has been reasoned that, where land is sold by parol, the price paid, the possession delivered, the assessment for taxes changed, the taxes paid, and the control of the land by fixed boundaries held by the vendee and those claiming under him for upwards of forty years,— the possessor is not held, in ejectment against him by the holder of the legal title, to the same strictness of proof of the contract which is required in the case of a recent bargain. The rule requiring the proof to bring the contracting parties face to face, to hear them make or repeat the bargain, and precisely state its terms, must, after that lapse of time, be relaxed. Hence, in such a case it was held error to instruct the jury that the defendant must prove the contract, clearly and satisfactorily in all its parts, by witnesses who knew it, by having heard it made or re-

[1] 1 Greenl. Ev., § 34.

[2] Hicks *v.* Davis, 4 Cal. 67.

[3] 1 Greenl. Ev., §§ 45, 46.

peated in the presence of both parties; that it must exhibit location, boundaries, quantity, price, and manner of payment; that the description must be so accurate that a third person could find or run the lines; that there must be proof that possession was taken immediately, or soon after the contract was made, in pursuance of it; and that the possession must have been actual, notorious, exclusive, continuous, and accompanied by improvements. It is not necessary, in such a case, that the defendant's possession should have been the continued, actual, resident, and hostile possession required of a trespasser, to sustain a claim of title under the statute of limitations; but only that such a possession for such a lapse of time should be shown, as that the law would presume the release, satisfaction, or abandonment of the right or claim of him who held it, to the party by whom any duty under it may have been due. Such a *presumption* does arise in favor of a vendee in a parol contract and those claiming under him, after the lapse of forty years from its date; the payment of purchase-money coeval with it, and the preceding possession delivered in pursuance therewith; the change in assessment for taxes from vendor to vendee; the payment of taxes, and continued acts of ownership, evincing complete performance of the duty owed to the vendor, and, as such, acknowledged and acquiesced in by him. In such a case it is the duty of the court to leave the jury to find the facts upon all the circumstances in the case; and if satisfied of the fact of the sale, identity of the land, extent of the purchase, payment of the price, and delivery of possession in pursuance of the contract, this evidence should be held sufficient to support the defense.[1]

§ 1409. View that Possession a Question of Law — In some jurisdictions the view is taken that, what state of facts, when established, will amount to possession, is a *question of law*.[2] Thus, in Missouri, what acts of ownership will amount to adverse possession is a question of law, and it is error to submit

[1] Richards *v.* Elwell, 48 Pa. St. 361.

[2] Bowie *v.* Brahe, 3 Duer (N. Y.), 35, 44.

such a question to the decision of a jury.[1] Again, it has been said: "The question of actual possession is a question of fact; what would constitute possession, a question of law."[2] And again: "It is the province of the court to tell the jury what constitutes an adverse possession, and the jury must determine from the evidence whether such facts exist, as, in the opinion of the court, constitute such adverse possession."[3] Again, it is held that, in an action of forcible entry and detainer, the court may properly instruct the jury that a hypothetical state of facts, presented by the evidence, does or does not constitute possession, and it is for the jury to find whether such a state of facts exists.[4] And where, in an action of trespass for cutting and carrying away timber, the court declined to charge the jury "that the facts and circumstances proved on the part of the defendant could not establish for him any title by possession of the lands in controversy," — it was said in the reviewing court, that, "what constitutes adverse possession, is a question of *law;* and if the evidence in the cause, admitting its truth, does not show such possession, it is the duty of the court so to declare."[5] And the court, proceeding to examine what constitutes adverse possession and what evidence is necessary to sustain it, held that the defendant's evidence failed to establish such possession, and that the trial court should so have instructed the jury.[6]

§ **1410. When a Question of Law and When of Fact.** — It is said that, what constitutes adverse possession is a question of law; but, as the *intention* of the possessor must always be considered in determining the question of adverse possession, that is a fact

[1] Turner *v.* Baker, 64 Mo. 219, 245.

[2] Blackman *v.* Welsh, 44 Mo. 41, 45, per Bliss, J.

[3] Macklot *v.* Dubreuil, 9 Mo. 477, 491, opinion by Napton, J.

[4] DeGraw *v.* Prior, 60 Mo. 56.

[5] Cornelius *v.* Giberson, 25 N. J. L. 1, 31.

[6] *Ibid.* 39. Where an exception to the petition to an action of *slander of title*, or, as it is called in the Civil Code of Louisiana, *jactitation*, on the ground that the plaintiff was not in possession of the land, filed in *limine litis*, had been dismissed by the court previously to the empaneling of the jury, — it was held that the question of possession was not before the jury for decision. Arrowsmith *v.* Durell, 14 La. Ann. 849.

which could be ascertained *alone by a jury*; and in determining the *quo animo*, the jury must of course be governed by their own view of the effect of the evidence.[1] Whether possession is adverse or friendly is always a question of intention. It is sufficient to prevent the possession being adverse that the party taking possession *intends* to occupy the lands, subject to the will of the owner.[2] This intention will generally be a question of fact for a jury.[3] Thus, where a tenant in common mortgaged the whole estate and remained in actual possession, it was held that, if her intention was not to hold adversely to her co-tenancy, the mortgage did not operate as a constructive ouster: and, there being evidence that her intention was not to oust her co-tenant, whether there was a constructive ouster was a question for the jury.[4] It is stated by a modern writer of reputation that "the question whether an alleged possession is marked by the characteristics requisite to make it adverse, and the foundation for a title by occupancy, is not wholly a question of law, and is a question for the jury, under proper instructions from the court."[5] Since the celebrated judgment of Lord Mansfield in *Taylor* v. *Horde*,[6] it seems not to have been much doubted that *disseisin* is a fact to be found by a jury; and the general rule may be stated that the question whether a possession, under which a defendant claims, in order to perfect his title under the statute of limitations, was an open, notorious and adverse possession, is not exclusively a question of law, but one which ought to be submitted to the jury under proper instructions.[7] In many cases, in order to find this ultimate fact, it will be necessary to determine whether the alleged *disseisor* took or held possession with the intent to exclude

[1] Magee *v.* Magee, 37 Miss. 138, 154.

[2] Criswell *v.* Altemus, 7 Watts (Pa.), 581. So it has been held that, whether the use of a *right of way* over land attached to a hotel is adverse or permissive, is, in an action of tort for obstructing such a way, a question of fact for a jury, under proper instructions from the court as to the nature of adverse possession, and how far the same would exist over land belonging to a public building. Putnam *v.* Bowker, 11 Cush. (Mass.) 542.

[3] *Ante*, §1196, *et seq.*

[4] Moore *v.* Collishaw, 10 Pa. St. 225.

[5] Wood on Limitations, 258.

[6] 1 Burr. 60, 113.

[7] Webb *v.* Richardson, 42 Vt. 465, 472.

the rights of the prior owner or claimant. And it is now invariably held by American courts that the question whether occupancy was with an intent adverse to the owner, or an intent to hold in subordination to his rights, is a question of fact for a jury.[1] "The question," says M. Wood, "as to what constitutes adverse possession, as well as what evidence is necessary to establish it, is for the court; but the question as to whether the possession in a given case is adverse, or under the owner's title, is for the jury; and the person setting up the claim takes the burden of establishing all the requisites to make his title by occupancy complete.[2] But the court may decline to submit the question of adverse possession to the jury, where, from the undisputed facts, as a matter of law, no such possession exists."[3] In order to bring a case within this definition, all the authorities concede that the possession must be so *open*, *notorious* and *unequivocal* as to impart notice to the world that it is under an exclusive claim of right made by the possessor, and that the right of the prior owner or

[1] Wood Lim., § 258. The following cases, cited by Mr. Wood, support the doctrine: Poignard *v.* Smith, 6 Pick. (Mass.) 172; Hall *v.* Dewey, 10 Vt. 593; Jackson *v.* Joy, 9 Johns. (N. Y.) 102; Bradstreet *v.* Huntington, 5 Pet. (U. S.) 402; Kinsell *v.* Daggett, 11 Me. 309; Jackson *v.* Stephens, 13 Johns. (N. Y.) 495; Coburn *v.* Hollis, 3 Met. (Mass.) 125; Gayette *v.* Bethune, 14 Mass. 55; Hopkins *v.* Robinson, 3 Watts (Pa.), 205; Brandt *v.* Ogden, 1 Johns. (N. Y.) 156; Jackson *v.* Sharpe, 9 *Id.* 163; Jackson *v.* Wheat, 18 *Id.* 40; Jackson *v.* Waters, 12 *Id.* 365; Jackson *v.* Ellis, 13 *Id.* 118; Smith *v.* Burtis, 9 *Id.* 174; Jackson *v.* Newton, 18 *Id.* 355; Jackson *v.* Thomas, 16 *Id.* 293; Jones *v.* Porter, 3 Pen. & W. (Pa.) 132; McClung *v.* Ross, 5 Wheat. (U. S.) 124; Cummings *v.* Wyman, 10 Mass. 464; Wallace *v.* Duffield, 2 Serg. & R. (Pa.) 521; Schwartz *v.* Kuhn, 10 Me. 274; Atherton *v.* Johnson, 2 N. H. 31; Munshower *v.* Patton, 10 S. & R. (Pa.) 334; Overfield *v.* Christie, 7 *Id.* 173; Bolling *v.* Petersburgh, 3 Rand. (Va.) 563; Malson *v.* Fry, 1 Watts (Pa.), 433; Bell *v.* Hartley, 4 Watts & S. (Pa.(32; McNair *v.* Hunt, 5 Mo. 300; Rogers *v.* Madden, 2 Bailey (S. C.), 321; Boston Mill Corp. *v.* Bulfinch, 6 Mass. 229; Bracken *v.* Martin, 3 Yerg. (Tenn.) 55; Warren *v.* Childs, 11 Mass. 222; Read *v.* Goodyear, 17 Serg. & R. (Pa.) 350; Pray *v.* Pierce, 7 Mass. 383; Stephens *v.* Dewing, 2 Aik. (Vt.) 112.

[2] Herbert *v.* Henrick, 16 Ala. 581; Runey *v.* Shoenberger, 2 Watts (Pa.), 23; Jones *v.* Porter, 3 Pen. & W. (Pa.) 132; Gill *v.* Fauntleroy, 8 B. Mon. (Ky.) 177; Baker *v.* Swan, 32 Md. 355; Washburn *v.* Cutter, 17 Minn. 361.

[3] Wood on Limitations, § 258; citing on the last point: Argotsinger *v.* Vines, 82 N. Y. 308; Bowie *v.* Babe, 3 Duer (N. Y.), 35; Nearhoff *v.* Addleman, 31 Pa. St. 279.

occupier is invaded and denied with an intention to assert a claim adverse to his.[1]

§ 1411. **The Subject further Discussed and Illustrated.** — Extending, it would seem, this idea, it has been ruled that if, by the true construction of a deed, a grant of land extends beyond the eaves and to the walls of a house owned by the grantor, and the water is allowed for more than 20 years thereafter to fall upon the granted land from the eaves of the house, — it should, in an action for damages for a breach of the covenants of warranty in the deed, be submitted as a question of fact, for the jury to determine, whether the owner of the house thereby acquires a title by adverse enjoyment, or an easement, or no right at all, in the land under the eaves; and a verdict was set aside because the judge ruled, as matter of law, that the projection of the eaves of the ancient house over the land claimed by the plaintiff under his deed from the defendant, having continued over 20 years, was an adverse occupation of the land under the eaves, which matured into a right, so that the land under the eaves passed by defendant's deed to the plaintiff.[2] So, where the defendant in ejectment took another person upon the ground in dispute, rented the same to him, and, after nailing up a cabin, which was the only building thereon, they retired together, charging a witness who was present not to disclose the facts, — it was held that the question whether the possession was changed should have been submitted to the jury; since, if the arrangement was colorable only, the possession was not changed, and this would be a question of fact for the jury.[3] It has been reasoned that, in trespass *quare clausum* with issue joined on a plea of *liberum tenementum*, it is for the jury to ascertain the fact of adverse possession, from all the evidence in the case applicable to that question, embracing the intent with which the entry was made, the nature of the possession, and the acts of ownership, conduct and

[1] Beatty *v.* Mason, 30 Md. 409; Carroll *v.* Gillion, 33 Geo. 539; Thomas *v.* Babb, 45 Mo. 384; Soule *v.* Barlow, 49 Vt. 329; Paine *v.* Hutchins, 49 Vt. 314.

[2] Carbrey *v.* Willis, 7 Allen (Mass.), 364.

[3] Oliver *v.* Williams, 25 Ga. 217.

declarations of the party under whom title by possession may be claimed.[1] So, it has been held that, in ejectment, where there is evidence tending to show some acts of ownership and possession, such as a survey, a marking of lines by blazing and felling trees, the erection of buildings, the cutting of timber, etc., whether this is sufficient to establish possession is a question for the jury, and not for the court.[2] And, under any view of the question, it is the province of the jury to find, under proper instructions as to what constitutes possession, whether possession is proved; and it has been added that their finding will not be disturbed on error, unless manifestly against the evidence.[3]

§ 1412. Conclusion that it is a Mixed Question of Law and Fact. — It has been said: "Adverse possession is a mixed question of law and fact, to be left to the jury under the instruction of the court. Whether a given state of facts exists which constitute adverse possession, the jury are to judge. But, assuming all the facts proven to be true, whether they amount to adverse possession, is unquestionably a matter of law for the court to decide." [4]

[1] Keener *v.* Kauffman, 16 Md. 296, 307. The court cite Helms *v.* Howard, 2 Harr. & McH. (Md.) 76; Matthews *v.* Ward, 10 Gill & J. (Md.) 443; Adams Ejectm. 505.

[2] Sharon *v.* Davidson, 4 Nev. 416.

[3] Truesdale *v.* Ford, 37 Ill. 210.

[4] Paxson *v.* Bailey, 17 Ga. 600. For a state of facts where the court refused to charge the jury that a possession had been proved, but submitted to them the question on all the evidence, see Gage *v.* Smith, 27 Conn. 70. In an action of ejectment in Pennsylvania, it appeared that one tenant in common was indebted to his co-tenants, and apparently insolvent; that the surviving owners and their representatives, during nearly forty years, paid the taxes and ground rent of the premises, mortgaged the property, and, at different times, erected and re-erected buildings thereon, suitable for their business, and received the profits. It was held that these facts, though not conclusive evidence of an ouster of the heirs of the deceased co-tenant, should have been submitted to the jury, with the instruction that, if true and unexplained, they would justify the finding of the ouster which was claimed to have taken place. Keyser *v.* Evans, 30 Pa. St. 507. The court said: "Considered separately, each of these facts may have been conclusive; together they bore powerfully on the result; for if 'improving lands, and receiving the rents, issues, and profits thereof, are in all cases the highest acts of ownership which can be exercised over them, and the exercise of these acts

§ **1413. Whether Actual or Constructive.** — It has been said that "what is actual, and what is constructive possession, in many cases, must be a *question of fact for the jury.*" [1] In an action of ejectment, brought against the defendants as trustees of a church, it has been held proper to submit the question to the jury, whether the defendants were actually in possession, or only constructively in possession as trustees.[2] So, in a case where a married woman, holding a farm to her sole and separate use, lived upon it with her husband and family, he managing and controlling it and taking the rents, profits, etc., for a number of years as if he were the absolute owner, it was held that he must be presumed, *prima facie*, to have had the rightful and beneficial possession of the land; but if there was doubt on the question, it was for the jury, and not for the court, to determine the character of his possession.[3]

§ **1414. Whether of Duration and Character Necessary to Sustain a Prescription.** — "As a general rule, the possession necessary to sustain a prescription is founded upon facts, which it is the province of a jury to ascertain." [4] Where adverse possession is proved by parol testimony only, it is a mere question for the jury whether it is continuous.[5] The length of time during which an adverse possession has continued, whether it has reached back beyond the date of the possessor's deed, and if so, whether or not he held under such a person, or by such a claim

strongly marks the possession with exclusiveness and hostility' (Dikeman *v.* Parrish, 6 Pa. St. 211), the defendant's testimony ought to have given a preponderance to the scale." *Ibid.* 510, opinion by Porter, J.

[1] O'Callaghan *v.* Booth, 6 Cal. 63, 65. Under circumstances, it was held in Texas that, whether a party was in possession or not, could not be assumed as a fact, by the court in charging the jury. Patrick *v.* Roach, 27 Tex. 579, 581. But this conclusion means nothing; since there are many cases where the facts would be so unequivocal that the judge in charging the jury could assume the fact of possession as established.

[2] Lucas *v.* Johnson, 8 Barb. (N. Y.) 244.

[3] Albin *v.* Lord, 39 N. H. 196, 205.

[4] Anderson *v.* Bock, 15 How. (U. S.) 323; citing Ewing *v.* Burnet, 11 Pet. (U. S.) 41; Beverly *v.* Burke, 9 Ga. 440.

[5] Cunningham *v.* Patton, 6 Pa. St. 355.

and color of title, as to render his possession adverse, — have been held questions for a jury.[1] In like manner, it has been held that the question whether or not open and exclusive possession by a tenant, continued for thirty years, was adverse, is a question of fact for the jury, on the trial of a writ of entry, and the judge cannot take it from them by directing a verdict.[2]

§ 1415. How Jury instructed in such a Case. — In such a case it has been held proper to instruct the jury, "that a right by prescription could be acquired to a way over another's land by proof of twenty-one years' uninterrupted, adverse, or undisputed enjoyment or use of it, and that this was a question for the jury to determine from the evidence; that, if the plaintiff had proved this, he was entitled to recover; if not, their verdict should be for the defendant." [3]

§ 1416. Whether Common, Mixed, or Exclusive. — In an action of ejectment, it has been held proper to submit all the acts of the party claiming possession, to the jury, under a proper instruction, leaving it to them to say, from the number, character and times of the entries shown in evidence, whether they exhibited a common or mixed possession, and thus evidenced to them that the possession of the opposite party was not exclusive, or whether they were purely casual and accidental, and not done in prosecution of his rights as an owner. "Any other doctrine," said the court, "would render the title of adjoining owners insecure, and liable to be divested by acts of which the owner may be wholly ignorant. Where tracts are large and woodlands extensive, an owner who sees an ax-mark perhaps in the middle of his woodland, may not for an instant dream of its being an ear-mark for a survey, to be connected with a distinct trespass by clearing upon the outskirts of his tract. If his own ordinary use of his woodland, which in such a case may be at very distant intervals, is to be denominated a trespass, unless it carries with it all the solemn acts to characterize an entry to toll the statute in a case of actual disseisin, he may, at a distant day, find him-

[1] Wiggins *v.* Holley, 11 Ind. 2.
[2] Eaton *v.* Jacobs, 52 Me. 445, 454.
[3] Steffy *v.* Carpenter, 37 Pa. St. 41, 44.

self deprived of his valuable woodland by presumptions in favor of a trespasser, without the benefit of the natural presumption that flows from the acts of an owner, never rightfully excluded from his land, or prevented from thus using his own." [1]

§ 1417. Color of Title and Good Faith of Claimant thereunder.—What constitutes color of title, within the meaning of statutes of limitations, is a *question of law;* [2] and, in instructing the jury in such a case, the court should tell them what constitutes color of title.[3] Those claiming adversely under color of title must enter and occupy the land in *good faith*, claiming the whole tract, and relying upon the instrument which constitutes color of title, as conveying to them the legal title.[4] And where there is a question whether the deeds which are relied on as constituting color of title are taken in good faith, the court should submit that *question to the jury*.[5] So, whether the claimant of land under legislative grants was in "occupation and actual possession, *bona fide*, and making improvements," is a question of fact, in an action of trespass *quare clausum*.[6] But, color of title being a question of law, it is error to submit to the jury the aggregate question what is color of title made in good faith. Accordingly, the following instruction has been held erroneous: "That if they are satisfied from the evidence that the defendant had color of title, made in good faith to, and paid all the taxes assessed on, the land in controversy, the same being vacant and unoccupied for seven successive years before the commencement of this suit, he shall be adjudged the legal owner thereof, to the extent and according to the purport of his paper title." [7]

§ 1418. Territorial Extent of an Adverse Possession.—Where there is a deed, though the description of the land therein be indefinite, which purports to convey a tract of land, and a

[1] O'Hara *v.* Richardson, 46 Pa. St. 385, 391, opinion by Agnew, J.

[2] Woodward *v.* Blanchard, 16 Ill. 424.

[3] Turner *v.* Hall, 60 Mo. 271.

[4] Gaines *v.* Saunders, 87 Mo. 557.

[5] Turner *v.* Hall, 60 Mo. 271; Gaines *v.* Saunders, 87 Mo. 557; Woodward *v.* Blanchard, 16 Ill. 424.

[6] Merrill *v.* Hilliard, 59 N. H. 481.

[7] Shackleford *v.* Bailey, 35 Ill. 387.

survey made by the grantee and a recorded plat describing the exact tract claimed under the deed, and there is some evidence of constant, continuous acts of ownership over the whole tract. — the fact that the recorded plat subdivides the tract is not conclusive that the actual possession, maintained through one employed to warn trespassers off the whole tract, is possession only of the subdivision on which the house is situated. But, in such a case, it is *for the jury to say* whether he took possession of a part of the tract, intending to take possession of the whole, under that deed, and whether he exercised acts of ownership, openly and notoriously, claiming, under that deed, the entire tract purporting to be conveyed thereby.[1] It has been ruled, as *matter of law*, that the mere dumping of some earth, or the piling and removing of some rock, on small fractions of a ten-acre tract of land, is not a taking possession of the entire tract, so as to entitle such a possessor to maintain a possessory action therefor.[2]

§ **1419. Ouster of one Co-tenant by the Other.** — Where a co-tenant has been long in possession, receiving to his own use

[1] McElhinney *v.* Kraus, 10 Mo. App. 218. In determining the question of adverse possession, the payment of taxes, by the person asserting title by such possession, is a fact which may, with other circumstances, be considered by the jury. Draper *v.* Shoot, 25 Mo. 197. See also Turner *v.* Hall, 60 Mo. 271; Gaines *v.* Saunders, 87 Mo. 557, 564. That an adverse possession of a part may be considered as extending to the whole of a tract of land, see Fugate *v.* Pierce, 49 Mo. 441; Turner *v.* Hall, 60 Mo. 271; Long *v.* Higginbotham, 56 Mo. 245; St. Louis Agricultural &c. Association *v.* Reinecke, 21 Mo. App. 478. What acts of possession will enable a claimant to maintain forcible entry and detainer against a subsequent intruder. See St. Louis Agricultural &c. Association *v.* Reinecke, 21 Mo. App. 478.

[2] Kennedy *v.* Prueitt, 24 Mo. App. 414. In this case it was said by Rombauer, J., in giving the opinion of the court: "We can clearly see the difficulty under which the trial court labored in an attempt to distinguish possession as a matter of law, from possession as a matter of fact. In many cases the boundary between the two questions is so indistinct that it is difficult to decide, without a close analysis of the testimony, which the haste of a jury trial does not admit of, on which side of the boundary the case lies. That analysis, which we were enabled to make with care, has satisfied us, that the plaintiff, under the evidence, is not entitled to judgment as a matter of law." *Ibid.*, page 420.

the rents accruing from the property, and this has been acquiesced in by the other co-tenant, it is a *question for a jury* under all the circumstances, whether there has been an ouster by the one co-tenant of the other, and a possession by the former held adversely to the latter.[1] If a tenant in common, being in possession of the land, conveys it with a covenant of warranty against all claims and demands, possession under the deed will be adverse to the title of the co-tenants of the grantor. In such a case, if the fact is found that the possession of the grantee is under a deed, it is the legal conclusion that his possession is adverse, and the question is *not for the jury*.[2]

§ 1420. Abandonment of a Prior Possession. — In an action of unlawful detainer, in which the only question is whether the defendant's conceded prior possession had been abandoned before the plaintiff's entry upon the land, the question of abandonment is *one of fact*.[3]

§ 1421. Surrender of Title to a Chattel acquired by Adverse Possession. — On the same principle, it has been held that, if a husband, having acquired title to a *chattel* by adverse possession against the true owner, verbally consents to the execution of a deed of gift by the latter, conveying the chattel to a trustee for the benefit of the husband's wife and children, it will be, in an action of detinue for the chattel, a *question for the jury* whether the husband's prescriptive title was thereby surrendered; and that an instruction, asserting that such consent would not divest the title acquired under the statute of limitations, was an invasion of the province of the jury.[4]

[1] Robidoux *v.* Cassilegi, 10 Mo. App. 516, 522. As to what will be *evidence* of an ouster of one co-tenant by another, sufficient to take the question to the jury whether there has been an ouster and an adverse possession, see Warfield *v.* Lindell, 30 Mo. 272; *s. c.* 38 Mo. 561; Lapeyre *v.* Paul, 47 Mo 586.

[2] Newmarket Man. Co. *v.* Pendergast, 24 N. H. 54, 69. The court cite: Kittredge *v.* Proprietors, 17 Pick. (Mass.) 246; Parker *v.* Proprietors, &c., 3 Metc. (Mass.) 91.

[3] Brown *v.* McCormick, 23 Mo. App. 181; *post*, § 1435, *et seq.*

[4] Lucas *v.* Daniels, 34 Ala. 188. Circumstances under which the ques-

§ **1422. Possession of Land Sufficient to affect Strangers with Notice.** — Where the possession under a deed is open, notorious and unequivocal, it will affect strangers to the deed with notice thereof, in like manner as would the recording of the deed under the operation of the recording acts.[1] The reason of the rule is that, whatever *puts a person upon inquiry* as to a fact is equivalent in law to actual notice. But it is obvious that cases may arise within this rule, where the evidence as to the character of the possession may be so conflicting and may leave the conclusion in so much doubt, that it will be the duty of the court to submit the question to the jury, whether the possession, with its surrounding facts, is of such a character as to put a prudent man upon inquiry as to the title of the alleged possessor.

§ 1423. PRECEDENTS OF INSTRUCTIONS AS TO ADVERSE POSSESSION UNDER COLOR OF TITLE. — "That if the tenants, under their respective leases from Kittredge, occupied and cultivated to the Tyler line, in such a manner as the owners of such land would ordinarily occupy and cultivate, and such an occupation had continued for the period of thirty years, it would constitute such an adverse possession as would bar the demandant's right to recover."[3]

§ 1424. [CONTINUED.] SUCCESSORSHIP OF ADVERSE POSSESSION UNDER COLOR OF TITLE. — "That the possession of the premises by said lessees,

tion in whose possession *personal property* was at the time of the levy, was held a *question of fact* to be left to the jury. Ohlsen *v.* Manderfeld, 28 Minn. 390.

[1] Jacques *v.* Weeks, 7 Watts (Pa.), 261, 276; Daniels *v.* Davison, 16 Ves. 249; *s. c.* 17 Ves. 433; Kerr *v.* Day, 14 Pa. St. 112, 117; Hood *v.* Fahnestock, 1 Pa. St. 470, 474; Sailor *v.* Hertzog, 4 Whart. (Pa.) 259; Krider *v.* Lafferty, 1 Whart. (Pa.) 303, 318; Green *v.* Drinker, 7 Watts & S. (Pa.) 440.

[2] Hottenstein *v.* Lerch, 104 Pa. St. 454, 463.

[3] Approved in Reed *v.* Proprietors &c., 8 How. (U. S.) 274, 291. In Pennsylvania, a charge to the jury, in an action of ejectment, that they would determine whether or not the tenants of the land in question were holding under lawful authority, or as tenants under the plaintiff, and, if the latter, that the action would not lie if no notice to quit had been given, or demand of possession made, is correct, and it is also proper in such action to leave the question of possession to the jury. Logan *v.* Quigley (Penn.), 11 Atl. Rep. 92.

under the lease, was the possession of Kittredge, the lessor, and his heirs, he claiming to have a deed which included them, and having turned Melvin out of possession; if it was of such a character as amounted to a disseisin, it would in law, inure to the benefit of Kittredge and his heirs, and would be the disseisin and adverse possession of the lessor." [1]

§ 1425. THE SAME SUBJECT CONTINUED. — "If the possession of Cheever and Thissel, in 1796, under Kittredge, included the demanded premises, and the same possession had been continued by the subsequent lessees, as the evidence tended to show it had been, down to the entry of the heirs of Melvin and wife, in 1832, it constituted in law such a continuity of possession as would bar the demandant's right to recover." [2]

§ 1426. SIMILAR INSTRUCTIONS UNDER MISSOURI STATUTE. — "If defendants, and those under whom they claim, have had adverse possession of so much of the premises described in the petition as is covered by the building of defendants, and said possession was open, notorious and hostile, under claim of title, and continuous for more than ten years prior to the institution of this suit, on February 27th, 1864, then the plaintiffs cannot recover the portion of said premises so covered by said building." [3] - - - - "The court declares the law to be, that, in order to divest the title to the land in plaintiff's petition mentioned, out of the plaintiff and vest it in the defendant, by reason of his adverse possession, that possession must be actual, visible, notorious and hostile, continuous and uninterrupted, under a claim of title, for a period of ten years next preceding the commencement of this suit." [4] - - - - "If the jury believe from the evidence that the defendant, and those through whom he obtained possession of the property sued for, had had a continuous possession thereof for twenty years next before the commencement of this suit, claiming the same as their own, — then they should find for the defendant as against each of the plaintiffs, who has not proved

[1] Approved in Reed *v.* Proprietors &c., 8 How. (U. S.) 274, 291.

[2] Approved in Reed *v.* Proprietors &c., 8 How. (U. S.) 274, 291. Compare Melvin *v.* Proprietors &c., 16 Pick. (Mass.) 161; also 5 Met. (Mass.) 15.

[3] Approved in Dalton *v.* Bank of St. Louis, 54 Mo. 106. There is a similar instruction in the same case, on the theory of a limitation of *twenty years*.

[4] Approved in Dalby *v.* Snuffer, 57 Mo. 296.

herself or himself either under twenty-one years of age, or a married woman, at the commencement of such possession; and the burden of proof is upon each of the plaintiffs claiming to have been under such age, or a married woman at the commencement of such possession, to prove it affirmatively; and until it be proved to the satisfaction of the jury, the contrary thereof should be presumed by the jury. - - - - If the jury believe from the evidence that the defendant, and those through whom he obtained possession of the land sued for, had had such a length of possession thereof next before the commencement of this suit, as described in instruction marked A, claiming the same as their own, after the plaintiff, Emily Dessaunier was at the age of at least twenty-one years and unmarried, they should find for the defendant as to her. - - - - If the jury believe from the evidence that the defendant, and those through whom he obtained possession of the land sued for, had had such a length of such a possession thereof next before the commencement of this suit, as described in instruction marked A, claiming the same as their own, after Margaret Mallet, mother of the plaintiffs named Mallet, was of the age of at least twenty-one years and unmarried, and that neither she nor her husband was ever in possession of said land, and that the same, at and before her death, was in possession of others claiming the same as their own, — then they should find for the defendant." [1]

§ 1427. Instructions on Theory of Acquisition of a Fee by Twenty Years' adverse Possession. — "If the jury find from the evidence that N. P. Taylor took actual possession, fenced in the whole of the Generaux tract in 1836, and that he and his heirs continued in such actual possession for more than twenty years thereafter, and that said tract embraced and covered the premises in dispute, — such possession was effectual to convey to said Taylor and his representatives all the right and title confirmed to Faustin *dit* Parent or his representatives, and such possession vested in said Taylor and his representatives the documentary titles set up by Polk and others under said Parent or Faustin and given in evidence by the defendants in this case. - - - - If N. P. Taylor and his representative took the actual possession of the Generaux tract, by fencing up the whole of it, and held such possession, claiming the tract in fee, for more than twenty years prior to the entry of the defendants, and those under whom they

[1] Approved in Dessaunier *v.* Murphy, 33 Mo. 191, 192.

claim, such possession vested the fee in said Taylor's representatives." [1]

§ 1428. Adverse Possession of Personal Property — Instruction on the Theory of Five Years' Adverse Possession. — "In order to establish the title of the property in controversy in Charles W. Kielmann, at the time of the execution and delivery of the Mertens mortgage, by possession, it must appear from the evidence that the said Kielmann, for at least five years prior to such execution and delivery, was in actual, continuous, exclusive and notorious possession thereof." [2]

§ 1429. [Continued.] Instruction on the Theory that Adverse Possession must have been "Continuous and Unequivocal." — "It is not sufficient, to constitute the possession referred to in the preceding instruction, that the said Charles W. Kielmann should have occasionally used such property for the purposes of a printing office, during a period of time equal to five years or more; but such possession, in order to bind the true owner, must have been continuous and unequivocal." [3]

§ 1430. Another Instruction on the Same Hypothesis. — "If it appear from the evidence that, at the time of the delivery to plaintiff's vendor of the Kielmann mortgage, the title to the property so sold was in some person other than the mortgager Charles W. Kielmann, then the issues must be found for defendant, unless it also appear that the said personal property was placed in possession of said mortgager by such actual owner, and such possession, so acquired, had remained in

[1] Farrar *v.* Heinrich, 86 Mo. 521, 527. Although this case was decided in favor of the defendants, yet the court approved the principle embodied in the two above instructions. Ray, J., in giving the opinion of the court, said: "It is contended by the plaintiffs, and rightfully so contended, that the actual, adverse, open and continuous possession of the tract in question, by the plaintiffs and those under whom they claim, from 1836 to 1860, under claim and color of title, will not only bar a recovery by those claiming under an older title, but will also confer title on those claiming by such adverse possession; for such is the settled law of this State." *Ibid.* 530. The court cite: Bank *v.* Evans, 51 Mo. 335; Shepley *v.* Cowan, 52 Mo. 559; Barry *v.* Otto, 56 Mo. 117; Ridgeway *v.* Holliday, 59 Mo. 144. The case was decided on the ground that the younger title under which the defendants claimed was good.

[2] In Mertens *v.* Kielmann, 79 Mo. 412, it was held error to refuse this instruction.

[3] In Mertens *v.* Kielmann, 79 Mo. 412, it was held error to refuse this instruction.

such mortgager for at least the space of five years, without demand, made and pursued by due process of law, on the part of such owner." [1]

[1] In Mertens *v.* Kielmann, 79 Mo. 412, 416, it was held error to refuse this instruction. In the course of its opinion the court say: "We are aware that it is held in this State, as elsewhere, that a mortgagee of chattels, after breach of the condition, is entitled to the possession of the property. Robinson *v.* Campbell, 8 Mo. 365; Bowens *v.* Benson, 57 Mo. 26. And 'a mortgagee may maintain replevin against the mortgager for the property before the maturity of the mortgage debt, if there be no agreement in the mortgage that the mortgager shall retain possession.' Jones on Chattel Mort., § 442. But, 'to sustain an action by a mortgagee against a mortgagor for an unlawful detention of the mortgaged property, as distinguished from an unlawful taking of it, the mortgagee must show a demand for it and a refusal to deliver it.' Jones Chattel Mort., § 443. From the terms of the mortgage in question, it is fairly inferable that the mortgagor was to retain possession of the mortgaged property until the maturity of the note secured by it. But, under the authorities, it is immaterial whether, by the mortgage, he was or not entitled to the possession of the property until breach of the condition of the mortgage. No demand of possession of the property was made of the mortgager, who died before the maturity of the note, or of the defendant, who succeeded to the mortgager's possession, until after the sale of the mortgaged property under the mortgage, and the statute of limitations did not begin to run against the mortgagee until that demand and refusal occurred."

CHAPTER XLVII.

WAIVER: ABANDONMENT: LACHES: ACQUIESCENCE.

SECTION
1435. Mixed Question of Law and Fact.
1436. Waiver of Conditions in Contracts.
1437. Laches.
1438. Waiver in Legal Proceedings a Matter of Law.
1439. Abandonment of a Contract.
1440. Abandonment of Rights.
1441. Abandonment of Pre-emption or Claim of Public Lands.
1442. The Same Subject Continued.
1443. Waiver of Vendor's Lien.
1444. Abandonment of a Public Office.
1445. Waiver by Administrator of Copy of Claim against an Estate.
1446. Waiver by a Creditor of his Right to Rescind a Composition Agreement.
1447. Waiver cannot Take Place without Knowledge.
1448. Instructions as to What Constitutes Abandonment of Real Estate in Action of Ejectment.

§ **1435. Mixed Question of Law and Fact.** — It is said that the question what amounts to a *waiver* is, in all cases, a mixed question of law and fact, to be determined by the jury, under proper instructions from the court ;[1] but this is not strictly true, as will presently appear. Again, it is said: "If it be conceded that there may be cases where the declarations or acts of the parties to a contract are so express or unequivocal, that it would not only be practical and competent, but even the duty of the court to determine, as a matter of law, that certain rights had been waived and could no longer be insisted on, those cases are very rare; because a question of waiver is one of *intention*, and most usually depends on acts or declarations which, in regard to their character, are of an inconclusive or doubtful nature, and furnish only evidence of intention and grounds of inference and

[1] Traynor *v.* Johnson, 1 Head (Tenn.), 51, 55.

deduction, which it is the proper province of a jury to consider."[1] On the contrary, it has been held that, where all the facts and circumstances upon which a waiver is predicated are admitted, a party has the right to ask the court to instruct the jury whether the evidence is sufficient to establish a waiver or not.[2]

§ **1436. Waiver of Conditions in Contracts.** — Whether there has been a waiver of the conditions of a contract is, where the question depends upon declarations or conduct, a *question of fact* for a jury.[3] But when the question of waiver is to be determined by an inspection of a writing, it is a question for the court.[4] Again, if the facts are established and are unequivocal in their character, the court may say whether there has been such a waiver, as a mere *conclusion of law*. Thus, where one stipulated, for a compensation to go to another State and take three slaves, supposed to be in the possession of some person there, and deliver them to their owner in Mobile, no time for their delivery being fixed, it was held it could not be assumed as a legal conclusion that the acceptance by the owner of two of the slaves was a waiver of the entire fulfillment of the contract, but that it should be left to the jury to determine whether, under the circumstances, such acceptance was *intended* as a waiver.[5] Contrary, it would seem, to the doctrine of the last case, it has been held in Illinois, in an action upon a contract indorsed upon a lease, by which the defendant guaranteed the payment of rent reserved thereunder, that whether a new agreement, made during the term of this lease, between the lessor and lessee, regarding the terms of renting the premises, constituted a waiver or surrender of the original lease,— that is whether it was so *intended* by the parties, — was properly *left to the jury*.[6]

[1] Fitch *v.* Woodruff Iron Works, 29 Conn. 82, 91. That *intent* is a question for the jury, see *ante*, § 1333, *et seq.*

[2] Spring Garden Mutual Ins. Co. *v.* Evans, 9 Md. 1, 20.

[3] Chapman *v.* Colby, 47 Mich. 46; Hale Man. Co. *v.* American Saw Co., 43 Mich. 250.

[4] Mowry *v.* Wood, 12 Wis. 414.

[5] Wolfe *v.* Parham, 18 Ala. 442, 450.

[6] White *v.* Walker, 31 Ill. 422, 423.

§ **1437. Laches.** — This word is employed by courts of equity to designate that *negligence* in bringing an action or otherwise asserting one's right, which will preclude him from obtaining the aid of such a court. As the ordinary procedure of such courts takes place without a jury, whether the party has been guilty of laches will, of course, be decided by the chancellor, subject to review on appeal. In courts of law, no delay in asserting one's right by an action, unless it reach the period of the statute of limitations, will operate as a bar to his right though such delay may be an evidential fact against the plaintiff, where he asserts a stale and disputed claim. In a case in Michigan, which was an action at law for a deceit and wrongful conversion, it was said: "Delay alone, while it may have some bearing on the fraud as affecting the plaintiff's conduct, cannot be, in a court of law, a bar to suit, unless coming within the statute of limitations applicable to such cases. In all controversies not within the statute, *waiver*, if relied on, is a *question of fact* and not of law."[1] Outside of cases calling for the application of the equitable doctrine in respect of laches, the question whether a party has lost his rights by his laches, or by acquiescence in the conduct of another, may, on the principle first stated above, be a question of fact, the decision of which, where the evidence is conflicting, will not be a subject of review on error or appeal.[2]

§ **1438. Waiver in Legal Proceedings a Matter of Law.** — There are many cases where the doing of certain acts are held to amount to a *waiver* as a matter of law. A familiar illustration of this is in the case where the defendant in an action, who has not been duly served with process, appears and contests the merits. Here, by his voluntary appearance, he waives any defect in the process which was sued out for the purpose of bringing him before the court against his will.[3] In many other cases

[1] Dayton *v.* Monroe, 47 Mich. 195, opinion by Campbell, J.

[2] Combs *v.* Smith, 78 Mo. 32, 40.

[3] Shields *v.* Thomas, 18 How. (U. S.) 253; United States *v.* Yates, 6 How. (U. S.) 605; Farrar *v.* United States, 3 Pet. (U. S.) 459; Gracie *v.* Palmer, 8 Wheat. (U. S.) 699; Pollard *v.* Dwight, 4 Cranch (U. S.), 421; Knox *v.* Summers, 3 Cranch (U. S.), 496; Leegee *v.* Thomas, 1 Blatchf. (U. S.) 11; Fields *v.* Gibbs, 1 Pet. C. C. (U.

in legal proceedings the parties are held, by particular *conduct* or *admissions*, conclusively to have waived rights, which otherwise they might have insisted upon.[1] In general, it is said that, where jurisdiction or the power to act exists, and the only objection to its exercise is one intended for the benefit and protection of the party complaining thereof, such objection must be taken at the earliest practicable opportunity, after the party or his counsel is aware of its existence, or it will be regarded as waived by the omission or neglect to urge it as soon as possible.[2] Perhaps the most frequent application of this principle is that pleas in abatement must be filed *in limine* or they will be taken to have been waived.[3] In general, an appearance and pleading to the declaration amounts to a waiver of all precedent irregularities,[4] and the defendant will not, under such circumstances, be heard to say that he was not notified by service of process,[5] or that irregularities existed in previous orders of continuance.[6]

S.) 155; Carrington *v.* Brents, 1 McLean, (U. S.), 174; Suydam *v* Pitcher, 4 Cal. 280; Payne *v.* Farmers' Bank, 29 Conn. 415; Deputy *v.* Betts, 4 Harr. (Del.) 352; Crull *v.* Keener, 18 Ill. 65; Abbott *v.* Semple, 25 Ill. 107; Cruikshank *v.* Coggswell, 26 Ill. 366; Roberts *v.* Thompson, 28 Ill. 79; Miles *v.* Goodwin, 35 Ill. 53; Eldredge *v.* Folwell, 3 Blackf. (Ind.) 208; Brayton *v.* Freese, 1 Ind. 121; Little *v.* Vance, 14 Ind. 22; Bell *v.* Pierson, 1 Ia. 21; Lorriner *v.* Bank of Ill., 1 Ia. 223; Hall *v.* Biever, 1 Ia. 113; Harriss *v.* Guin, 10 Smed. & M. (Miss.) 563; Winchester *v.* Cox, 3 Iowa, 575; Chouteau *v.* Rice, 1 Minn. 192; Lewis *v.* Nuckols, 26 Mo. 278; State *v.* Woolery, 39 Mo. 525; Fox *v.* Reed, 3 Grant (Pa.), 81; Anderson *v.* Morris, 12 Wis. 689.

[1] Illustrations of this will be found in the following cases: Ransom *v.* City of New York, 20 How. (U. S.) 581; Selby *v.* Hutchinson, 9 Ill. 319; Gunn *v.* Gudehus, 15 B. Mon. (Ky.) 447; Cushing *v.* Babcock, 38 Me. 452; Higley *v.* Lant, 3 Mich. 612; Warren *v.* Glynn, 37 N. H. 340; Dale *v.* Radcliffe, 25 Barb. (N. Y.) 333; Gordon *v.* Ingram, 1 Grant Cas. (Pa.) 152; Belknap *v.* Godfrey, 22 Vt. 288; Pulling *v.* Supervisors, 3 Wis. 337.

[2] Warren *v.* Glynn, 37 N. H. 340.

[3] Hartz *v.* Com., 1 Grant Cas. (Pa.) 359; Preston *v.* Simons, 1 Rich. L. (S. C.) 262; Morgan *v.* Houston, 6 Yerg. (Tenn.) 314, Pearce *v.* Young, Walk. (Miss.) 259.

[4] Stanley *v.* Bank of Mobile, 23 Ala. 652, 656; Moore *v.* Phillips, 8 Porter (Ala.) 467; Hobson *v.* Emanuel, 8 Porter (Ala.) 442.

[5] Crawford *v.* Branch Bank, 7 Ala. 205.

[6] Stanley *v.* Bank of Mobile, 23 Ala. 652, 655.

§ **1439. Abandonment of a Contract.** — What amounts to an abandonment of a contract is a *matter of law*, and the court should instruct the jury as to the legal effect of the facts which they may find, bearing upon the question, and not leave it to them to say, without such instruction, whether a contract has been abandoned or not.[1] In other words, where an act, or certain specific acts, are relied on to show an abondonment of a contract by one of the parties to it, it is proper for the court to declare whether such act or acts constitute an abandonment.[2] The principle is said to be this: "Where a contract is *entire*, and not made divisible by its terms, one of the parties cannot take advantage of his own default, either from laches or willful refusal to perform his part, for the purpose of putting the contract out of the way, so as to enable him to maintain assumpsit on the common counts, and therefore evade the rule that, while the special contract is in force, general assumpsit will not lie; and the contract is considered to remain in force until it is rescinded by mutual consent, or until the opposite party does some act inconsistent with the duty imposed upon him by the contract, which amounts to an abandonment;" and that, what amounts to an abandonment is a question of law, and it is error to submit such a question to a jury.[3] In like manner, it has been said that "the *abandonment of a claim* may become and does become, when the facts of the cases are admitted, a conclusion of law from the facts, to be applied by the court, and not left to the discretion of the jury."[4]

§ **1440. Abandonment of Rights.** — The subject of the *abandonment* of a right stands on the same footing as the subject of

[1] Henry *v.* Bassett, 75 Mo. 90, 95. To the same effect White *v.* Wright, 16 Mo. App. 551.

[2] Chouteau *v.* Jupiter Iron Works, 83 Mo. 73, 82.

[3] Dula *v.* Cowles, 7 Jones L. (N. C.) 290, opinion by Pearson, C. J. Compare Blake *v.* Lane, 5 Jones Eq. (N. C.) 412; Brown *v.* Becknall, 5 Jones Eq. (N. C.) 423; Devereux *v.* Burgoyne, 5 Ired. Eq. (N. C.) 351, — where the question was considered in cases in equity, where the judge disposed of the facts as well as the law.

[4] Thornburgh *v.* Mastin, 93 N. C. 258; Headen *v.* Womack, 88 N. C. 468.

the *waiver* of a right. In fact, in most cases the two words express the same idea. Whether a party has abandoned a right once possessed, — as, for instance, a right to an *easement*, — would seem to be always for the consideration of a jury, as a *question of fact and intention*.[1] Thus, in an action of ejectment to recover a *mining claim*, it has been held a question for a jury, whether a location, which the evidence tended to show, was made prior to the time when that attempted by the plaintiff, had been forfeited or abandoned.[2] Where a *chattel* was in the possession of a person, who made frequent declarations that he was the owner of it and offered to sell it, and another imputed owner lived but five miles away, and he neither objected to the use of the property by the actual possessor, nor made any interference with his use of it, — these circumstances were held evidence tending to show that he assented to the claim of right of the actual possessor, and it was a question for the jury to determine their weight, — in other words, whether such person had not waived any claim of title.[3]

§ 1441. Abandonment of Pre-emption or claim of Public Lands. — What will constitute an abandonment, under a statute securing an interest in the public lands to actual settlers who continuously reside on the land, may, under some circumstances, be a *question of law*, and under others a *question of fact*. It is obvious that the question is distinctly analogous to the question of *domicile;*[4] and the question of the loss of the right of a homestead exemption in land by ceasing to reside upon it as a home.[5] A number of decisions upon this question were made by the Supreme Court of Pennsylvania, under the Act of Assembly of that State, of date Dec. 30, 1786, allowing pre-emptions of the public domain of the State, and defining what should constitute a settlement. It provided among other things, "that, by a settlement, shall be understood an actual, personal, resident settlement, with a manifest intention of making it a place of abode, and the means of supporting a family, and continued from time to time, unless interrupted by the enemy, or by going into the military service of the country during the war." The

[1] Parkins *v.* Dunham, 3 Strobh. Law (S. C.), 224, 228.

[2] Taylor *v.* Middleton, 67 Cal. 656.

[3] Avery *v.* Clemons, 18 Conn. 306, 310.

[4] *Ante*, § 1359.

[5] *Ante*, § 1360

question under consideration, so far as it involved the interpretation of this statute, turned upon the meaning of the words "continued from time to time." The circumstances which give authoritative value to the decisions under this statute, have, for the most part, passed away, and they are cited merely as having an analogous value in cases where the question arises under Acts of Congress, or in Texas under Acts of the State Legislature, touching dispositions of the public domain. In one case it was reasoned as follows by the court, speaking through Kennedy, J.: "Abandonment is not always a question of intention, and therefore a matter of fact, to be left exclusively to the jury without any controlling instructions from the court; * * * because, when more than a reasonable time has elapsed for completing the settlement without its being done, after making a proper allowance for all delay occasioned by what the law may deem a sufficient excuse or cause for it, and the facts are not controverted, the law will pronounce the neglect or the failure of the party to perfect his settlement, an abandonment, whatever his intention in regard to it may have been." And therefore, where no excuse whatever was offered why the claimant had not prosecuted and perfected his improvements, by personal, resident settlement on the land, although more than six years had elapsed from the commencement of it, and this state of facts was shown by the evidence of both parties, it was held that the court below would clearly have been justified in charging the jury that there had been an abandonment.[1] This decision seems opposed to the previous decision of the same court, to the effect that whenever a question of abandonment arose from a lapse of time less than seven years, accompanied by circumstances from which it might be inferred that the party intended to abandon, it was a mixed question of law and fact, to be submitted to the jury; but when the question arose from mere lapse of time, it was a question of law, to be determined by the court without regard to the intention of the party; and if the time exceeded *seven years*, it was a conclusive abandonment in law.[2] Still earlier, it was said by Tilghman, C. J.: "Were the matter at all doubtful it should be left to the jury. But abandonment is not in all cases a matter of fact. It may be a conclusion of law from facts. Where a man makes a settlement and leaves it for a great length of time, it does not signify for him that he keeps up his claim. The law declares that such verbal claims have no avail as against the act of relinquishing the possession. And in such case I consider it as the right of

[1] Atchison *v.* McCulloch, 5 Watts (Pa.), 13, 15.

[2] Brentlinger *v.* Hutchinson, 1 Watts (Pa.), 46.

the judge to declare the conclusion of law."[1] In another case it was said by Duncan, J.: "Abandonment is a term very often misapplied, and I know nothing more destructive of the security of titles, than leaving it to a jury to presume an abandonment of such a title. * * * A man may abandon his settlement, and that abandonment may be of such a cast, as that the court may decide it as a matter of law, independent of the statutory provisions of limitation as to seven years; because continuity of actual residence and possession is the very vital principle of this right, and is a part of its legal definition. Hence, it is determined that settlements must not have the smallest cast of abandonment. The abandonment then is not constructive, but absolute; a dereliction of the possession, which amounts to a surrender of the preemption right, unless this dereliction is accounted for by some extraordinary occurrence, as being dispossessed by force, and an immediate prosecution of the right, or prosecution within some reasonable time, or being driven off by the public enemy. Where a location is not followed up by a survey in a reasonable time, this is the constructive abandonment, and may be decided as matter of law by the court; and where there is an intervening right before the survey, this imperfect right and inception of title may be considered as relinquished, or in other words, abandoned." And it was held that it was error to leave it to the jury to decide, in the particular case, whether an application on which a survey had been made had been abandoned.[2] In another case, where an actual settler had resided on land for two years and had then left it unoccupied for five years, it was held proper for the court to instruct the jury that his absence for that length of time was a legal abandonment of his rights. Gibson, C. J., said: "It is certain that a question of abandonment is not necessarily a question of intention. There are instances where the conclusion to be drawn from the evidence, taking the truth of it for granted, is not one of fact but law, and where an admitted intent to resume the settlement is immaterial. To substitute claim for residence, a convenience for prosecution of title, would subvert the whole doctrine of improvement. An appropriator is not to be held off by an improver who has barely set his mark on the land, by the commencement of a settlement, suspended, but intended to be resumed at a more convenient season. In such a case, the *animus revertendi* goes for nothing. It is continuance of residence, with such occasional exceptions of temporary but indispensable interruption of it, as circum-

[1] Cluggage *v.* Duncan, 1 Serg. & R. (Pa.) 111, 120.

[2] Watson *v.* Gilday, 11 Serg. & R. (Pa.) 337, 340.

stances may require, and of which it may be the province of the court to judge, which is the groundwork of the title." [1] Finally, the conclusion has been reached that, where the question of abandonment depends upon mere *lapse of time*, not excused by any circumstance named in the statute or contemplated by it, and there is no dispute as to the length of the time, it is a *question of law*, to be decided by the court without regard to the *intention* of the party; and it was held, in such a case, that relinquishment of actual residence for five years and nine months, without any circumstance to bring the case within the equity of the statutory excuses, was abandonment as matter of law, without regard to the intention of the claimant.[2] In another case it was ruled that, if actual residence be discontinued for five years, and not accounted for, it is an abandonment in point of law.[3]

§ 1442. THE SAME SUBJECT CONTINUED. — Passing from these to another class of cases under the same statute, we find that it has been well decided that, in all cases where the circumstances leave room for doubt whether there was an abandonment or not, *the jury is the proper tribunal* to decide.[4] "Some cases," said Coulter J., "may be so strongly and indelibly marked, either by continuous absence, and suffering the improvement to return to its wild state, or by the declarations and acts of the party, as to justify the court in deciding as a matter of law upon the question; yet, in a large majority of the cases which occur, there is such a mixture of motive, intent and circumstances, as to make it a matter properly referable to the jury. It is not a mere length of absence for any reasonable time, which gives character to the act of quitting possession; for a man may leave behind him unquestionable marks of the *animus revertendi*, such as grain growing, household utensils and farming implements. On the other hand, short absence may be marked as unequivocally, by acts and declarations, with an intent to give up the right of settlement." [5] Accordingly, where the court submitted the question to the jury upon the following instruction, it was held no error: "When a single man had an actual settlement, improvement, and residence on a tract of land, with a cabin to live in, suitable to his circumstances in his single state, and married, his residing off the

[1] McDonald *v.* Mulhollan, 5 Watts (Pa.), 173.

[2] Jacobs *v.* Figard, 25 Pa. St. 45.

[3] Smith *v.* Beck, 25 Pa. St. 106.

[4] Foster *v.* McDivit, 5 Watts & S. 359; Wilson *v.* Watterson, 4 Pa. St. 214, 219; Heath *v.* Biddle, 9 Pa. St. 273.

[5] Wilson *v.* Watterson, 4 Pa. St. 214, 219.

land, in a house of his father-in-law, or with his father-in-law until he could get accommodations for his wife and expected increasing family, for a reasonable time, during which time he still occupies it, would not be an abandonment. Whether the residence was changed for such temporary purpose, and whether the time of this absence of personal residence was a reasonable time to effect the object, and prosecuted with due diligence, especially when there was conflicting and contradictory evidence, would be facts to be determined by the jury." [1] Again, where the court recapitulated the facts, instructed the jury what amounted to an abandonment, and gave them what might perhaps be an intimation of the court's opinion that there was an abandonment, but left the question to them, it was held that, while there might be evidence sufficiently clear to warrant the court in telling the jury, as matter of law, that there had been abandonment, no error was committed in the particular case.[2] In another case it has been held that an interruption of occupancy for a period of six months would not of itself amount to an abandonment, unless accompanied by acts or declarations indicative of an intention to abandon the premises; and, under the circumstances, it was held proper for the court so to charge the jury, — the court conceding what is held in decisions already quoted, that in some cases it will be a mere question of law.[3] Reviewing these decisions, it was held in a later case that, being so far advanced from the period and policy which gave rise to the statutes, the court ought not to contract the rule in regard to actual residence more than their predecessors had done; and where the discontinuance of the actual resident possession was but a few days over two years before the warrant of the subsequent claimant was issued, it was held that this was too short a time to give it the character of an abandonment in law from lapse of time, and that the trial court therefore erred in rejecting evidence tending to prove the *animus revertendi*. The court intimated that where the interruption of the settler's residence is for a less period than *five years*, it ought to be left to the jury to determine, under all the evidence in the case, whether there existed an intention to abandon.[4]

§ **1443. Waiver of Vendor's Lien.** — It has been ruled that, whether a *vendor* intended to *waive* his *lien* by taking a new note, is a *question of law*, and ought not to be submitted

[1] Heath *v.* Biddle, 9 Pa. St. 273, 274.

[2] Sample *v.* Robb, 16 Pa. St. 305, 320.

[3] Goodman *v.* Losey, 3 Watts & S. (Pa.) 526.

[4] Whitcomb *v.* Hoyt, 20 Pa. St. 443.

to a jury. It was argued, and the court admitted the position, that the abandonment of a vendor's lien is a question of *intention;* but Lumpkin, J., nevertheless said: "The law is that the waiver may be actual or implied. But whether the uniting of other considerations in the same note is an implied waiver, is a question of law, just as much as whether taking other and additional security amounts to a waiver. The facts being admitted, the law arising out of any given state of facts is to be decided by the courts." [1]

§ **1444. Abandonment of a Public Office.** — It has been said that, "what amounts to an abandonment of an office (if one can be vacated by abandonment, otherwise than in the manner prescribed by the statute), is a *question of law*, and the special facts should be stated, in order that the court may determine whether those facts constitute an abandonment or not." [2]

§ **1445. Waiver by Administrator of Copy of Claim against an Estate.** — Under the statutes of Arkansas, the executor or administrator of the estate of a deceased person is entitled to a copy of any claim which is presented to the probate court for allowance against the estate, — the object of the statute being to enable him to act advisedly in allowing or refusing it, and, in case of its allowance, to place in his possession accurate data for the classification of claims against the estate.[3] This being the policy of the statute, where the executor or administrator has had a fair and convenient opportunity to examine the original claim, no violence is done to the spirit of the statute by the finding of a waiver of the copy by a jury, even upon slight grounds; and it is held that, whether or not the facts and circumstances shown in evidence amount to a waiver, is a *matter of fact* to be determined by a jury.[4]

[1] Mims *v.* Lockett, 23 Ga. 237. The writer may be permitted to doubt the conclusion of this case. Where the question is one of intention, the law may indeed conclusively annex a particular intention to a particular state of facts; but the general rule is certainly otherwise. *Ante*, § 1333, *et seq.*

[2] State *v.* Seay, 64 Mo. 89, 97.

[3] Borden *v.* Fowler, 14 Ark. 471, 474.

[4] Grimes *v.* Bush, 16 Ark. 647.

§ 1446. Waiver by a Creditor of his Right to Rescind a Composition Agreement. — If a composition takes place between a debtor and his creditors, whereby each creditor is to receive a certain amount, the legal effect of the contract is that it is not only a contract between the debtor and each separate creditor, but it is a contract among the creditors themselves.[1] Hence, if one creditor consents to sign the agreement, upon a secret understanding with the debtor or with an agent or friend of the debtor, or even, it is held, with a mere volunteer, that he is to get a larger amount than the other creditors, the rest of them are cheated, and, on discovering this fact, have the right to rescind the contract and sue for their full debt.[2] But, while this and other circumstances which might be supposed, will give the right to any particular creditor to rescind the composition agreement and sue for his full debt, this right, like any other, may be *waived;* and obviously it will be assumed in law to have been waived, if the creditor, with full knowledge of the circumstances which give him the right to rescind the agreement, accepts performance of it from the debtor according to its terms.[3] But where there are facts from which the contrary inference may be drawn, which will control the decision of this question, — as, for instance, whether the creditor accepted performance from the debtor with full knowledge of the circumstances which gave him the right of rescission, — the question whether there has been a waiver must go to the jury.[4] Thus, where it appeared that, in the state of facts previously supposed, the creditor refused to surrender the promissory note by which his debt was evidenced, except upon the promise of the debtor to pay or secure the balance in full, — under these circumstances the acceptance of part performance from the debtor, according to the terms of the compo-

[1] Solinger *v.* Earle, 82 N. Y. 393, 396; Sage *v.* Valentine, 23 Minn. 102; Breck *v.* Cole, 4 Sandf. (N. Y.) 79, 83.

[2] Bank of Commerce *v.* Hoeber, 11 Mo. App. 475; Pulsford *v.* Richards, 22 L. J. (Ch.) 559; *s. c.* 19 Eng. L. & Eq. 387; Knight *v.* Hunt, 5 Bing. 432; Re Whitney, 14 Nat. Bank Reg. 1, 3; Robson *v.* Calze, Dougl. 216; Holland *v.* Palmer, 1 Bos. & Pul. 95; Re Sawyer, 14 Nat. Bank. Reg. 241.

[3] Cobleigh *v.* Pierce, 32 Vt. 788, 796.

[4] *Ibid.*

sition agreement, would not be conclusive evidence of a waiver, and the question would remain a question for the jury.[1]

§ 1447. Waiver cannot take Place without Knowledge. — It must in all cases appear that the party had a full *knowledge* of his rights, in respect to the matter of which the waiver is predicated; for, if ignorant thereof, of course no intention to waive anything can be implied.[2] In this respect the doctrine of waiver rests upon very much the same footing as that of *ratification*. Indeed, the two things are the same, though one term is applied in one situation, and the other in another. To illustrate the foregoing statement, take a case where the plaintiff hired a slave to the defendant, by an express contract, to be employed in a particular service. The defendant, disregarding the contract, sub-hired the slave, to be employed in a totally different service. Pending the latter service, the slave was taken violently ill, and, at the suggestion of a physician, was taken to the house of the plaintiff to be nursed, where he died. It was held that the mere fact of the plaintiff receiving the slave under the circumstances was not of itself a *waiver of the conversion;* that whether or not it was such a waiver depended upon the motive with which it was done, and that this was a question of fact for a jury. If, with the knowledge of the fact which in law constituted the conversion, the plaintiff took back the slave *as owner*, and as if the outrage had not been committed, this would be evidence of a waiver of the conversion.[3]

§ 1448. INSTRUCTIONS AS TO WHAT CONSTITUTES ABANDONMENT OF REAL ESTATE IN ACTION OF EJECTMENT. — "The question of abandonment is one of fact and intention. Ceasing to cultivate a lot in the common fields and a removal elsewhere do not make an abandonment; but, to constitute an abandonment by a party, it must be shown that he quitted the property with the intention of no further claiming the same, and

[1] *Ibid.* Compare Dauchy *v.* Goodrich, 20 Vt. 127.

[2] Tryanor *v.* Johnson, 1 Head (Tenn.), 51, 55; Cobleigh *v.* Pierce, 32 Vt. 788, 796.

[3] Tryanor *v.* Johnson, *supra*. Compare Bell *v.* Cummings, 3 Sneed (Tenn.), 275.

the burden of showing the abandonment rests upon the one who asserts it. - - - - Although the jury may believe from the evidence that the land in contest was part of a common-field or out-lot, and the same was inhabited, cultivated or possessed by said Francis Bequette prior to the 20th of December, 1803, yet if, from the evidence, they believe that said Bequette, his heirs or legal representatives, did leave the said common-field or out-lot with the intention not to return and occupy the same, as his or their property respectively — such action on his or their part is an abandonment of their or his right, title or claim to the land in contest, and the jury should find accordingly." [1]

[1] Approved in Tayon *v.* Ladew, 33 Mo. 205, 208.

CHAPTER XLVIII.

IDENTITY: RESEMBLANCE.

SECTION

1450. Question for Jury.
1451. Where there are two persons of the same Name.
1452. [Illustrations.] Whether Father or Son the Grantee in a Deed.
1453. Identity of Personal Property.
1454. Res Judicata — Identity of the Issues in a Former Proceeding.
1455. Identity of a Signature with the Name of a Firm.
1456. Difference between two Machines.
1457. Sufficiency of Specification of a Patent — Informality — Abandonment — Identity.

§ **1450. Question for Jury.** — Identity is a matter peculiarly within the province of the jury, to be determined by them in view of all the circumstances; and the court must not, in instructing them, intimate an opinion as to what inferences should be drawn by them from the facts in evidence.[1]

§ **1451. Where there are Two Persons of the same Name.** — Where it becomes a question which one of two persons bearing the same name was intended to be the grantee in a deed, the question is one of *fact for a jury*. In so holding the Supreme Court of Wisconsin have lately said: "In a sense, as to the real person intended, there is a *latent ambiguity* in the deed, but more properly, perhaps, it is a question of identity; as in wills, 'where the words are neither ambiguous nor obscure, and the devise on the face of it is perfect and intelligible, but, from some of the circumstances admitted in proof, an ambiguity arises as to which of two or more things, or which of two or more persons (each answering the words in the will) the testator intended.'[2] This is what Lord Bacon called 'an equivocation, that is, the words equally apply to two things or two persons.' But it is clear that

[1] Miller *v.* Marks, 20 Mo. App. 369. [2] Citing 1 Greenl. Ev., § 289.

in any sense this question is not one of construction or of law, to be decided by the court in an action at law, but one of fact, pure and simple, to be passed upon by the jury; as much so as the meaning of words used in a written instrument, which this court held was a question for the jury; [1] and, as the questions in the cases hereafter cited in analogy to this case.[2]

§ 1452. [Illustrations]. Whether Father or Son the Grantee in a Deed. — A father and son both bore the name of David Felker. They both resided in the same town. The father purchased a piece of land, taking the deed to "David Felker, junior," describing him as of the town where they both resided. The father executed notes for a part of the purchase-money, and gave a mortgage of the land to secure the same, by the name of "David Felker, junior." He said nothing at the time of his acting as agent for his son, and the grantor supposed that the father was in fact the purchaser, that his name was David Felker, junior, and that he was conveying the land to him. Some of the evidence tended to prove that the son had authorized the father to buy the land for him and in his name, and that he had paid either directly or indirectly, the whole purchase price. Under this evidence, it was held a *question of fact* for the jury whether the son was or was not the real principal and purchaser of the land, under an instruction that if they found he was, then the title vested in him, and not in the father.[3] The court disposed of the inference to be derived from the addition of "junior" to the name of David Felker in the deed, by saying: "The addition of 'junior' is in law no part of a person's name, but it is used as merely descriptive of the person; and is assumed, applied, and discarded at will." [4] Another case involving this curious question was an action of ejectment in New York; where the plaintiff claimed title under a sale, which had taken place under an execution, issued upon a judgment which had been recovered against one David Brown. The

[1] Citing Ganson *v.* Madigan, 15 Wis. 145.

[2] Begg *v.* Begg, 56 Wis. 534, 537. The court cited the following analogous cases of parol evidence to explain written instruments: Thompson *v.* Jones, 4 Wis. 106; Atwater *v.* Schenck, 9 Wis. 160; Staak *v.* Sigelkow, 12 Wis. 234; Sargeant *v.* Solberg, 22 Wis. 132; Bancroft *v.* Grover, 23 Wis. 463; Harding *v.* Colburn, 12 Met. (Mass.) 333.

[3] Prentiss *v.* Blake, 34 Vt. 460; *ante*, § 1350.

[4] *Ibid.* 465, citing Brainard *v.* Stilphin, 6 Vt. 9; Blake *v.* Tucker, 12 Vt. 39; Isaacs *v.* Wilkey, 12 Vt. 677.

defendant claimed title by inheritance from her son, David C. Brown. The premises in question were conveyed some years before the action, by a deed duly executed, acknowledged and recorded, in which the name of the grantee was stated to be David C. Brown. David C. Brown was the name of an infant son of the judgment debtor, through whom the plaintiff claimed, whose true name was David Addison Brown, but who was sometimes called David Brown. The plaintiff claimed that the father was intended to be the grantee in the deed, and gave evidence tending to show that he negotiated the sale and that at the time of the execution and delivery of the deed, he delivered to the grantor a bond for the purchase-money, secured by a mortgage of the premises, which bond and mortgage were, however, executed, in like manner with the deed, in the name of David C. Brown. It was also shown that the father went into possession of the premises and so remained until the time of his death. There was also evidence tending to show that, in important business transactions, the name of the father was written David A. Brown. It was held that it was for the jury to say which of the persons, the father or the son, was intended to be the grantee in the deed, and that it was error to direct a verdict for the plaintiff. The court said: "The defendant has the legal presumption in her favor that her son was intended as the grantee; and whether it has been overcome by parol proof, we think should have been left for the jury to determine." [1]

§ **1453. Identity of Personal Property.** — In an action of *replevin*, the identity of personal property is peculiarly *for the jury*, and they should be left free to make their own deductions from the evidence. Upon the question of identity the testimony of witnesses who swear to the fact of identity is necessarily the statement of an *opinion* or *conclusion;* but it is nevertheless, from the nature of the case, to go to the jury.[2] So, what property is embraced in a *levy* which is described in the return in obscure terms, may be shown by parol evidence, and it is consequently a question of fact to be determined by a jury.[3] So, whether certain goods delivered were delivered in pursuance of an oral

[1] McDuffie *v.* Clark, 39 Hun (N. Y.), 166; citing Padgett *v.* Lawrence, 10 Paige (N. Y.), 170.

[2] State *v.* Babb, 76 Mo. 504; Com. *v.* Cunningham, 104 Mass. 545.

[3] Scott *v.* Sheakly, 3 Watts (Pa.), 50.

contract of sale, was held a question of fact for the jury.[1] The identity of property in chattel mortgage is always a question of fact for the jury. It was so held where the question was whether a certain engine, which had been seized and sold by the defendants, was included in the description of "one portable saw mill," in such a mortgage.[2]

§ **1454. Res Judicata — Identity of the Issues in a Former Proceeding.** — In order that a judgment may have the effect of barring a subsequent action, it must appear, either upon the face of the record or by extrinsic evidence, that the precise issue was raised and determined in the former suit. If this appears from the record of the former suit, apart from extrinsic evidence, then the question is a question of law, and is not to be submitted to a jury.[3] But if it appears that several matters may have been in issue, and that the judgment may have gone upon one or more, thus leaving the precise issue in doubt, this uncertainty should be removed by *extrinsic evidence*.[4] If such extrinsic evidence is presented in the form of parol testimony, it should be *left to the jury*, under proper instructions, to say whether the issues, as defined by the court in the case at bar, were in point of fact passed upon at the previous trial.[5]

§ **1455. Identity of a Signature with the name of a Firm.** — It has been held that the question whether "Chas. G. Ramsey & Co." signed to a promissory note was the signature of the firm known as the firm of "Charles G. Ramsey & Co." was a *question of fact* for the jury.[6]

§ **1456. Difference between two Machines.** — A branch of the rule that identity is peculiarly a question of fact for a jury,

[1] Stonewall Man. Co. *v.* Peek, 63 Miss. 342.

[2] Weber *v.* Illing, 66 Wis. 79.

[3] Tutt *v.* Price, 7 Mo. App. 194.

[4] Tutt *v.* Price, 7 Mo. App. 194; Spradling *v.* Conway, 51 Mo. 51; Wright *v.* Salisbury, 46 Mo. 26; Packet Co. *v.* Sickles, 5 Wall. (U. S.) 590; Russell *v.* Place, 94 U. S. 606.

[5] Tutt *v.* Price, 7 Mo. App. 194, 197; Packet Co. *v.* Sickles, *supra*.

[6] Tilford *v.* Ramsey, 37 Mo 563, 567; citing Kirk *v.* Blurton, 9 Mees. & W. 284; Kinsman *v.* Dullam, 5 T. B. Mon. (Ky.) 382.

may be found in a holding which has been made in an action at law to recover damages for the infringement of letters-patent. It is ruled that, when the defendant in such an action sets up a prior publication of a machine, anticipating the patented invention, and it appears that there are obvious differences between the two machines, in the arrangement of the separate parts, in the relation of the parts to each other, and in their connection with each other in performing the functions for which the machine is intended, and experts differ upon the question whether these differences are material to the result, and whether they require the faculty of invention — those questions are *questions of fact*, to be left to the jury under proper instructions.[1]

§ 1457. Sufficiency of Specifications of a Patent — Informality — Abandonment — Identity. — It seems that, in an action at law for the infringement of a patent, it is a question for the jury, to determine from the evidence in the case, whether the specifications, including the claim, upon which the patent was granted, were so precise as to enable any person skilled in the construction of machines, to make the one described; also whether the patent was possessed of novelty; also whether a renewed patent was for the same invention as the original patent; also whether the invention had been abandoned to the public; as well as the identity of the machine used by the defendant with that of the plaintiffs, or whether they have been constructed and operate upon the same principle.[2]

[1] Keyes *v.* Grant, 118 U. S. 25, 36; distinguishing Randall *v.* Baltimore &c. R. Co., 109 U. S. 478.

[2] Battin *v.* Taggert, 17 How. (U. S.) 74, 85.

CHAPTER XLIX.

PLACE: LOCALITY: BOUNDARY: IDENTITY OF LAND.

SECTION

1461. Court to Construe a Deed: Jury to Apply Description to the Land.
1462. Whether the Courses and Distances Carry the Lines to a Certain Point.
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1484. Instructions as to Survey and Plat of Public Road being Evidence of its Location, etc., in Criminal Prosecution for Obstructing a Public Highway under Illinois Statute.

§ 1461. Court to Construe a Deed — Jury to Apply Description of the Land. — While it is the duty of the court to construe a deed, it is the duty of the jury to apply its descriptive terms, when thus construed, to the land, and to ascertain whether the premises in question are within the description [1]

[1] Reed *v.* Proprietors &c., 8 How. (U. S.) 274; Bell *v.* Woodward, 46 N. H. 332; Naglee *v.* Ingersoll, 7 Pa. St. 185, 189.

Stated in another way, "what are the *boundaries* of land conveyed by a deed, is a *question of law;* where the boundaries are, is a *question of fact.*" [1] Still another way of stating the same principle is to say that, while it is the peculiar province of the jury to find facts and to ascertain the true positions of objects called for as monuments in a deed, from the evidence submitted to them, it is nevertheless the duty of the court to determine, whether, or *in what manner*, a call in a deed or patent should be *gratified*.[2] "When there is a latent ambiguity in the description contained in the deed, all the cases agree that *evidence aliunde* is admissible. But it is not upon this principle alone that the evidence is received. It is admissible in all cases where there is a doubt as to the true location of the survey, or a question as to the application of the grant to its proper subject-matter. It must be constantly borne in mind that it is *not a question of construction, but of location*. A question of construction is a pure question of law, to be decided by the court upon the terms of the instrument itself, to the exclusion of evidence *aliunde*, where no latent ambiguity exists. A question of location, or the application of the grant to its proper subject-matter, is a question of fact to be determined by the jury by the aid of extrinsic evidence." [3] "It cannot be denied," said the Court of Appeals of Maryland, "that the jury are the proper tribunal to decide whether any, and what, variation ought to be allowed in the location of lands. But whether any and what degree of allowance for variation ought to be made are questions of fact, to be determined by the jury on the testimony upon that subject, adduced to them in the trial of the cause. If no such

[1] St. Louis *v.* Meyer, 13 Mo. App. 367, 382; *s. c.* affirmed, 87 Mo. 276. That the location of a disputed boundary line is always a question of fact for a jury, or for a referee when acting as a jury, see the following cases: Tasker *v.* Cilley, 59 N. H. 575; Madden *v.* Tucker, 46 Me. 367; Abbott *v.* Abbott, 51 Me. 575; Tebbetts *v.* Estes, 52 Me. 566; Williston *v.* Morse, 10 Met (Mass.) 17, 27; Brown *v.* Willey, 42 Pa. St. 205, 209, opinion by Thompson, J.; Herpel *v.* Malone, 56 Mich. 199; Barry *v.* Otto, 56 Mo. 177.

[2] Thomas *v.* Godfrey, 3 Gill & J. (Md.) 143; Friend *v.* Friend, 64 Md. 321, 331.

[3] Opdyke *v.* Stephens, 28 N. J. L. 83, 90, opinion by Green, C. J. See also Abbott *v.* Abbott, 51 Me. 575, 581.

testimony be offered, the jury are not authorized to depart from the courses and distances expressed in the conveyances, by making any allowance for variation." [1] "The identical monument or boundary referred to in a deed is always a subject of *parol evidence;* and when disputed, it is always left to the jury to say which was the actual monument intended. Thus, there may be two trees of a similar species and with similar marks; two similar stakes not far distant from each other, or two rivers of the same name; and which was intended by the deed would be settled by parol evidence, on the ground that it is a latent ambiguity." [2]

§ 1462. Whether the Courses and Distances Carry the Lines to a Certain Point. — Thus, in an action at law, where a boundary line is in dispute, and the land is described in the deed by which the question is governed, by courses and distances, but no fixed monuments or corners are mentioned, the question whether the courses and distances carry the lines to certain points claimed by one of the parties, is a *question of fact* for the jury, which the judge cannot determine by an instruction peremptory in its nature.[3]

§ 1463. Whether a Grant Includes the Premises in Controversy. — Whether land in controversy is included within a particular grant, being a question of *identity*, is necessarily a *question of fact* for a jury.[4] In an action for damages for the breach of a contract to convey land, where it is objected that the instrument sued on does not describe the land, the question of the sufficiency of the description is for the jury to determine from the evidence, unless it is manifest from the instrument that it cannot be located.[5] So, it is the province of a jury to say whether a *descriptive warrant* has been located upon the land

[1] Wilson *v.* Inloes, 6 Gill (Md.), 121, 163; Peterkin *v.* Inloes, 4 Md. 175.

[2] Claremont *v.* Carlton, 2 N. H. 369, 373, opinion by Woodbury, J. This case is a very apt illustration of the rule.

[3] Opdyke *v.* Stephens, 28 N. J. L. 84.

[4] Ferris *v.* Coover, 10 Cal. 590, 622; Baynard *v.* Eddings, 2 Strobh. Law (N. C.), 374; Barry *v.* Otto, 56 Mo. 177.

[5] White *v.* Hermann, 51 Ill. 243.

called for in it, or not. And whether a warrant has been shifted or properly located, is for them to determine.[1] Where it was established, not only as a part of the history of the country, but by evidence in a particular case, that many of the documents, relating to an *impresario* contract between the Mexican Government and Martin de Leon, had been destroyed during the Texas revolution, it was held that it was properly left to the jury to say whether the land in controversy was in this tract.[2]

§ 1464. How Jury Instructed in Such a Case. — The following instructions, given in such a case, have been explicitly approved by the Supreme Court of the United States: "1. That if they [the jury] believe from the evidence, looking to the monuments, length of lines, quantities, actual occupation, etc., that it is more probable that the parties to the mortgage of 1782 intended to include therein the demanded premises than otherwise, they should return their verdict for the tenants.[3] - - - - The following were approved by the Supreme Court of Texas: "This is an action of trespass to try title, brought by the plaintiffs in the petition against the defendants therein named. There is no controversy, however, as to the titles of the parties, each claiming under the same grantee from the sovereignty of the soil, but the dispute is as to the true boundary line between their respective tracts of land. - - - - The general rules which are to be observed in ascertaining the locality, identity, or boundary of a particular tract of land described in a deed or grant, are well settled. Recourse must be had, first, to natural objects; second, to artificial marks, and third to course and distance. - - - - The acquiescence of the proprietors of adjoining lands, in a particular line, is a circumstance to which the jury may look in determining the true boundary. - - - - If the jury believe from the evidence that the boundary line between plaintiffs and defendants would give the disputed premises to plaintiffs, then they will find for plaintiffs. - - - - If, on the other hand, the jury believe from the evidence that said true boundary line would leave said disputed premises in defendants' tract of land, they will find for defendants. - - - - If the jury believe from the evidence that the dividing line between the lands of plaintiffs and

[1] Cassidy *v.* Conway, 25 Pa. St. 240, 244.

[2] White *v.* Burnley, 20 How. (U. S.) 235, 247.

[3] Approved in Reed *v.* Proprietors &c., 8 How. (U. S.) 274, 288, — the court holding that the instruction is not obnoxious to the objection that it submits the interpretation of the deed to the jury.

defendants has been run, and that the parties, or those under whom they claim, have acquiesced in the same, and recognized the said dividing line, they will find for defendants." [1]

§ 1465. An Instruction on the Theory of a Boundary Line Fixed by Agreement. — "The jury are instructed that it is perfectly competent for parties owning adjoining tracts of land to settle, by agreement, where the division line shall be; and if the jury shall believe from the evidence, that the plaintiff and defendant owned adjoining tracts of land, and any question or dispute had arisen as to where the line now in controversy was, and the plaintiff and defendant agreed upon the line and established it, as between themselves, then, in that case, it is wholly immaterial where a survey would put the line. Each party is bound by his agreement; and, in determining whether there was such agreement, and fixing on the line, it is competent for the jury to take into consideration acts and statements of the parties at the time, the acts done by, each and the fixing and adjustment of fences and improvements by them, under such agreement, if any are proven." [2]

§ 1466. What Monuments Satisfy the Calls of a Deed. — Where a deed calls for a particular *object*, and there is evidence as to the actual location of the object, it is the province of the jury to find where its location was.[3] Thus, where a survey called for *two small trees* of a certain kind, as a monument at the corner of the tract of land surveyed, and two small trees of the kind thus called for were found in the neighborhood, it was proper to refuse an instruction to the jury to disregard them, on the theory that it was doubtful whether they were the trees called for. The question was one of fact for the exclusive determination of the jury.[4]

[1] Approved in McArthur *v.* Henry, 35 Tex. 804, 805; citing George *v.* Thomas, 16 Texas, 74, 84; Houston *v.* Sneed, 15 Texas, 307, 309; Singleton *v.* Whiteside, 5 Yerger (Tenn.), 18, 34; Ross *v.* Turner, 5 Yerger (Tenn.), 338; Goodridge *v.* Dustin, 5 Metc. (Mass.), 363; Adams *v.* Rockwell, 16 Wend. (N. Y.) 285; Dibble *v.* Rogers, 13 Wend. (N. Y.) 536; Chew *v.* Morton, 10 Watts (Pa.), 321; Gray *v.* Berry, 9 N. H. 473; Jackson *v.* Ogden, 7 Johns. (N. Y.) 238; Gilchrist *v.* McGee, 9 Yerger (Tenn.), 455; Nichol *v.* Lytle, 4 Yerger (Tenn.), 456. See also Wilson *v.* Hudson, 8 Yerg. (Tenn.) 398.

[2] Approved in Cutler *v.* Callison, 72 Ill. 116.

[3] Hawkins *v.* Nye, 59 Tex. 98.

[4] Ayers *v.* Watson, 113 U. S. 594, 605.

§ 1467. No Presumption of Law in such a Case. — The identity of a particular monument as the one called for in a deed, involves a question of fact, and there is no presumption of law in such a case. Accordingly, it has been held proper to refuse the following instruction: "If they [the jury] found that there was an old stake standing at the end of the one hundred and fifty-six rods, the distance named in the deed, bearing upon it surveyor's marks, and other *indications* of the character of the monument named in the deed, in the absence of all proof to the contrary, the presumption would be that it was the stake referred to in the deed." The court say: "There was no presumption of law in the case. The various facts bearing upon the stake, tending to show the same to be the monument, were proper for the consideration of the jury; but the court could not, as requested, have given the instruction that there was any presumption of law binding on them. The evidence was entirely for the consideration of the jury." [1]

§ 1468. Whether a particular Monument was Intended to be Adopted by a Deed. — Closely allied to the foregoing is a rule which so far lets in *parol evidence* to explain a deed, as to show that a particular monument, *not called for* in the deed by name, was intended to be adopted by it. This rule has been declared with reference to public patents or grants.[2] And, though it has been conjectured that it may extend, *ex necessitate*, to old deeds, yet it has been doubted whether it extends to private deeds; and, as it is a violation of principle, it has been said that it ought not to be extended.[3] The rule has been thus stated: "Where it can be proved that there was a line actually run by the surveyor, which was marked and a corner made, the party claiming under the patent or deed shall hold accordingly, notwithstanding a mistaken description of the land in the patent or deed." [4] "This rule," said the same court in a subsequent case, "pre-

[1] Robinson *v.* White, 42 Me. 209, 216.

[2] Cherry *v.* Slade, 3 Murph. (N. C.) 82.

[3] Safret *v.* Hartman, 5 Jones L. (N. C.), 185.

[4] Cherry *v.* Slade, 3 Murph. (N. C.) 82, 86.

supposes that the patent or deed is made in pursuance of the survey, and that the line was marked, and that the corner that was made in making the survey, was adopted and acted upon in making the patent or deed; and, therefore, permits such line and corner to control the patent or deed, although they are not called for, and do not make a part of it. Parol evidence being thus let in for the purpose of controlling the patent or deed, by establishing a line and corner not called for, as a matter of course, it is also let in for the purpose of showing that such line and corner were not adopted and acted on in the making of the patent or deed; because the rule presupposes this to be the fact."[1] It necessarily follows that, whether the line or corner was adopted or acted upon in making the deed, is a *question of fact* for a jury.[2]

§ **1469. Calls of a Survey.**—"When the calls of a survey are all ascertained by the grant, and there is no necessity for reference to external evidence to ascertain or identify them, their construction is a *matter of law*, and belongs exclusively to the court; but when parol evidence is introduced to ascertain or identify the calls, then it is a question of law and fact, the jury finding the fact, the court declaring the law."[3] "In cases of boundary, which depend upon the swearing of witnesses, it would, no doubt, be incompetent for the court, by any sort of instructions that might be given, to withdraw from the jury a decision upon the weight of the testimony, and the facts which the testimony conduces to establish. The actual position and identity of the boundary, in such a case, would be exclusively a *question of fact* for the consideration and determination of the jury, and not the court."[4] "Where contradictory evidence is given of the location of a survey, or where, from the evidence, the true location is doubtful and uncertain, it must be referred to the jury to determine the land included in the survey; but where

[1] Safret *v.* Hartman, 5 Jones Law (N. C.), 185, 189.

[2] *Ibid.*

[3] Ott *v.* Soulard, 9 Mo. 581, 604.

[4] Cockrell *v.* McQuinn, 4 T. B. Mon. (Ky.) 63, opinion by Owsley, J.

there is no conflict in the evidence, and no room for doubt or hesitation in regard to the location, there is nothing to leave to the jury, and the questions of law are for the court." [1]

§ 1470. [ILLUSTRATION.] CONCLUSIVENESS OF MARKED CORNERS AND LINES IN A SURVEY. — Where the closing line of a survey, starting from an admitted corner, did not, as marked on the ground, reach the boundary of the tract which it was intended to enclose, and there were no indications of a corner on the ground at that point, where it would intersect said boundary if extended; but there was, near that point, a "marked corner" which could be reached by diverging by an angle of 45 degrees from the extremity of the marked line, — it was held a *question of fact* for a jury, in an action of ejectment, whether the "marked corner" was or was not the original corner, and if so, whether the partial line on the ground had not been abandoned by the surveyor and another one adopted, closing the survey by a straight line, running from the admitted corner to the marked corner.[2]

§ **1471. Indefinite or Insufficient Calls in a Deed.** — Where the calls in a deed are so indefinite that the court cannot pronounce their meaning, the question what land was intended by the parties to be embraced in the deed, is a question depending both on law and fact, which should be *submitted to a jury* under the direction of the court as to such rules of construction as may be found applicable.[3]

§ 1472. ILLUSTRATION OF FOREGOING. — It was so held where land was described in different deeds as bounded "on the mountain," "by the mountain," and "at the foot of the mountain." [4] So, where a testator, in devising land, laid down as a line of division, "a post" and "a corner," and there were two such posts, and the language of the will pointed to neither to the exclusion of the other, though external circumstances might do so, — it was held that the question as to which of the posts was intended was a question of fact, which did not de-

[1] Ramage *v.* Peterman, 25 Pa. St. 349, opinion by Knox, J.

[2] Hunt *v.* McFarland, 38 Pa. St. 69.

[3] Williston *v.* Morse, 10 Metc. (Mass.) 17, 26; Murray *v.* Spencer, 88 N. C. 357.

[4] Williston *v.* Morse, 10 Met. (Mass.) 17, 26.

pend in any degree upon direction in matter of law. "Here," said Gibson, C. J., "there was no disagreement, — the name and the description answering in the same degree to each of the corner posts, so that nothing was to be determined but a pure question of fact."[1] So, where a deed called for "an old line down a bottom to a given point," and there was no evidence as to the old line, but there was conflicting evidence as to two bottoms, extending from the point reached to the one aimed at, — it was held proper for the judge to submit to the jury the question which of the two bottoms was the one called for.[2] So, where a lease described the demised premises as the lessor's "coal bank and the appurtenances thereunto belonging," and did not otherwise describe them, it was held, in an action for the rent, in which eviction was set up as a defense, that it was for the jury, and not for the court, to say what was the extent of the demised premises, — it being rather a latent ambiguity to be solved, than an instrument of writing to be construed. "The meaning of the words used," said the court, "is plain enough; but the extent and scope of their operation are where the ambiguity lurks. Words enough were not put into the instrument to define the boundaries of the grant, and therefore it was for the jury to define them from evidence *dehors* the instrument."[3] So, in an early case in California it was held that, where the boundaries of a lot of land granted by an alcalde in Mexican times were uncertain, the true location of the lot was a question of fact within the peculiar province of a jury.[4] So, it has been held in Pennsylvania that, where it is uncertain from the language employed in a sheriff's return, what land was in fact sold, the question may, in an action of ejectment, be submitted to the jury. The court say: "The construction of written instruments is undoubtedly the exclusive province of the court, and the *quantum* of estate conveyed by a deed is referable to the judges alone. But where that estate is situate, what are its limits and contents, must frequently depend upon evidence *dehors* the writing; and thus it is often a pure question of fact, or of law and fact compounded, upon which a jury must be called to pass. This is peculiarly true of loose written returns of writs of execution, which ignorance and carelessness combine to divest of every feature approaching to certainty. With us, inaccuracy of description in these inceptions of title is so often indulged, that it has been found

[1] Brownfield *v.* Brownfield, 12 Pa. St. 136, 144.

[2] Hill *v.* Mason, 7 Jones . L. (N. C.), 551.

[3] Tilley *v.* Moyers, 43 Pa. St. 404, 411, opinion by Woodward, J.

[4] Reynolds *v.* West, 1 Cal. 323, 328.

necessary to make a liberal use of assisting evidence, documentary and oral, in correcting mistakes, explaining ambiguities, and applying indeterminate delineations to disputed localities. Where a return is intelligible in itself, and ascertains with reasonable precision the particular tract taken in execution, no room is afforded for the introduction of explanatory proof, and none will be received in contradiction of the official act But where, either from the generality of the terms used, uncertainty of delineation, or seeming contradiction of description, a doubt is raised affecting the boundaries of the levy, its particular locality or extent, recourse is necessarily had to evidence *aliunde*. In many, perhaps most of these instances, the difficulty proceeds from wide generalities of language, which fail to indicate any precise locality, though it also frequently springs from inability to fix a described line of division or boundary, without invoking the local knowledge of those acquainted with the subject of dispute. Where this happens, while the right of construing the written return must be conceded to the court, the position and limits of the land and the quantity intended to be sold, become a legitimate object of investigation for a jury. A judge who evades to declare the meaning of a deed or other writing commits an error; but if the instrument cannot be understood without reference to extraneous facts, the jury must judge of the whole." [1] Where a sheriff advertised "all that tract of land and premises on which said William Todd now lives, situate," etc., "and containing two hundred acres, more or less," and made a sale, in pursuance of this advertisement, which was followed by his deed to the purchaser, upon a subsequent controversy as to whether a certain twenty-nine acres of land passed by the sale, the question was held to be a question of fact for the jury, and it was held that the court erred in directing a verdict for the defendant.[2]

§ **1473. Parol Evidence Admissible in such a Case.** — From what has preceded it will follow that, in order to enable the jury to discharge the office of applying the descriptive words of a deed to the land, *parol evidence* must frequently be heard.[3] Such evidence, it has been said, is *always admissible*.[4]

[1] Hoffman *v.* Danner, 14 Pa. St. 25, 28, opinion by Bell, J. See *ante*, § 1083.

[2] Todd *v.* Philhower, 24 N. J. L. 797, 807.

[3] Naglee *v.* Ingersoll, 7 Pa. St. 185, 198.

[4] Abbott *v.* Abbott, 51 Me. 575, 581. Upon the admissibility of parol evidence, the court cited Waterman *v.* Johnson, 13 Pick. (Mass.) 261; Wing *v.* Burgis, 13 Me. 111. "It sometimes happens," says Davis, J.,

§ **1474. Verdict of Jury of Vicinage entitled to Great Weight.** — It has been said, in an action for damages for cutting a ditch and making a levy, whereby *water* has been *diverted* from its previous channel and cast upon the land of the plaintiff, that "the relative situation of the lands of the plaintiff and defendants, and the natural drainage of the soil, are matters peculiarly within the *cognizance of a jury* of the vicinage; and their verdict upon a subject so generally interesting to the inhabitants of an alluvial region, is of the highest authority with us." [1]

§ **1475. Identity of Land and Whether Assessed or Unseated.** — Where, in an action of ejectment by one claiming under a treasurer's tax deed, there is a question about the validity of the deed, because of a doubt in regard to the identity of the land described in the writ and that set out in the deed, or because it is uncertain whether the land was really assessed as unseated, or whether it was in fact unseated, — these questions, it has been held, are *for the jury* and not for the court; and this is so, although the defendant is a mere intruder, not having even color of title. The reason is that the treasurer's deed is good for nothing unless it is made to appear that the land therein described was assessed and taxed as unseated, and it is too clear for dispute that a question of identity of land is a question for the jury.[2]

§ **1476. Questions of Locality, Distance, etc., for the Jury.** — The general rule, then, is that questions of locality,

in this last case, "that the monument found upon the ground corresponds with the description of the monument in the deed in some particulars, and differs from it in others. In such case the whole description in the deed is not to be rejected, and parol evidence is admissible to show whether the monument, partially but erroneously described, was the one intended. Parker *v.* Smith, 17 Mass. 413; Clark *v.* Munyan, 22 Pick. (Mass.) 410; Slater *v.* Rawson, 1 Met. (Mass.) 450." That the acts and declarations of the grantor are important in determining the question of boundary, see Patten *v.* Goldsborough, 9 Serg. & R. (Pa.) 47. That subsequent occupation by the parties is generally decisive, see Stone *v.* Clark, 1 Met. (Mass.) 378.

[1] Williams *v.* Bridge, 14 La. Ann. 721 opinion by Buchanan, J.

[2] Miller *v.* McCullough, 104 Pa. St. 624, 629.

boundary, distance, direction, identity of land are *questions of fact*, and not of law.

§ **1477.** [**Illustration.**] **Appurtenances.** — Thus, it has been held, under circumstances which need not be set out, that the question whether lots of ground are appurtenant to a railway, and indispensably necessary to the enjoyment by the railway company of its franchises, and, as such, included in a mortgage of the railway property, is a question which may properly be *submitted to a jury*.[1] So, under an indictment founded on a statute for selling liquor to be drunk in the defendant's out-house, yard, garden and *appurtenances* thereto belonging, it has been held a question of fact, for the jury to determine, whether the liquor was drunk upon the appurtenances of the premises of the defendant.[2]

§ **1478.** [**Continued.**] **Curtilage.** — So, it has been held, in a criminal prosecution for burning a barn, charged to be within the curtilage of a dwelling house, that the question whether the barn was within the curtilage of the dwelling house, as alleged in the indictment, was a *question for the jury* upon the evidence, the court defining to them the meaning of the word "curtilage."[3]

§ **1479. Whether the Place of Entry was a part of the House.** — In cases of *house-breaking*, which are analogous to *burglaries* at common law, the question whether the place

[1] Shamokin &c. R. Co. *v.* Livermore, 47 Pa. St. 465. The court comment upon the following cases, touching the question what property is *appurtenant* to the property of a railway company or other corporation: Lehigh Coal &c. Co. *v.* Northampton County, 8 Watts & S. (Pa.) 334; Railroad *v.* Berks County, 6 Pa. St. 70; Wayne County *v.* Delaware &c. R. Co., 15 Pa. St. 351; New York &c. R. Co. *v.* Sabin 26 Pa. St. 242; Westchester Gas Co. *v.* County of Chester, 30 Pa. St. 232; Ammarat *v.* Turnpike, 13 Serg. & R. (Pa.) 210; Canal Co. *v.* Bonham, 9 Watts & S. (Pa.) 27.

[2] Stout *v.* State, 93 Ind. 150.

[3] Com. *v.* Barney, 10 Cush. (Mass.) 480. The court defined curtilage, in law, as meaning a fence or *enclosure* of a small piece of land around a dwelling house, usually including the buildings occupied in connection with the house, which enclosure may consist wholly of a fence, or partly of a fence and partly of the exterior side of buildings so within the enclosure. *Ibid.*

of ingress where the breaking took place was a part of the house which is charged to have been broken into, has been held, upon doubtful grounds, a *question of law* for the court, and not a question of fact for the jury. Thus, where the evidence showed that the defendant entered the store-house, by removing a grate on the street which gave him entrance into the cellar thereunder, which connected with the store-house through a hatchway, and the court instructed the jury that, if they believed from the evidence that the grating removed by the accused was not a part of the store-house, they should acquit, — it was held that the question was one of law; but, as the jury decided it rightly, by convicting the defendant, the judgment was ordered to stand.[1]

§ **1480. Boundaries of Places.** — In New Hampshire it is laid down that the court cannot determine what are the limits, or whether there are any limits, of a place, not being a public corporation, described by its name only. "The court," said Bell, J., "are in no situation to decide that Fisherville is not a good and sufficient description of a place in Concord and Boscawen, as alleged. Whether there is a place called by that name, where it is situated, what are its limits, if it has any, are matters of fact, to be determined by a jury upon such evidence as the parties may lay before them. It is in no sense a matter of law, of which a court can take judicial cognizance. What is included in a name descriptive of a place, not being a public corporation, is always *matter for a jury*." [2]

§ **1481. Boundaries of Counties.** — The boundaries of counties, established by public law, are to be determined as *matter of law* by the court, unless in cases where the meaning of the statute is uncertain, in which cases, it has been held, the courts will not disturb a boundary fixed by *common usage* and *acquiescence*. But where the boundary is not uncertain, the fact that particular land has been for 28 years assessed in the wrong

[1] Com. *v.* Bruce, 79 Ky. 560.

[2] Blanding *v.* Sargent, 33 N. H. 239, 245.

county, will not be sufficient to authorize a court to allow a jury to say that the land lies within such county. The court must decide it as a matter of law.[1] But in a later case in the same court, it was said: "The definition of county lines is, of course, matter of public law, and, as such, must be interpreted by the court; but the jury alone can find the facts that give it a practical application, in actions of ejectment for the trial of private rights." When, therefore, in an action of ejectment, one of the parties claimed title to the land through a judicial sale, the validity of which depended upon the question of fact whether the land lay in one county or in another, it was held that the court committed no error, after defining the county line as established by statute, in leaving the question in controversy to the jury upon all the evidence.[2] It is added that, in such a case, where the meaning of the law which fixed the line was long in doubt, the court was not bound to give it an interpretation derived from its language alone, without reference to the actual interpretation which it had received through the acquiescence of the public during three quarters of a century. "Long established public regulations," said the court, "ought not to be disturbed by the logical or philological criticisms of original principles. The county line ought to be recognized as being where it was generally understood to be, and not where we would now place it, if we had now to apply the law for the first time. We can best ascertain where the true line was, by looking to the public practice relative to it, in connection with the levying of taxes, selecting jurors, serving process by the sheriffs and constables, elections, official surveys and such like matters. More of such evidence would have been better here." [3]

§ **1482. Boundary of a State.** — In a case in the Supreme Court of the United States, it was said by Mr. Justice Nelson, in giving the opinion of the court: "The boundary of a State, when a material fact in the determination of the extent of the

[1] Johns *v.* Davidson, 16 Pa. St. 512.

[2] Hecker *v.* Sterling, 36 Pa. St. 423, 428.

[3] *Ibid.*, opinion by Lowrie, C. J.

jurisdiction of a court, is not a simple question of law. The description of a boundary may be a matter of construction, which belongs to the court; but the application of the evidence in the ascertainment of it, as thus described and interpreted, with a view to its location and settlement, *belongs to the jury*. All the testimony bearing upon this question, whether of maps, surveys, practical location and the like, should be submitted to them under proper instructions to find the fact."[1]

§ 1483. Public Roads — Instruction that Monuments and Lines of Surveyor Prevail. — "The monuments observed and lines actually run by the surveyor, in surveying the road, and the laying out and viewing the line of road on the ground where it is laid, always prevail in determining the location of the road, provided the road is actually opened on that line. The notes of survey and the plat returned by the surveyor are matters of description, which serve to assist in determining the place where the road is laid, but they are not conclusive. * * * Whenever you find from the evidence that they (the surveyor, chainman, viewers, etc.) actually surveyed and located this road upon the ground, if it was afterwards opened by the road overseer, will be the road for the purposes of this case, whether it was laid upon the township line, or not."[2]

§ 1484. Instructions as to Survey and Plat of Public Road being Evidence of its Location, etc., in Criminal Prosecution for Obstructing a Public Highway under Illinois Statute. — "The monuments or corner run to, by the surveyor in surveying the road, and the staking and laying out of the road, must always control in determining the location of the road; and the field notes and plat returned by the surveyor are but matter of description which serve to assist in determining the

[1] United States *v.* Jackalow, 1 Black (U. S.), 484, 487.

[2] Approved in Shaffer *v.* Weech, 34 Kans. 598; citing Hiner *v.* People, 34 Ill. 297; Beckwith *v.* Beckwith, 22 Ohio St. 180; Everett *v.* Lusk, 19 Kans. 195, 199; McAlpine *v.* Reicheneker, 27 *Id.* 257; Tarpenning *v.* Cannon, 28 *Id.* 665; Twogood *v.* Hoyt, 42 Mich. 609; Cullacott *v.* Mining Co., 6 Pac. Rep. 211; Turnbull *v.* Schroeder, 29 Minn. 49; Johnson *v.* Preston, 9 Neb. 474; Penry *v.* Richards, 52 Cal. 496; Pike *v.* Dyke, 2 Me. 213; Brown *v.* Gay, 3 *Id.* 126; Williams *v.* Spaulding, 29 Me. 112; Marsh *v.* Mitchell, 25 Wis. 706; Fleischfresser *v.* Schmidt, 41 *Id.* 223; Jackson *v.* Cole, 16 Johns. (N. Y.) 257.

place where the road was actually located. - - - - In determining the boundaries of land in this State, the original mounds or monuments must govern as to the location of the line, although the line may, by following such original mounds, be made a crooked or deflected line. And if the original mounds have once been discovered and recognized by a county surveyor as original corners, a county surveyor who might be subsequently elected, would have no right to disregard such original corners and establish a different line, though such a line might be a straight one. - - - - If the jury believe from the evidence, that Berfield actually surveyed and located the road on the deflected line, under proper authority, that would be the true line of the road, although the true section line might be south of that. The actual survey and staking and viewing of the road, upon the ground where it is laid, constitutes the location, and the markings and lines, made by the surveyor and viewers upon the plat, do not constitute the location of the road, provided the road was actually opened upon such line." [1]

[1] Approved in Hiner *v.* People, 34 Ill. 298, 299.

CHAPTER L.

NOTICE.

SECTION

1487. Distinction between Actual and Constructive Notice.
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§ 1487. Distinction between Actual and Constructive Notice. — Actual notice is notice *in fact;* constructive notice is notice *in law.* Actual notice is purely a fact, and is proved as a fact and found as a fact by a jury.[1] Constructive notice is the

[1] Muldrow *v.* Robinson, 58 Mo. 332, 350; Beatie *v.* Butler, 21 Mo. 313, 323; Vaughn *v.* Tracy, 22 Mo. 415; Eyerman *v.* Second National Bank, 13 Mo. App. 289; *s. c.* affirmed, 84 Mo. 408; Hill *v.* Tissier, 15 Mo. App. 299; Masterson *v.* West End Narrow Gauge R. Co., 5 Mo. App. 64. It was so held, where the question was whether the party liable to pay an account had acquired notice from an interview which occurred between him and the debtor, that the account had been transferred to a third person. In such case, to have given an instruction which was requested, to the effect that what occurred between the parties to the account did not amount to notice, would

notice which the law conclusively ascribes to certain kinds of publications, such as the recording of a deed in the recording office, or the publication of a legal notice to a non-resident or unknown party. From this it follows that actual notice is always a *question of fact* for a jury, and that constructive notice, upon the fact of the statutory publication being found or established, is always a *question of law* for the court. The only exception to this rule which is recalled, arises in cases governed by the law merchant, and has been already considered.[1] It is said: "Actual notice does not require positive and certain knowledge, such as seeing the deed; but that is sufficient notice, if it be such as men usually act upon in the ordinary affairs of life. When it is shown that purchasers are affected with a knowledge of such circumstances, then the foundation is laid from which the inference of actual notice may be drawn." [2]

§ 1488. Actual Notice in Lieu of Registration. — Actual notice of an assignment preferring other creditors, is equivalent to registration; and whether the particular creditor or his attorney had such actual notice is a *question of fact* for a jury in all cases.[3]

1489. Subsequent Purchaser with Notice. — Whether or not the possession of a purchaser of real property, whose title is not

have been an invasion of the province of the jury. Saltmarsh *v.* Bower, 22 Ala. 221, 232. The rule that *notice of dishonor*, if deposited at the proper time in the proper office with the proper direction, is conclusively presumed to have reached the *indorser*, has been held to apply only to cases governed by the *law merchant;* and it has been held that, in other cases, the question of the sufficiency of the notice is one of fact for a jury. Therefore, it has been held that the sufficiency of a notice, given by the vendee of a chattel to the vendor, of the vendee's rejection of the chattel because of defects in it, cannot be decided as matter of law, although the notice may have been written, addressed and mailed under such circumstances as, in a case within the law merchant, would make a good notice to an indorser as a mere conclusion of law. Walworth *v.* Seaver, 30 Vt. 728.

[1] *Ante*, § 1223, *et seq.*

[2] *Ibid.;* citing Curtis *v.* Mundy, 3 Met. (Mass.) 405. See also Pomeroy *v.* Stephens, 11 Met. (Mass.) 244; Spofford *v.* Weston, 29 Me. 140; Dey *v.* Dunham, 2 Johns. (N. Y.) 182; Jolland *v.* Stainbridge, 3 Ves. 478; Wade on Notice, *passim;* Speck *v.* Riggin, 40 Mo. 405.

[3] Van Hook *v.* Walton, 28 Tex. 59.

recorded, is of such a character as to affect a subsequent purchaser with notice, is a *question of fact* for a jury.[1] So, in Pennsylvania, it was held that, whether or not a purchaser at sheriff's sale had actual notice of an unrecorded assignment of contracts relating to the land purchased, was a *question of fact* for a jury.[2]

§ **1490. Notice of Non-liability for Negligence.** — Where a person or corporation, exercising a public employment, gives receipts to its customers upon which is printed a notice that such person or corporation will not be liable for the negligence of its employés in the exercise of their employment, it is held a *question for a jury*, in an action for damages for such negligence, whether the receipt was a part of the contract between the parties, and it is not to be decided as a question of law.[3] It was so decided in the following case: the master of a steam tug, of which the defendants were owners, was employed by the plaintiff to tow his fishing smack out of a harbor. In so doing, the fishing smack was stranded through the alleged negligence of the master. The plaintiff had, on previous occasions, hired the defendant's steam tug to tow his smack, and, on paying the charge, had received receipts, on the back of which was printed a notice that the defendants would not be answerable for damages occasioned by any supposed negligence of their servants. It was held that it was a question for the jury whether the contract in the particular case was made on the terms printed on the back of the receipts.[4]

§ **1491. Notice on Passage Tickets as to Limit of Baggage.**— So, it has been held that a notice, printed on the back of a passage ticket of a railway company, that the company would not be liable for the baggage of passengers beyond a certain amount, unless freight on any addition thereto should be paid in advance, the notice stating that "this forms part of all contracts for trans-

[1] Ponton *v.* Ballard, 24 Tex. 619.

[2] Rhines *v.* Baird, 41 Pa. St. 256, 264.

[3] Symonds *v.* Pain, 6 Hurl. & N. 709; Brown *v.* Eastern R. Co., 11 Cush. (Mass.) 97.

[4] Symonds *v.* Pain, 6 Hurl. & N. 709. See *post*, § 1862, 1863.

portation of passengers and their effects,"—does not raise a *legal presumption* that the passenger, at the time of receiving the ticket and before the train leaves the station, has knowledge of the limits and conditions which the carrier thus attaches to the transportation of the baggage of passengers; but, in an action for the loss of a passenger's baggage, it will be a *question for the jury* whether the plaintiff knew of the notice before commencing the journey.[1] In the concluding part of the opinion, Mr. Justice Dewey says: "I am aware that, in reference to ordinary merchandise transported by common carriers, it has been held in some cases in the English courts, that a ticket given to the owner of merchandise, containing on the face of it a condition or limitation of the liability of the carrier, was held to furnish evidence of the special contract of transportation, sufficient to affect the owner of the merchandise, and to limit the liability of the carrier.[2] These cases obviously differ with the present, and fail to satisfy us of the sufficiency of the notice in the case before us."[3]

§ 1492. Notice to Guest of Usage of Leaving Money or Valuables at the Bar. — The liability of an innkeeper for the loss of goods of his guest is not varied by a usage at the particular inn, of guests to leave their money or valuables at the bar, unless the guest has actual knowledge or notice of such usage, and whether he has such knowledge or notice is a *question of fact* for the jury.[4]

§ 1493. Instruction as to Scienter, in the Owner of a Vicious Dog, from a Previous Bite. — In an action for damages for an injury sustained by the plaintiff, through the fact of his minor son being bitten by the defendant's dog, the court instructed the jury "that, to enable the plaintiff to recover, he must prove that the dog was accus-

[1] Brown *v.* Eastern R. Co., 11 Cush. (Mass.) 97; *post*, § 1862, 1879.

[2] Citing Austin *v.* Manchester &c. R. Co., 10 Com. Bench, 454; Shaw *v.* York &c. R. Co., 6 Rail. Cas. 87; *s. c.* 13 Ad. & El. (N. S.) 347.

[3] Brown *v.* Eastern R. Co., *supra*.

[4] Berkshire Woolen Co. *v.* Proctor, 7 Cush. (Mass.) 417, 428. The court instructed the jury that the innkeeper would be exonerated if the guest was "willfully ignorant" of the custom. *Ibid.*

tomed to bite mankind, and that it must also be proved that the defendant had knowledge that he was so accustomed to bite; that, if a single instance of biting mankind previous to the act complained of in the declaration was fully and satisfactorily proved to the jury, and a knowledge of such act on the part of the defendant was proved in like manner, that had been held sufficient to warrant a jury in finding a verdict for the plaintiff in cases of this kind; but that the force of such testimony would depend much upon the circumstances attending the transaction, as, whether they indicated a disposition to bite without provocation, or the contrary." The Supreme Court held that, "as a guide to the jury in applying and weighing the evidence before them, this part of the charge was unobjectionable, and adapted to the case, and fully sustained by the authorities." [1]

§ 1494. Liability of Partner Retiring without Notice of Dissolution. — Where an ostensible or known partner retires from the firm, he will still be liable for its debts and contracts, as to all persons who have previously dealt with the firm and have no notice of his retirement.[2]

§ 1495. Rule Applies only in Favor of Persons who have had Previous Dealings with the Firm. — The rule applies only in favor of persons who have had previous dealings with the firm. The object of requiring notice of the dissolution to be given is to remove the impression which has been created in the minds of such persons, that certain persons continue to compose the partnership. So far as mere *strangers* are concerned, it is obvious that no such impression can exist, and that they cannot be said to give credit to, or place reliance on *a partner of whom they are ignorant.*[3] Moreover, such persons must have dealt with the firm *as customers*. The rule, it has been held, has no application to the *clerks* and *salesmen* of a customer with whom the

[1] Arnold *v.* Norton, 25 Conn. 92.

[2] Story Part., § 160; Pope *v.* Risley, 23 Mo. 185, 187, per Scott, J.; Gardner *v.* Towsey, 3 Littell (Ky.), 423, 425; Kennedy *v.* Bohannon, 11 B. Mon. (Ky.) 118; Western Bank of Scotland *v.* Needell, 1 Fost. & Fin. 461; Mulford *v.* Griffin, 1 Fost. & Fin. 145; Faldo *v.* Griffin, 1 Fost. & Fin. 147; Grady *v.* Robinson, 28 Ala. 289, 300; Bradley *v.* Camp, Kirby (Conn.), 77, 86; Buxton *v.* Edwards, 134 Mass. 567.

[3] Dowzelot *v.* Rawlings, 58 Mo. 76.

firm had previous dealings. The benefit of the rule reaches the customer, but it does not, through him, reach his own agents and servants.[1]

§ 1496. But Retiring Partner may Become Liable to Strangers by a "Holding out." — But a retiring partner (or any other person) may become liable to strangers by holding himself out, or by suffering himself to be held out, to the public or to particular persons, as a partner.[2] Thus, if the retiring partner permits his name to remain over the door of the place of business of the partnership after he has retired, he may become liable for the firm debts, although a notice of the dissolution has been given by publication.[3] At least, he will be liable to any one who has been misled by his conduct in this particular into giving credit to the firm.[4] It was therefore held, in an action where a defendant was sued upon a liability as a partner, and he was shown to have been once a partner, that, even though it appeared that the partnership had been dissolved, if there had been no notice of the dissolution, any evidence that he had continued to give orders and bills in the name of the firm, and to act as if he were a partner with the same person, though in a different business, and notwithstanding that it was proved that he was in fact only a paid servant, — would be sufficient to render him liable for goods ordered by him in the name of the supposed firm.[5] In such a case, it will be a question for the jury whether the retiring partner has acted in such a way as would lead a reasonable man to suppose that he was still a partner, and whether the plaintiff in fact acted upon the faith that he was so and gave credit to the firm as such.[6] It is obvious that, where a party is charged as a partner on the ground of his having held himself out as such, he can only be affected by acts of holding out *prior* to the contract

[1] Richardson *v.* Snider, 72 Ind. 425; *s. c.* 37 Am. Rep. 168.

[2] Mulford *v.* Griffin, 1 Fost. & Fin. 145; Gurney *v.* Evans, 27 L. J. Exch. 166; M'Iver *v.* Humble, 16 East, 169, 174, 176; Kennedy *v.* Bohannon, 11 B. Mon. (Ky.) 118, 120.

[3] Williams *v.* Keats, 2 Stark. 290.

[4] Dowzelot *v.* Rawlings, 58 Mo. 76, per Sherwood, J.

[5] Mulford *v.* Griffin, 1 Fost. & Fin. 145.

[6] Faldo *v.* Griffin, 1 Fost. & Fin. 147.

sued on: since any subsequent holding out could not have induced the plaintiff to give the credit.[1]

§ 1497. Rule does not Apply as against Dormant Partners. — A very obvious suggestion to the mind will be, that the rule does not apply so as to charge a dormant partner who is unknown as a partner to creditors, for the reason that he has never been held out as a member of the firm, and that credit has presumably never been given to the firm on the faith of his being individually answerable for its debts.[2] But the rule has been extended to a dormant partner, where the creditor dealing with the supposed firm had previously known that such dormant partner was a member of the firm.[3] If the fact of his being a dormant partner be unknown to all the creditors, no notice whatever of his retirement is necessary; if it be known to a few, notice to them is necessary.[4]

§ 1498. Rule does not apply to a Partnership trading under a Corporate Name. — The rule which exonerates dormant partners who retire without giving notice is held to have no application to a partnership which trades under a name which would be appropriate to a corporation, in which the names of none of the partners are given, such as the "Titusville Savings Bank." The reason for this conclusion is thus stated: "When a copartnership is formed and an artificial name, such as is usually employed to designate a corporation, is adopted, it must be regarded as an invitation to give credit, not to the empty name, but to the individuals who compose the association thus designated; and hence none of the partners can properly claim to be dormant. They are all, presumptively at least, known partners and liable as such." [5]

[1] Baird *v.* Planque, 1 Fost. & Fin. 344.

[2] Grady *v.* Robinson, 28 Ala. 289, 300.

[3] Farrar *v.* Deflinne, 1 Car. & K. 580; Park *v.* Wooten, 35 Ala. 242.

[4] Kennedy *v.* Bohannon, 11 B. Mon. (Ky.) 118, 120. See also Deford *v.* Reynolds, 36 Pa. St. 325; Shamburg *v.* Ruggles, 83 Pa. St. 148.

[5] Clark *v.* Fletcher, 96 Pa. St 416, 417.

§ 1499. Rule Rests only on the Principle of Estoppel. — Another obvious suggestion to the mind is that this rule is nothing more than an illustration of the general principle of estoppel by conduct.[1] The rule as to such estoppels, is that where A., by acting or failing to act in a given way, induces B. to believe in the truth of a given state of facts, upon the faith of which B. does something to his injury, A. will thereafter, as against B., be precluded from showing that in truth such a state of facts did not exist. The reason of the rule is that, having by his conduct or his silence assisted in deceiving B. as to the truth of the facts, it would operate as a fraud upon B. to allow him afterwards to prove the truth. It is essential to the very idea of such an estoppel that B. must have done the act upon the faith of the existence of the state of facts, in the existence of which the conduct or the silence of A. induced him to believe. It is to be regretted that cases are found which, in dealing with the subject under consideration, ignore this underlying principle and hold that it is not necessary for the party seeking to hold such partner to show that he gave credit to the firm on account of such partner's financial ability.[2] These cases proceed upon the naked ground that a person, who suffers himself to be placed before the world as a partner, precludes himself from asserting, against third persons, that he was not in fact such.[3] In so doing, they necessarily raise the question above the level of a question of estoppel or of fraud, to that of a question of *public policy*.[4] They forget that justice is the highest public policy, and that public policy is not concerned in requiring a man to pay damages to another, for doing or omitting to do something which has wrought no injury to that other. They forget the cogent observation of Chancellor Walworth, that "the want of knowledge of the dissolution of the partnership cannot benefit a customer who loses

[1] Lind. Part. (4th ed.), 50; Lovejoy *v.* Spafford, 93 U. S. 430, 440, 441; Thompson *v.* First Nat. Bank, 111 U. S. 529, 538; Pratt *v.* Page, 32 Vt. 13; Hefner *v.* Palmer, 67 Ill. 161.

[2] Strecker *v.* Conn., 90 Ind. 469

[3] Uhl *v.* Harvey, 78 Ind. 26.

[4] Compare the language of Eyre, C. J., in Waugh *v.* Carver, 2 H. Bl. 235, 246, with the observation thereon of Sir N. Lindley (Lind. Part. (4th ed.) 48), and the reasoning of Mr. Justice Gray in Thompson *v.* First Nat. Bank, 111 U. S. 529, 538.

nothing by his ignorance of the fact, and who is only to be placed in the same situation as he would have been if the fact had been communicated to him in season." [1] The ground of estoppel is clearly that upon which the English courts have generally proceeded. They have ruled that the "holding out" of the defendant as a partner must be something more than a holding out "to the world," for that is a loose expression, — but to the plaintiff himself, or under such circumstances of publicity as to satisfy a jury that the plaintiff knew of it and believed him to be a partner.[2] "I told the jury," said an eminent English judge,[3] "that the defendant would be liable if the debt was contracted whilst he was actually a partner, or upon a representation by himself as a partner to the plaintiff, or upon such a representation of himself in that character as to lead the jury to conclude that the plaintiff, knowing of that representation, and believing the defendant to be a partner, gave him credit under that belief." [4] In another case it was held that the person sought to be charged as a partner was not liable, because there was no evidence to show that credit was in fact given to him.[5] In this country, as in England, it has been held necessary to prove that the plaintiff gave the credit with a *knowledge* that the defendant had so held himself out. It is added that this knowledge might be easily inferred, if the defendant had thus held himself out *to the community*.[6] The English doctrine is thus summed up by the Lord Justice Lindley, in his work on Partnership: "No person can be affixed with liabilty on the ground that he has been held out as a partner, unless two things concur, viz.: first, the alleged act of holding out must have been done either

[1] Brisban *v.* Boyd, 4 Paige (N. Y.), 17, 22.

[2] Dickinson *v.* Valpy, 10 Barn. & Cres. 128, 140, per Mr. Justice Parke, afterwards Baron Parke and Lord Wensleydale.

[3] Baron Rolfe, afterwards Lord Cranworth.

[4] Ford *v.* Whitmarsh, Hurl. & W. 53, 55.

[5] Pott *v.* Eyton, 3 C. B. 32, 39. In a case in the same court, in 1863, Chief Justice Erle and Mr. Justice Willes express similar opinions: Martyn *v.* Gray, 14 C. B. (N. S.) 824, 839, 843. The decision of the Court of Exchequer in Edmundson *v.* Thompson, 31 L. J. (Exch.) 207; *s. c.* 8 Jur. (N. S.) 235, is to the like effect. See also Carter *v.* Whalley, 1 Barn. & Ald. 11.

[6] Hefner *v.* Palmer, 67 Ill. 161.

by him or by his consent, and, second, it must have been known to the person seeking to avail himself of it. In the absence of the first of these requisites, whatever may have been done cannot be imputed to the person sought to be made liable; and, in the absence of the second, the person seeking to make him liable has not, in any way, been misled."[1] The rule under this head cannot be better summed up than in the following propositions, found in an opinion of the Supreme Court of Vermont: It is necessary to show: 1. That such customer knew, at the time when the contract was made, that the partners whom he seeks to hold had been in partnership. 2. That he was ignorant of their dissolution. 3. That he made the contract supposing that he was contracting with all of them as partners, and in reliance on their joint liability.[2]

§ **1500. Kind of Notice Required: Actual Notice to Previous Customers.** — Under this head, there is a distinction between the kind of notice which is required to exonerate the retiring partner in respect of *previous customers* of the firm, and in respect of *strangers* or the *general public*. The principle is that, as to previous customers, *actual notice* must be given, that is, specially communicated to them.[3] The rule is well established that *publication of notice* of the dissolution of a partnership in a *newspaper*, at the place where the business is carried on, is not sufficient to relieve a retiring partner from liability for subsequent transactions, in the firm name, with one having dealings with the firm prior to the dissolution. In such case notice must be brought home to the dealer, or it must appear that facts came to his knowledge sufficient to advise him, or to give him reason to believe, that a dissolution had taken place.[4] It has been held

[1] Lind. Part. (4th ed.) 50.

[2] Pratt *v.* Page, 32 Vt. 13.

[3] Gorham *v.* Thompson, Peake, N. P. 42; Godfrey *v.* Turnbull, 1 Esp. 371; Graham *v.* Hope, Peake, N. P. 154; Parkin *v.* Carruthers, 3 Esp. 248; Minnitt *v.* Whitney, 16 Vin. Abr. 244, pl. 12; Ketcham *v.* Clark, 6 Johns. (N. Y.) 144.

[4] Gilchrist *v.* Brande, 58 Wis. 184, 199; Austin *v.* Holland, 69 N. Y. 571; Zollar *v.* Janvrin, 47 N. H. 324; Lyon *v.* Johnson, 28 Conn. 1; Little *v.* Clarke, 36 Pa. St. 114; Kenney *v.* Altvater, 77 Pa. St. 34; Johnson *v.* Totten, 3 Cal. 343; Ennis *v.* Williams, 30 Ga. 691; Hutchins *v.* Hudson, 8 Humph. (Tenn.) 426; Prentiss *v.* Sin-

that *publication in a newspaper* taken by the dealer at the time, is a fact from which the jury may *infer* actual notice to him, though they are not bound to draw such inference.[1] But where there was some evidence that the plaintiff had taken the paper off and on, in which the notice of dissolution was printed, but he positively testified that he had no knowledge of any dissolution of the firm, and his testimony was corroborated, and the jury found in his favor, it was held that their finding was conclusive upon the question of notice.[2] It is not necessary, in order to exonerate the retiring partner, that *formal notice* to the previous dealer should be shown. Any notice which reached him in any way, so as to advise him of the fact of dissolution, or which was sufficient to put him upon his inquiry, is adequate.[3] In all such cases the creditor must, in order to avail himself of this rule and hold the retiring partner, show that he did not have *actual notice* of the dissolution of the partnership. Whether he did have such notice or not is a *question of fact* for the jury; and the court commits no error, it has been held, in declining to instruct the jury that a certain course of dealing with the remaining partner is evidence from which the jury ought to infer actual notice of the dissolution, — especially where there is some evidence of a want of notice.[4]

§ 1501. Reasonable Notice by Publication to the Public Generally. — In order to exonerate himself from liability for the future debts of his copartners, the retiring partner should see that a reasonable notice of his withdrawal from the firm is given to the public in some form. "One who has been a member of a partnership and has been so advertised to the world, owes it to the community to give notice of his withdrawal from the firm; failing in this, he stands bound to those who, in the belief that he is still a member of the partnership, give it credit.

clair, 5 Vt. 149; Dickinson *v.* Dickinson, 25 Gratt (Va.) 321; Laird *v.* Ivens, 45 Tex. 622.

[1] Treadwell *v.* Wells, 4 Cal. 260.

[2] Gilchrist *v.* Brande, 58 Wis. 184, 200.

[3] Gilchrist *v.* Brande, 58 Wis. 184, 200; Young *v.* Tibbitts, 32 Wis. 79.

[4] Deford *v.* Reynolds, 36 Pa. St. 325, 334.

This duty to give general notice is due to the public; it is not confined solely to former customers of the firm; former customers of the firm are entitled to actual notice." [1] In what form this notice may be given was thus stated, upon a view of several authorities, by Mr. Justice Hunt: "We think it is not an absolute inflexible rule that there must be a publication in a newspaper, in order to protect a retiring partner. That is one of the circumstances contributing to, or forming the general notice required. It is an important one; but it is not the only or indispensable one. Any means that, in the language of Mr. Bell,[2] are fair means, to publish as widely as possible the fact of dissolution; or which, in the words of Judge Edmonds,[3] are public or notorious, to put the public on its guard; or, in the words of Judge Nelson,[4] notice in any other public or notorious manner; or, in the language of Mr. Verplanck,[5] notice by advertisement or otherwise, or by withdrawing the external indications of partnership, and giving public notice in the manner usual in the community where he resides, — are means and circumstances proper to be considered on the question of notice." [6] It has been held that, where a person has served as a *director* in a joint stock partnership and his name has been published as such, the mere fact of dropping his name from the published list of directors is not sufficient.[7]

§ 1502. Not a Question of Actual Notice, but of Diligence in Giving Notice. — In the case of those who have *not been customers* of the firm, the question is not whether actual notice was received, but, as in the case of the protest of commercial paper,[8]

[1] Strecker *v.* Conn, 90 Ind. 469, 471. To the same effect see Backus *v.* Taylor, 84 Ind. 503; Uhl *v.* Harvey, 78 Ind. 26; Southwick *v.* McGovern, 28 Iowa, 533; Ketcham *v.* Clark, 6 Johns. (N. Y.) 144; *s. c.* 5 Am. Dec. 197.

[2] Bell Com. 640, 641.

[3] Wardwell *v.* Haight, 2 Barb. (N. Y.) 549, 552.

[4] Bristol *v.* Sprague, 8 Wend. (N. Y.) 423.

[5] Senator Verplanck, in Vernon *v.* Manhattan Co., 22 Wend. (N. Y.) 183.

[6] Lovejoy *v.* Spafford, 93 U. S. 430, 440. See, for illustration, Bradley *v.* Camp, Kirby (Conn.), 77, 83, where an oral declaration to several persons was, under circumstances, held insufficient.

[7] Clark *v.* Fletcher, 96 Pa. St. 416.

[8] *Ante*, § 1223, *et seq.*

whether proper diligence was used in giving notice; since it would be impossible for the retiring partner to give actual notice to every man who might by any possibility become a future creditor of the remaining partner, and no man is held to impossibilities.[1] "The question," said Mr. Justice Hunt, "is not exclusively whether the holders of the paper did in fact receive any information of the dissolution; if they did, they certainly cannot recover against a retiring partner. But if they had no actual notice, the question is still one of duty and diligence on the part of the withdrawing partner. If he did all that the law requires, he is exempt, although the notice did not reach the holders."[2]

§ **1503. General Notoriety.** — That the fact of the dissolution was a matter of general notoriety is not, as a matter of law, equivalent to notice, in respect of the general public.[3] But, upon the question whether general notoriety is a fact from which, in connection with other facts, the jury may infer knowledge, the authorities seem to be conflicting. It should seem, upon principle, that evidence that the fact of the dissolution of the firm was a matter of public notoriety is competent, for the purpose of showing that the person seeking to charge the retiring partner had knowledge of the fact. It has, however, been held, by a court and judge of high authority, that such evidence is not even competent. "Mere notoriety," said Chief Justice Shaw, "may exist, and yet the party dealing with such firm may not be acquainted with it. And where it is in the power of one party, and his duty, to give public and explicit notice of a fact affecting the rights of others, and he does not do it, it ought not to be assumed upon doubtful grounds of presumption."[4] In like manner, it was said by Mr. Justice Elliott: "The fact that the withdrawal was generally known within the community may perhaps be consid-

[1] Vernon *v.* Manhattan Co., 22 Wend. (N. Y.) 183; Bristol *v.* Sprague, 8 Wend. (N. Y.) 423; Ketcham *v.* Clark, 6 Johns. (N. Y.) 144; Wardwell *v.* Haight, 2 Barb. (N. Y.) 549, 552; Lovejoy *v.* Spafford, 93 U. S. 430.

[2] Lovejoy *v.* Spafford, 93 U. S. 430, 441.

[3] Strecker *v.* Conn, 90 Ind. 469, 471.

[4] Pitcher *v.* Barrows, 17 Pick. (Mass.) 361.

ered, in conjunction with other evidence, as tending to charge those dealing with the partnership with notice of the withdrawal; but the mere fact that the withdrawal was a matter of general notoriety will not supply the place of public notice, where there is no visible change in the business, in the title of the firm, or in its advertisements."[1]

[1] Strecker *v.* Conn, 90 Ind. 469, 471. See also Holdane *v.* Butterworth, 5 Bosw. (N. Y.) 1; Gorham *v.* Thompson, 1 Peake, N. P. 42; Graham *v.* Hope, 1 Peake, N. P. 154; City Bank *v.* McChesney, 20 N. Y. 240.

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